No. 18-422	
Title:	Robert A. Rucho, et al., Appellants v. Common Cause, et al.
Docketed:	October 3, 2018
Lower Ct:	United States District Court for the Middle District of North Carolina
Case Numbers:	(1:16-CV-1026)
Decision Date:	August 27, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 01 2018	Statement as to jurisdiction filed. (Response due November 2, 2018) **Jurisdictional Statement** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 23 2018	Blanket Consent filed by Respondents, Common Cause, et al.. **Blanket Consent**
Oct 30 2018	Blanket Consent filed by Petitioners, Robert A. Rucho, et al.. **Blanket Consent**
Oct 31 2018	Motion to affirm filed by appellees League of Women Voters of North Carolina, et al. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 01 2018	Brief amicus curiae of Philip P. Kalodner filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 02 2018	Motion to affirm filed by appellees Common Cause, et al. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Nov 05 2018	Blanket Consent filed by Respondents, League of Women Voters of North Carolina, et al.. **Blanket Consent**
Nov 08 2018	Supplemental brief of appellees Common Cause, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	DISTRIBUTED for Conference of 12/7/2018.

Nov 20 2018	Brief opposing motion to affirm from appellants Robert A. Rucho, et al. filed. (Distributed) **Main Document** **Other** **Proof of Service**
Dec 10 2018	Rescheduled.
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 04 2019	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. The case will be set for argument in the March argument session.
Jan 08 2019	Appellants' briefs on the merits are to be filed on or before Friday, February 8, 2019. Appellees' briefs on the merits are to be filed on or before Monday, March 4, 2019. Reply briefs on the merits are to be filed in accordance with Rule 25.3 of the Rules of this Court. Amicus curiae briefs in support of appellants or in support of neither party are to be filed on or before Tuesday, February 12, 2019. Amicus curiae briefs in support of appellees are to be filed on or before Friday, March 8, 2019.
Jan 25 2019	SET FOR ARGUMENT on Tuesday, March 26, 2019
Jan 30 2019	Blanket Consent filed by Petitioners, Robert A. Rucho, et al.. **Blanket Consent**
Feb 05 2019	Blanket Consent filed by Respondents, Common Cause, et al.. **Blanket Consent**
Feb 05 2019	Blanket Consent filed by Respondent, League of Women Voters of North Carolina, et al. **Blanket Consent**
Feb 05 2019	Joint motion for enlargement of time for oral argument and for divided argument filed by appellees. **Main Document** **Proof of Service** **Other**
Feb 08 2019	Joint appendix (2 volumes) filed. **Main Document** **Main Document**
Feb 08 2019	Brief of appellants Robert A. Rucho, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 11 2019	Brief amicus curiae of David Orentlicher in support of neither party filed (also in 18-726). **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 11 2019	Brief amicus curiae of The National Republican Redistricting Trust filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**

Feb 12 2019	Brief amici curiae of the American Civil Rights Union and Southeastern Legal Foundation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of Judicial Watch, Inc. and Allied Educational Foundation in support of neither party filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amicus curiae of Public Interest Legal Foundation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of The Republican National Committee and the National Republican Congressional Committee filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of Members of Congress from the North Carolina Delegation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amicus curiae of Texas House Representative Carl Isett filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amicus curiae of Speaker Michael C. Turzai filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of Bernard Grofman and Ronald Keith Gaddie in support of neither party filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of The Wisconsin State Senate and Wisconsin State Assembly filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	CIRCULATED
Feb 15 2019	Brief amici curiae of States of Texas, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2019	Record requested from the U.S.D.C. Middle Dist. of North Carolina.
Feb 21 2019	Record from the U.S.C.A 4th Circuit is electronic and located on PACER.
Mar 04 2019	Brief of appellees League of Women Voters of North Carolina, et al. filed. (Reprinted version submitted)

Mar 04 2019	Brief of appellees League of Women Voters of North Carolina, et al. filed. (March 5, 2019) (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief of appellees Common Cause, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 06 2019	Brief amici curiae of Colleagues of Professor Norman Dorsen filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 07 2019	Brief amicus curiae of First Amendment Clinic Duke Law School filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 07 2019	Brief amicus curiae of Eric S. Lander filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Stephen M. Shapiro filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Professor D. Theodore Rave filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of First Amendment and Election Law Scholars filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Amicus brief of Floyd Abrams Institute for Freedom of Expression not accepted for filing. (March 11, 2019)
Mar 08 2019	Brief amici curiae of Professors Wesley Pegden, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Bipartisan Group of Current and Former Members of the House of Representatives filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Professors Christopher S. Elmendorf, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Constitutional Accountability Center filed. (also in 18-726) (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 08 2019	Brief amicus curiae of Senator Sheldon Whitehouse filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of States of Oregon, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of 27 Election Law, Scientific Evidence, and Empirical Legal Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of the American Jewish Committee filed (also in 18-726). (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 08 2019	Brief amici curiae of Political Science Professors filed (also in18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Governors Arnold Schwarzenegger and Lawrence Joseph Hogan, Jr. filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Democracy North Carolina and The People's Alliance Fund filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of the American Civil Liberties Union, et al. filed (also in 18-726). (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 08 2019	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Historians filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of International Municipal Lawyers Association, et al. filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Anti-Defamation League, et al. filed (also in 18-726). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Professor Michael Kang filed (also in 18-726). (Distributed)

	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 08 2019	Brief amici curiae of Mathematicians, Law Professors, and Students filed (also in 18-726). (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 11 2019	Amicus brief of Floyd Abrams Institute for Freedom of Expression not accepted for filing. (Corrected brief submitted).		
Mar 11 2019	Brief amicus curiae of Floyd Abrams Institute for Freedom of Expression filed (March 18, 2019) (also in 18-726). (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 15 2019	Joint motion of appellees for enlargement of time for oral argument and for divided argument GRANTED in part, and the time is divided as follows: 35 minutes for appellants, 20 minutes for appellees Common Cause, et al., and 15 minutes for appellees League of Women Voters of North Carolina, et al.		
Mar 19 2019	Reply of appellants Robert A. Rucho, et al. filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Mar 26 2019	Argued. For appellants: Paul D. Clement, Washington, D. C. For appellees Common Cause, et al.: Emmet J. Bondurant, II, Atlanta, Ga. For appellees League of Women Voters of North Carolina, et al.: Allison J. Riggs, Durham, N. C.		

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No. _____

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

---

JURISDICTIONAL STATEMENT

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Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

October 1, 2018

QUESTIONS PRESENTED

Earlier this year, while *Gill v. Whitford* was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional districting map as a partisan gerrymander. After *Gill* was handed down, this Court vacated that decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the decision below, the district court largely readopted its previous reasoning and became the first post-*Gill* court to divine a justiciable test—in fact, four tests—and invalidate a legislatively enacted map as a partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate only generalized partisan preferences, the court concluded they had standing. The court then found justiciable standards for partisan gerrymandering claims under the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clauses of Article I. The court found the 2016 map to violate each of those newly articulated tests and enjoined the State from using the map after the November 2018 elections.

The questions presented are:

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Common Cause; North Carolina Democratic Party; Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; Morton Lurie; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; Russell G. Walker, Jr.; League of Women Voters of North Carolina; William Collins; Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; Willis Williams

Defendants:

Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Representative David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; A Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of

the North Carolina State Board of Elections; North Carolina State Board of Elections; State of North Carolina

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Notice of Appeal, United States District Court for the Middle District of North Carolina, *Common Cause v. Rucho*, No. 1:16-cv-1026 (Aug. 31, 2018) App-349

Appendix C

Order, United States District Court for the Middle District of North Carolina, *Common Cause v. Rucho*, No. 1:16-cv-1026 (Sept. 4, 2018) App-351

Appendix D

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INTRODUCTION

Earlier this year, while *Gill v. Whitford* was pending before this Court, the three-judge district court in this case became just the second federal court since *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to invalidate a districting map as a partisan gerrymander. Although the search for a justiciable test for such claims "has confounded th[is] Court for decades," *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018), the district court here purported to divine *four separate* tests—one in the Equal Protection Clause, one in the First Amendment, and, for the first time ever, two in the Elections Clauses of Article I. Each test was more sweeping and less forgiving than the last, culminating in the conclusion that the Elections Clauses prohibit districting for partisan advantage *entirely* because it deprives "the People" of their ability to elect their representatives, and because state legislatures were never "delegated" the power to district for partisan advantage.

In June, this Court vacated that extraordinary decision in light of *Gill* and remanded for further consideration. That time of reconsideration was short-lived. By August, the same three-judge panel generated a 321-page divided decision finding standing and multiple justiciable tests, and became the first post-*Gill* court to invalidate a districting map as a partisan gerrymander. After enjoining the State from using its districting map in congressional elections after 2018—and initially threatening to enjoin the use of the map in *this November's* midterm elections—the court ultimately accepted plaintiffs'

agreement with appellants that it should stay its decision pending this Court's review.

While this Court's jurisdiction over this case is doubtful, the need for plenary review is plain. If there is indeed a theory of standing for adjudicating generalized partisan grievances and a justiciable test for separating unconstitutional partisan gerrymanders from the run-of-the-mill consideration of partisan advantage by legislatures organized on party lines, they will have to come from this Court. Indeed, while there are very real reasons to doubt whether such standing theories and justiciable tests exist at all, it is even more clear that the answers are not lurking in the 321-page opinion issued below. In reality, this case suffers from the same standing problems that felled *Gill*, as plaintiffs once again seek to vindicate generalized partisan preferences, not constitutionally cognizable individual injuries. And none of the various formulations embraced in the decision below constitutes a judicially administrable test for separating excessive partisan gerrymandering from the run-of-the-mill consideration of partisan advantage by legislatures organized along party lines. In fact, by ultimately concluding that any consideration of partisan advantage in districting is unconstitutional, the majority below parted company with every Justice of this Court ever to consider the matter. In short, the decision below would thrust the courts into a role that no member of this Court has squarely embraced. The need for plenary consideration of this appeal could hardly be plainer.

OPINION BELOW

The Middle District of North Carolina's opinion is reported at 318 F. Supp. 3d 777. App.1-348.

JURISDICTION

The Middle District of North Carolina issued its decision on August 27, 2018. Appellants filed their notice of appeal on August 31, 2018. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reproduced at App.373-374.

STATEMENT OF THE CASE

A. Background

This appeal arises from the most recent round of congressional redistricting in North Carolina, which began in 2016 after an earlier round of redistricting litigation. In February 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map were unconstitutional racial gerrymanders and ordered the General Assembly to draw a new map within 14 days. *See Harris v. McCrory* (*Harris I*), 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris* (*Harris II*), 137 S. Ct. 1455 (2017). The General Assembly immediately set to work.

Because the district court's two-week deadline made time of the essence, the chairmen of the most recent Senate and House redistricting committee—Senator Robert Rucho and Representative David Lewis—promptly engaged expert mapdrawer Dr.

Thomas Hofeller to assist in drawing a new map. App.14-15. In addition to instructing Dr. Hofeller to comply with all state and federal districting requirements and traditional districting criteria, they instructed him not to consider racial data at all, but to consider political data and to endeavor to draw a map that was likely to preserve the existing partisan makeup of the State's congressional delegation. App.15-16.

Meanwhile, the General Assembly appointed a new districting committee, which adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable," ensuring contiguity and compactness, and making "reasonable efforts" to avoid pairing incumbents. App.19-20. The criteria also stated that racial data shall not be used or considered, but that political data may be used, and that "reasonable efforts" shall be made "to maintain the current partisan makeup of North Carolina's congressional delegation"—then, ten Republicans and three Democrats. App.20.

The committee unanimously adopted five of the seven districting criteria and adopted the two dealing with racial and political data and partisan advantage on a party-line vote. App.23. The committee ultimately approved the map drawn with Dr. Hofeller's assistance by a party-line vote, and the General Assembly thereafter enacted the map ("2016 Map"), with minor modifications, on party-line votes. App.24.

As a matter of traditional districting criteria, the 2016 Map compares favorably to the 2011 map.

Indeed, it adheres more closely to traditional districting criteria than any congressional map North Carolina has used in 25 years. The 2016 Map divides only 13 (out of 100) counties and splits only 12 (out of more than 2000) precincts across the entire State. App.25. No county is split between more than two congressional districts. By contrast, the 1992 map divided 44 counties (seven of which were trifurcated into three congressional districts) and split 77 precincts. App.20-21; Dkt.114 at 143.[1] The 1997 map divided 22 counties, the 1998 plan divided 21, the 2001 map divided 28, and the 2011 map divided 40. Dkt.114 at 143. The 2016 Map likewise is more compact "[u]nder several mathematical measures" than the 2011 map and paired only two incumbents. App.25.

The *Harris* plaintiffs nonetheless filed objections to the 2016 Map, including a partisan gerrymandering challenge, but the district court rejected those challenges. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 138 S. Ct. 2711 (2018) (mem.). The map took effect in June 2016, was in place for the November 2016 elections, and will govern the upcoming November 2018 elections as well.

B. Pre-*Gill* Proceedings

1. Shortly after the *Harris* district court approved the 2016 Map, appellees filed the two lawsuits that give rise to this appeal. In August 2016, Common Cause, the North Carolina Democratic Party, and 14

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[1] Unless otherwise noted, "Dkt." refers to docket entries in *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.).

individual voters filed suit against appellants (Senator Rucho, Representative Lewis, and two other legislators) and others, alleging that the 2016 Map is an unconstitutional partisan gerrymander. App.26-27. The next month, the League of Women Voters and 12 individual voters followed suit. App.27.

Both complaints alleged that the map violates the Equal Protection Clause and the First Amendment. App.27. The Common Cause plaintiffs further alleged that the map violates the Elections Clauses of Article I. App.28; *see* U.S. Const. art. I, §2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ...."); *id.* §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...."). Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Map as a whole, and the Common Cause plaintiffs also claimed "standing to assert ... district-by-district challenges." *Common Cause v. Rucho* (*Common Cause I*), 279 F. Supp. 3d 587, 609 (M.D.N.C.), *vacated and remanded*, *Rucho v. Common Cause* (*Common Cause II*), 138 S. Ct. 2679 (2018).

The cases were assigned to a three-judge district court. The court consolidated the cases and originally scheduled them for trial in June 2017, but subsequently postponed trial on its own motion. Amidst the pretrial proceedings, this Court agreed to hear *Gill*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.). Appellants filed a motion asking the district court to stay proceedings pending resolution of *Gill*, explaining it would make little sense to proceed with

a trial while this Court was considering whether partisan gerrymandering claims are even justiciable. *See* Dkt.75. But the district court denied the motion and forged ahead, holding a four-day bench trial in October 2017.

2. Three months later, the district court issued a divided opinion authored by Judge Wynn, holding that plaintiffs had statewide standing to press their claims and finding the 2016 Map unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. App.33-34. The majority immediately enjoined the State from using the 2016 Map in future elections and gave the General Assembly a mere two weeks—the absolute minimum time permissible under state law, *see* N.C. Gen. Stat. §120-2.4(a)—to draw, consider, debate, and vote on a new congressional map. App.34.

After the district court refused to stay its order, appellants filed an emergency stay application with this Court. App.34. This Court granted that application and stayed the district court's order pending the filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.). On June 18, the Court issued its decision in *Gill*, which concluded that the plaintiffs lacked standing to bring their statewide challenges to Wisconsin's districting map. 138 S. Ct. at 1930. On June 25, this Court vacated the district court's judgment in this case and remanded for further consideration in light of *Gill*. *See Common Cause II*, 138 S. Ct. 2679.

C. Post-*Gill* Decision

Just two months later, the district court issued a 321-page divided opinion. The majority opinion authored by Judge Wynn again concluded that plaintiffs have standing to press their partisan gerrymandering claims, that such claims are justiciable under the Equal Protection Clause, the First Amendment, and Sections 2 and 4 of Article I, and that the 2016 Map violates all four of those provisions. App.35-313.

1. Starting with the equal protection claims, the court acknowledged that *Gill* rejected a "statewide" standing theory, and that plaintiffs had previously asserted such a theory. *See, e.g.*, App.41-43. The court further conceded that Common Cause and several individual plaintiffs lacked standing for failure to claim anything other than a statewide injury. App.65-67 & n.15. Nonetheless, the court concluded that individual "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts" have standing to press vote-dilution claims under the Equal Protection Clause. App.50.[2]

The court also concluded that these "dilutionary injuries" afforded these same plaintiffs standing under the First Amendment. App.69-70. In addition, the court concluded that various individual plaintiffs had standing to press "non-dilutionary" claims under the First Amendment because, for example, they "had difficulty convincing fellow Democrats to 'come out to

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[2] The court concluded the North Carolina Democratic Party had standing in each district, and that the League, "at a minimum," had standing in one district. App.64-65 n.14.

vote'" in certain districts. App.69-70.[3] The court concluded that, "because these injuries are statewide, such Plaintiffs have standing to ... challenge ... the 2016 Plan as a whole." App.74.

Finally, the court concluded that the Common Cause plaintiffs have standing to press their Article I claims. App.74. Those claims, the court posited, are "premised on federalism" and so "do not stop at a single district's lines." App.74-75. Although the court acknowledged that such a "structural harm does not absolve litigants from ... alleg[ing] particularized injuries," it found that requirement satisfied because at least one plaintiff in each district alleged "dilutionary injuries," and because plaintiffs also alleged adequate "non-dilutionary injuries"—*e.g.*, "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions." App.76, 78. "[B]ecause these structural and associational harms have statewide implications," the court concluded, they "are sufficient to confer standing on a statewide basis" under the Elections Clauses. App.83.

2. Turning to justiciability, the court deemed itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to conclude that partisan gerrymandering claims are justiciable. App.86-88. The court further reasoned that partisan gerrymandering is "contrary to the republican system put in place by the Framers," and that no "deference to the policy judgments of the political branches" is warranted in this context

[3] The court concluded the North Carolina Democratic Party, the League, and Common Cause suffered non-dilutionary injuries too. App.72-74.

because gerrymandering "targets voting rights." App.92, 96. As for the thorny problem of identifying a manageable standard for determining how much consideration of politics is too much, the court declared that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in ... partisan gerrymandering" at all. App.118.

3. The court then moved to the merits and began by purporting to find a manageable standard for adjudicating plaintiffs' equal protection claims. To prove such claims, the court concluded, a plaintiff must demonstrate (1) "discriminatory intent" and (2) "discriminatory effects," at which point the burden shifts to the defendant to try to prove that (3) those "discriminatory effects are attributable to the state's political geography or another legitimate redistricting objective." App.138-39. As to intent, although the court had just concluded that *any* amount of districting for partisan advantage is impermissible, it maintained that its equal protection analysis "*does not rest*" on that conclusion. App.119. Instead, the court "assume[d]" for now that plaintiffs must show that "a legislative mapdrawer's predominant purpose ... was to 'subordinate adherents of one political party and entrench a rival party in power,'" even as it acknowledged that this Court declined to adopt a "predominant intent" requirement in previous partisan gerrymandering cases. App.145-46. The court then found its "assume[d]" intent standard satisfied in all but one district based on an assortment

of "statewide" and "district-specific" evidence. App.155, 223, 273.

As to discriminatory effects, the court began by noting (with considerable understatement) that "there is an absence of controlling authority" in this area. App.151. Forging ahead, the court concluded that a plaintiff proves discriminatory effects whenever "the dilution of the votes of supporters of a disfavored party in a particular district ... is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." App.152. Based on its review of various social science metrics—including "uniform swing analysis," "simulation analyses," the "efficiency gap," "partisan bias," and the "mean-median difference," App.191-92, 209—the court found "'strong proof' of the 2016 [Map's] discriminatory effects" based on statewide evidence. App.214. The court also found "district-specific evidence" of discriminatory effects in all but one district. App.227-74. The court then determined that no legitimate redistricting objective could justify the "dilution of ... voters' votes," and so held that "each of those twelve districts constitutes an invidious partisan gerrymander in violation of the Equal Protection Clause." App.273-74.

Next came the First Amendment claim. As with the equal protection claim, the court recognized that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." App.282. But the court purported to divine a judicially

manageable "three-prong test" that would identify a First Amendment violation: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan ... burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Disregarding its assumption under the Equal Protection Clause, the court concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment. App.287. It further concluded that, under prong two, a plaintiff need only show more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. App.287-88. Finding its virtually zero-tolerance test easily satisfied, the court held that the 2016 Map as an undifferentiated whole "violates the First Amendment." App.299-300.

Finally, the court addressed plaintiffs' claims under the Elections Clauses and concluded that the 2016 Map violates those provisions too. The court did not cite any decision from any court that had found justiciable partisan gerrymandering standards in the Elections Clauses, which appear to grant districting authority to state legislatures, rather than restrain them. Regardless, it concluded that partisan gerrymandering violates Section 2 of Article I because it deprives "the People" of their right to elect representatives, App.306, and violates Section 4 because it "exceeds" the States' "delegated authority,"

App.303. While these purported constitutional violations were in part derivative of the majority's equal protection and First Amendment holdings, *see* App.303, the court again justified them on the theory that partisan advantage is a forbidden consideration that *always* "exceeds" a State's powers and *always* deprives "the People" of their right to elect representatives. *See* App.305-06, 310.

5. Judge Osteen concurred in part and dissented in part. On standing, he concluded that plaintiffs who live in "packed" districts and "concede[] election of the candidate of his or her choice" lack standing because they lack an injury that affects them "in a personal and individual way." App.327, 330. He also "disagree[d]" that plaintiffs "have standing to assert a statewide claim as to the statewide collective effect of any political gerrymandering." App.327-28. And he concluded that the organizational plaintiffs have standing "only to the extent they challenge the districts on the basis of district-specific injury to individual members," and that they may not assert claims "because of other organizational purposes." App.332-34.

On the merits, Judge Osteen expressed doubt whether "there is a constitutional, and judicially manageable, standard" under the Equal Protection Clause "for limiting partisan political consideration by a partisan legislative body." App.322 n.1. He rejected the suggestion that "the Constitution does [not] permit consideration by a legislative body of both political and partisan interests in the redistricting process." App.337. Judge Osteen expressed similar skepticism as to whether plaintiffs' First Amendment

claims are justiciable, and lamented that the majority's test would "foreclose all partisan considerations in the redistricting process." App.322 n.1, 343. He also disagreed that plaintiffs had shown First Amendment injury, noting that they remain "free under the new [districting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.344. Finally, Judge Osteen disagreed that the Elections Clause "completely prohibits" States from districting for partisan advantage. App.347.

6. After concluding that the 2016 Map violates every constitutional provision that plaintiffs invoked, the majority enjoined the State from using the map in future elections after November 2018 and gave the General Assembly three weeks to draw, consider, debate, and vote on a new congressional map. App.318-19. The court noted that it was open to enjoining use of the 2016 Map in the November 2018 midterm elections. App.314-15. But after plaintiffs agreed with appellants that such a remedy would be inappropriate, and further agreed with appellants that the court should stay its decision pending review by this Court, the court entered a stay on the conditions that appellants file this jurisdictional statement by October 1 and seek no extensions on any briefing. App.361.

REASONS FOR PLENARY CONSIDERATION

According to the district court, the decades-long struggle to develop a justiciable test for partisan gerrymandering has ended in a rout. Not only are

judicially manageable standards out there, but there are multiple administrable tests for claims based on not one, but *four*, constitutional provisions, with at least three of the tests prohibiting any consideration of partisan advantage in districting whatsoever. That conclusion is every bit as implausible as it sounds. Indeed, not only have plaintiffs failed to identify a single judicially manageable standard, let alone four; they have not even identified a constitutionally cognizable injury sufficient to confer standing. Instead, as in *Gill*, this case fails at the threshold, as it is and always has been about "generalized partisan preferences," not the kinds of injuries for which individuals can seek redress in court.

Plaintiffs' lack of Article III standing and the absence of judicially manageable standards are mutually reinforcing. As decades of fruitless efforts have proven, trying to identify "judicially discernible and manageable standards" for adjudicating generalized political grievances is an exercise in futility. Indeed, the district court itself all but conceded as much when it abandoned the enterprise of trying to decide "how much is too much" and simply declared partisan gerrymandering *categorically* inconsistent with the Constitution. That, of course, is not and cannot be the law, as it is impossible to reconcile with the reality that the Framers expressly assigned districting to an inherently political body. A test that is manageable only at the expense of deeming every legislative districting exercise in recent history a probable constitutional violation is no test at all.

In all events, even assuming that some standard for partisan gerrymandering claims is out there, it is

not found in the 321-page opinion here. More to the point, if a viable theory of standing and a judicially manageable test exist, they will have to come from this Court after plenary review. Under no circumstances can the decision below be the final word, either on the 2016 North Carolina map or on partisan gerrymandering claims more broadly.

I. Plaintiffs Lack Standing To Press Their Partisan Gerrymandering Claims.

The first problem with plaintiffs' partisan gerrymandering claims is that they lack standing to bring them. To establish standing, a plaintiff must demonstrate (1) "injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; (3) and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury-in-fact requirement is "first and foremost," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), and requires a "legally and judicially cognizable" injury, *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

A "legally cognizable" injury is one that involves the "invasion of a legally protected interest," which is "concrete and particularized." *Lujan*, 504 U.S. at 560. To be "concrete," the injury must be *de facto*, not merely *de jure*—"that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). And to be "particularized," it must affect the plaintiff "in a personal and individual way." *Id.* Furthermore, to be "judicially cognizable," the "dispute" must be one "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

If these requirements are not met—if a plaintiff alleges only a "generally available grievance about government," *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam), or asserts an injury "too abstract, or otherwise not appropriate, to be considered judicially cognizable," *Allen v. Wright*, 468 U.S. 737, 752 (1984)—the plaintiff "does not state an Article III case or controversy," *Lujan*, 504 U.S. at 573-74.

Applying those principles in *Gill*, this Court concluded that the plaintiffs—"supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates"—failed to establish standing to challenge Wisconsin's districting map as a partisan gerrymander. 138 S. Ct. at 1923. First, the Court rejected the argument that Article III recognizes injuries based on a "statewide harm to [the plaintiffs'] interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Id.* at 1931. As the Court explained, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative"; conversely, an individual's "abstract interest in policies adopted by the legislature ... is a nonjusticiable 'general interest common to all members of the public." *Id.* "To the extent" the plaintiffs claimed injuries to their personal voting interests through "the dilution of their votes," the Court continued, "that injury is district specific" and such claims must proceed district-by-district—*i.e.*, the same way that racial gerrymandering claims must proceed. *Id.* at 1930.

Second, the Court concluded that the plaintiffs had not proven that they were disadvantaged in their

districts. The lead plaintiff, for example, lived in a district that, "under any plausible circumstances, [was] a heavily Democratic district," *id.* at 1924, so the alleged gerrymander "ha[d] not affected [his] individual vote for his Assembly representative" in any way, *id.* at 1933. And the remaining plaintiffs had not "meaningfully pursue[d] their allegations of individual harm," but "instead rested their case ... on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1932. All of that underscored "the fundamental problem" in *Gill*: "It [was] a case about group political interests" and "generalized partisan preferences," not "individual legal rights." *Id.* at 1933.

The case suffers from the same basic flaw, as it too has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress. Indeed, to use plaintiffs' own words, "[t]his case has always been about good government," Dkt.144 at 3, not about a violation of an individual right to have his or her vote be given full, undiluted effect. It is thus no accident that all plaintiffs asserted the same "statewide" theory that this Court repudiated in *Gill*, claiming that the ten-to-three ratio of Democrats to Republicans in North Carolina's congressional delegation injures all North Carolina Democrats. As one plaintiff explained, in his view, the "problem with the districts is that the number of Republicans elected is not proportional to the vote that Republicans receive in statewide elections." App.66. Another posited that "the 2016 Plan is 'unfair' to supporters of Democratic candidates ... because 'we have 3 representatives [in Washington] versus ... 10' Republican representatives." App.66. And another complained that the "problem with the

plan is that statewide it disadvantages Democrats." App.67.

The district court nonetheless found Article III standing. But in reaching that conclusion, the court once again reverted to expansive theories of exceedingly generalized injuries not specific to an individual's right to cast his own undiluted vote, such as "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions," App.78—a "general interest common to all members of the public" if ever there were one, *Gill*, 138 S. Ct. at 1931. And the court once again made clear that, in its view, these injuries "do not stop at a single district's lines," App.74, but rather empower anyone in the State to challenge the entire map. Thus, notwithstanding that "[r]ace is an impermissible classification" while "[p]olitics is quite a different matter," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), the decision below makes it *harder* for racial gerrymandering plaintiffs to vindicate their equal protection rights than for partisan gerrymandering plaintiffs to assert a heretofore-unrecognized claim that a districting map deprives "the People" of their ability to elect representatives. That makes no sense. If a voter has trouble persuading others to "give money to the Democratic congressional candidate in his Greensboro district," App.70, that does not create a concrete and particularized injury to the voter even in Greensboro, let alone furnish standing to challenge the district encompassing Charlotte.

The district court concluded that plaintiffs suffered district-specific "dilutionary" injuries because

their votes would "carry more weight" in "hypothetical" alternative districts. App.50, 67-68, 77-78 (alteration omitted). But this attempt to comply with Article III fares no better, as, in contrast to one-person-one-vote claims or challenges to the eligibility of other district voters, every voter still has a full right to cast an undiluted vote. In reality, the "injuries" the district court credited are merely a repackaged version of a non-cognizable desire to "influenc[e] the legislature's overall 'composition and policymaking'" and further "partisan preference[s]." *Gill*, 138 S. Ct. at 1931, 1933. Indeed, plaintiffs have sought to prove their "dilutionary" injuries simply by pointing to "alternative" maps that "approximat[e]" the State's proportion of Democrats to Republicans, App.46-50 & n.10—*i.e.*, to maps that they think would make "the overall composition of the legislature" more to their liking, *Gill*, 138 S. Ct. at 1931.

Consider Larry Hall, the majority's leading example of someone who has supposedly endured "dilutionary" injury. App.51-52. In every congressional election in recent memory, including the 2016 election, Hall's candidate of choice has prevailed. Dkt.101-2 at 12-13. In other words, the 2016 Map did not "affect[]" Hall's "ability to vote for and elect a Democrat in [his] district" at all. *Gill*, 138 S. Ct. at 1925. And plaintiffs' "alternative" map would not have changed anything either, as the Democratic candidate in that hypothetical universe would be "expected to obtain approximately 59 percent of the two-party vote." App.230. Like the lead plaintiff in *Gill*, then, Hall's district would have been "heavily Democratic" "under any plausible circumstances." *Gill*, 138 S. Ct. at 1924. Hall thus has no

individualized injury that "actually exist[s]," *Spokeo*, 136 S. Ct. at 1548, but rather seeks to vindicate only non-cognizable "group political interests," *Gill*, 138 S. Ct. at 1933.

Richard and Cheryl Taft—residents of CD3—are also illustrative. Under the 2016 Map, the Republican candidate in their district was projected to win "55% of the two-party vote share" and ultimately prevailed. App.237. By contrast (sort of), under plaintiffs' alternative map, the "expected Republican vote share" in the Tafts' district is 54.43%. App.238. Thus, regardless of the supposed "gerrymander," the Republican candidate was likely to receive a majority of votes. So just like Hall, the Tafts cannot plausibly "show[] disadvantage to themselves as individuals," let alone show a "disadvantage" that is constitutionally cognizable. *Gill*, 138 S. Ct. at 1929. Instead, their injury is a classic non-district-specific, generalized harm—a reality underscored by the fact that the Tafts *voted for the Republican candidate* who prevailed in CD3 in 2016. *See* Dkt.101-10 at 18; Dkt.101-11 at 15.

Nor do the handful of plaintiffs who claim that their representative may have shifted from Republican to Democrat under plaintiffs' alternative plans have standing.[4] The only "injury" such plaintiffs

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[4] Under "Plan 2-297"—the alternative plan that "maximally advances" "non-partisan districting objectives"—plaintiffs maintain that three additional Democrats likely would win congressional seats, while Republicans would retain a majority. App.47-50 & nn.9-10. It is surely no coincidence that plaintiffs' proposed map would achieve proportional representation in relation to the state-wide vote totals in the most recent election.

could claim is their inability to elect their candidate of choice (and their corresponding inability to add another Democrat to the "overall composition of the legislature"). *Gill*, 138 S. Ct. at 1931. But that is not a cognizable injury either, as courts "cannot presume ... that the candidate elected will entirely ignore the interests of ... voters" who voted for the losing candidate; to the contrary, "[a]n individual ... who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate." *Bandemer*, 478 U.S. at 132 (plurality op.).[5]

All of this underscores the more fundamental problem with partisan gerrymandering claims: They simply do not involve a constitutionally cognizable individual injury. Voters do not suffer cognizable injury from the lack of proportional representation in the legislature, as this Court's cases "clearly foreclose any claim that the Constitution requires proportional representation." *Id.* at 130. There is no "vote dilution" in partisan gerrymandering cases because the one-person, one-vote principle already ensures that votes are "equally weighted." *Gill*, 138 S. Ct. at 1930. Moreover, to the extent the voters' real beef is that there will be fewer Democrats for their own representatives to caucus with when they get to Washington, that is not only not a true "vote dilution" claim, but is a claim for which any injury belongs to the Representative, not the voter, and the

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[5] Because the individual plaintiffs lack standing, the organizational plaintiffs lack standing through their members. *Contra* App.63-65. And those organizations plainly do not independently have standing, as "[t]he right to vote is 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1929.

Representative's claim would be barred by *Raines v. Byrd*. *See* 521 U.S. at 829-30. Finally, partisan gerrymandering plaintiffs do not suffer any cognizable "associational" injuries, as they are "free ... to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.343-46 (Osteen, J., concurring in part and dissenting in part).

In short, after more than two years of litigation, plaintiffs still have not articulated an Article III injury, let alone connected any such injury to the sweeping relief they seek. This Court's opinion in *Gill* underscores that when a plaintiff's real concern is the statewide composition of the legislature or of congressional districts, the plaintiff lacks Article III standing. Rather than grapple with that decision, the district court tried to paper over fatal defects in plaintiffs' standing. Accordingly, if a coherent theory of standing to press partisan gerrymandering claims is to emerge, it will need to come from this Court, as it certainly cannot be found in the decision below.

II. Plaintiffs' Partisan Gerrymandering Claims Are Not Justiciable.

The flaws with plaintiffs' partisan gerrymandering claims go well beyond standing. Their claims are simply nonjusticiable. While the "general" rule is that "the Judiciary has a responsibility to decide cases properly before it," this Court has long held that the judiciary "lacks the authority to decide" cases presenting "political questions." *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Such claims "are said to be 'nonjusticiable.'"

Vieth, 541 U.S. at 277 (plurality op.). And this Court will find a claim nonjusticiable when there is "a lack of judicially discoverable and manageable standards for resolving" it. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

As Justice Scalia explained for a plurality of the Court in *Vieth*, that is precisely the problem with partisan gerrymandering claims. In reality, the Framers delegated primary authority over congressional districting to state legislatures subject to congressional oversight. While those state legislatures cannot violate judicially manageable standards that prohibit racial discrimination and actual vote dilution, a claim that state legislatures organized on partisan lines engaged in partisan decisionmaking is both nonjusticable and contrary to the Framers' basic design.

The *Vieth* plurality did not arrive at that conclusion lightly. Eighteen years earlier, a majority of this Court had concluded in *Bandemer* that the partisan gerrymandering case before it was justiciable, yet still could not agree on any "judicially discoverable and manageable standards for resolving" it. *See* 478 U.S. at 123. And for the next 18 years, lower courts struggled to identify either the injury partisan gerrymandering causes or a workable test for measuring it. It was only after "[e]ighteen years of judicial effort with virtually nothing to show for it," *Vieth*, 541 U.S. at 281 (plurality op.), that a plurality of the Court concluded that Justice O'Connor had it right from the start: These "challenges to the manner in which an apportionment has been carried out ... present a political question in the truest sense of the

term." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring); *see Vieth*, 541 U.S. at 281 (plurality op.).

The 14 years that have passed since *Vieth* have only reinforced that conclusion. Indeed, notwithstanding Justice Kennedy's prominent invitation to identify a "limited and precise rationale" for adjudicating partisan gerrymandering claims, *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring), all 14 more years have produced is more of the same: vague tests that rest on a combination of the kind of "fundamental choices about how this Nation is to be governed" that the Framers did not intend the judiciary to be making, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and sheer speculation about electoral "results that would occur in a hypothetical state of affairs," *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 417-18 (2006) (opinion of Kennedy, J.).

Moreover, these tests inevitably suffer from the problem that they are built around the misguided assumptions that political affiliation is binary and immutable, and that the only factor determining voting behavior is political affiliation. That is "assuredly not true," *Vieth*, 541 U.S. at 288 (plurality op.), and seems less true every day. Voters cast votes for individual candidates in individual districts, "not for a statewide slate of legislative candidates put forward by the parties." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). And as 200-plus years of ever-shifting political power have proven, voters can and do base their votes on candidates, not just the party next to their name. Moreover, members of the same party can differ passionately. Any test that

measures "partisan impact" by blindly assuming that each voter's preference for the Democrat or Republican in her district reflects a preference for every Democrat or Republican across the State thus is flawed from its inception. An individual voter "cannot vote for such candidates," "is not represented by them in any direct sense," and might not support them at all. *Id.* at 153.

The persistent inability to identify a workable test for adjudicating partisan gerrymandering claims is unsurprising given the inevitable connection between a cognizable constitutional injury and a judicially manageable standard for assessing it. This is not a context where anyone suffers a physical or pocketbook injury. Thus, identifying a cognizable constitutional injury requires some sense that there is a manageable constitutional test associated with the injury. As Justice Scalia explained in *Vieth*, "[b]efore considering whether" a "standard is judicially manageable," the Court must first ask "whether it is judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 287-88 (plurality op.). After all, "[n]o test ... can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. Yet no one can begin to identify any overarching "substantive definition of fairness in districting," *id.* at 306-07 (Kennedy, J., concurring), in this context without first making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217.

There is no better illustration of that than the decision below. In 321 pages, the best the district court could muster is that partisan gerrymandering

"runs contrary to ... the structure of the republican form of government embodied in the Constitution." App.90. There is a name for such claims: They are called Guarantee Clause claims, and this Court has consistently found them nonjusticiable. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). Slapping the label equal protection, or First Amendment—or, worse yet, Elections Clause—on such inherently value-laden claims does not make courts any less "fundamentally under-equipped" to resolve them. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)

Indeed, the district court's reliance on the Elections Clauses demonstrates that it may have gotten things *exactly* backwards. Far from empowering courts to interfere with the political choices States make in districting, Section 4 of Article I reflects "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Section 4—one of the same provisions that the district court found the 2016 Map somehow violates—gives state legislatures "the initial power to draw districts for federal elections," but gives Congress the power to "'make or alter' those districts if it wishe[s]." *Vieth*, 541 U.S. at 275 (plurality op.). The Framers certainly did not give the primary authority to state legislators only to empower courts to police the degree to which state legislatures took partisan advantage into account. To the contrary, the backstop to state legislative excess was another legislative body organized along partisan lines. That deliberate choice by the Framers goes a

long way to demonstrating that too much partisanship in districting is not a constitutional problem for courts to solve.

The power granted by the Elections Clause has not been lost on Congress. To the contrary, Congress' exercise of its Section 4 power is precisely why single-member congressional districting, with all its potential for gerrymandering district lines, remains the dominant practice today. *See* 2 U.S.C. §2c. Accordingly, if Congress wants to try to reduce partisan gerrymandering, it has the power to do so; indeed, in the 115th Congress alone, legislators have introduced several bills and resolutions aiming to do just that. *See, e.g.*, S. 3123, 115th Cong. (2018); H. Res. 364, 115th Cong. (2017); H. Res. 343, 115th Cong. (2017); H. Res. 283, 115th Cong. (2017). That not only belies protests that only the courts can "fix" this problem, but also belies any claim that the Framers intended courts to do so.

III. This Case Underscores That A "Limited And Precise" Test For Adjudicating Partisan Gerrymandering Claims Does Not Exist.

This case only underscores the problems with inserting the judiciary into partisan gerrymandering disputes. Indeed, far from producing a "limited and precise" test, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring), the district court produced four separate tests, each of which would encourage ever-more redistricting litigation while threatening state-drawn districting maps across the country.

A. The District Court Declined to Establish a Definitive Equal Protection Standard.

The majority first concluded that a districting plan violates the Equal Protection Clause whenever (1) a legislature passes the plan with "discriminatory intent," (2) the plan produces "discriminatory effects," and (3) those effects cannot be attributed to "another legitimate redistricting objective." App.138-39. Variants of this test have failed to persuade this Court before, and this version is no improvement.

The problems begin at the very first step. The district court first suggested that *any* intent to district for partisan advantage should be constitutionally suspect under the Equal Protection Clause, positing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish between an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." App.118. That startling proposition finds no support in this Court's cases. As Judge Osteen highlighted in rejecting the majority's suggestion, this "Court has recognized many times in redistricting and apportionment cases that some degree of partisanship and political consideration is constitutionally permissible in a redistricting process undertaken by partisan actors." App.339; *see also, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("a jurisdiction may engage in constitutional political gerrymandering"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Indeed, even Justices who have concluded that partisan gerrymandering claims are justiciable have acknowledged that *some* degree of districting for partisan advantage is inevitable and

permissible. *See, e.g.*, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part).

Perhaps recognizing that this extreme theory was a nonstarter, the district court alternatively "assume[d]" that, to satisfy the intent prong of its equal protection test, a plaintiff must prove that "a legislative mapdrawer's predominant purpose ... was to 'subordinate adherents of one political party and entrench a rival party in power.'" App.145-46. But a majority of this Court has already rejected such "heightened" intent requirements. *See Vieth*, 541 U.S. at 290-91 (plurality op.); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.). As the *Vieth* plurality explained, a "predominant intent" standard is much too "vague" and "indeterminate," as "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." 541 U.S. at 284-86, 290-91 (plurality op.). In all events, when the exercise is to develop a "limited and precise" test, a test that "assumes" without deciding one of its core components cannot crack the code.

The district court embraced an equally amorphous and unsustainable "discriminatory effects" test. According to the majority, "a plaintiff must show that the dilution of the votes of supporters of a disfavored party ... is likely to persist in subsequent elections such that an elected representative from the favored party ... will not feel a need to be responsive to constituents who support the disfavored party." App.152. The majority did not purport to identify how

much "bias" must exist or persist, or what evidence will suffice to prove that it does. *But see, e.g.*, *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (asking "how much partisan dominance is too much"). Instead, it concluded that plaintiffs may rely on all manner of social science metrics (district-specific or statewide) to try to prove their case under a "totality of the evidence" approach, and ultimately need only demonstrate that the plan has some "discernible discriminatory effects." App.191-92, 214. Again, that is the antithesis of "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

Moreover, the district court's effects test reflects the deeper incoherence of its approach to partisan gerrymandering. The test is premised on the concern that representatives in partisan-gerrymandered districts may be non-"responsive" to minority-party constituents. But that problem will be most acute in districts where majority-party voters already outnumber minority-party voters by large numbers, and partisan gerrymandering itself tends to avoid the concentration of majority-party voters in a small number of districts. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). Thus, if anything, partisan gerrymandering tends to ameliorate the purported problem. And in all events, the district court's inevitable resort to "th'ol' 'totality of the circumstances' test," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting), leaves States in the dark and courts in the driver's seat when it comes to identifying constitutionally compliant maps.

B. The First Amendment Standard Would Preclude *Any* Intent to District for Partisan Advantage.

If the majority's equal protection test would "almost *always*" leave "room for an election-impeding lawsuit," *Vieth*, 541 U.S. at 286 (plurality op.), its First Amendment test is even more problematic. According to the majority, to prove a First Amendment violation, a plaintiff must show: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan in fact burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Rather than assume that some degree of partisan gerrymandering is both inevitable and permissible, the majority wholeheartedly embraced the notion that the intent prong of this test is satisfied whenever districting for partisan advantage is *any* part of a legislature's motivation. *But see, e.g.*, *Hunt*, 526 U.S. at 551 ("a jurisdiction may engage in constitutional political gerrymandering"); App.339 (Osteen, J., concurring in part and dissenting in part) (collecting cases stating same). Furthermore, the district court's effects prong is proven whenever that intent has anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, be it the desire to vote, motivation to engage in political discourse, or "raising money, attracting candidates, and mobilizing voters to support ... political causes

and issues." App.288, 291. And its circular "causation" prong asks only whether the impacts of the legislature's intent to district for at least some degree of partisan advantage can be explained by something other than its intent to district for at least some degree of partisan advantage—in other words, it asks only whether the legislature did in fact intentionally district for at least some degree of partisan advantage. App.299.

As Judge Osteen observed in rejecting it, this novel test would "foreclose all partisan considerations in the redistricting process" and render *any* degree of districting for partisan advantage constitutionally verboten, App.343-44—a proposition that members of this Court have squarely and repeatedly rejected, *see, e.g.*, *Vieth*, 541 U.S. at 294 (plurality op.) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting[.]"). Moreover, as with its flawed equal protection test, the district court's First Amendment test reflects deeper doctrinal incoherence. For example, the test ignores that there are First Amendment values on both sides of the political ledger, as the political parties that purportedly stand to benefit from partisan gerrymandering are themselves associations that powerfully promote First Amendment values. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 434 (2001).

Thus, even assuming this Court were to find partisan gerrymandering claims justiciable under the First Amendment, there is no way the standard adopted below can be the right one. It makes little doctrinal sense, would invalidate nearly every

legislatively drawn districting plan in the country, and would essentially substitute the federal judiciary for the state legislatures as the ultimate mapdrawers. That result would be impossible to square with this Court's repeated reaffirmation of the primary role of the States in the redistricting process.

C. The Elections Clauses Standards Are Entirely Novel and Would Preclude *Any* Intent to District for Partisan Advantage.

Finally, the district court's novel conclusion that judicially manageable standards to police partisan gerrymandering have been lurking in the Elections Clauses all along is the *ne plus ultra* of doctrinal incoherence.

Section 2 of Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," *see* U.S. Const. art. I, §2, and Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," *id.* §4. In the district court's view, partisan gerrymandering violates Section 2 because it deprives "the People" of their right to elect Representatives, App.306-07, and it violates Section 4 because it "exceeds" the States' "delegated authority under the Elections Clause," App.303.

Indeed, according to the district court, "'manipulat[ing]' ... district lines" for "partisan advantage" *always* "exceeds" a State's powers under the Elections Clause because it is not "fair" or "neutral," and it *always* deprives "the People" of their right to elect their Representatives because the

legislature is purportedly "choos[ing]" for them. App.307, 311. Thus, according to the decision below, the quest for partisan gerrymandering standards in the Equal Protection Clause or the First Amendment—and the need to determine "[h]ow much political motivation and effect is too much," *Vieth*, 541 U.S. at 297 (plurality op.)—matters only for state and local elections. As to congressional elections, a judicially manageable framework has existed all along in the Elections Clauses, and the tolerable amount of political motivation in congressional redistricting is precisely zero.

There is no historical precedent whatsoever for that sweeping proposition, and that "lack of historical precedent" is itself a "telling indication of the severe constitutional problem" it poses. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). This Court has already concluded that the Elections Clauses "leave[] *with the States* primary responsibility for apportionment of their federal congressional ... districts." *LULAC*, 548 U.S. at 414 (emphasis added). And those provisions "clearly contemplate[] districting by political entities," which "unsurprisingly ... turns out to be root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285-86 (plurality op.). Accordingly, when the plaintiffs in *Vieth* proposed a partisan gerrymandering standard grounded in the Elections Clauses, the plurality emphatically "conclude[d] that neither Article I, §2, nor ... Article I, §4, provides a judicially enforceable limit on the political considerations that the States ... may take into account when districting." *Id.* at 305. No other member of the Court even deemed the plaintiffs' Elections Clauses arguments worthy of mention. And

since then, other courts have rejected them. *See, e.g.*, *Agre v. Wolf*, 284 F. Supp. 3d 591, 592 (E.D. Pa. 2018) (Smith, J.); *id.* at 631 (Shwartz, J., concurring).

In short, while the Framers generally left state elections to the States, the Framers focused specifically on congressional elections and delegated authority over them to state political bodies subject to oversight by the federal Congress. The idea that such a double delegation to state and federal legislatures is the font for the one and only judicially administrable limit on partisan gerrymandering (with a zero-tolerance standard to boot) strains credulity and underscores how many rocks the district court looked under to find a workable test. In reality, no such test exists, because partisan gerrymandering claims inevitably suffer from elemental standing and justiciability problems that preclude the development of judicially discernible and manageable standards for adjudicating them. But whatever else is true, an administrable test will have to come from this Court and has not yet been identified by the district court here. Thus, the case for this Court's plenary consideration of this appeal could not be clearer.

Finally, even if this Court were to articulate an administrable test for partisan gerrymandering, the 2016 Map would not violate it. If the Court were to identify a limited and precise test designed to ferret out the most extreme partisan gerrymandering, it would not condemn a map that adopted traditional districting criteria and conforms with such criteria to a degree not seen in the jurisdiction for a quarter century; indeed, after years of maps that split anywhere from 21 to 44 counties and upwards of 77

precincts, the 2016 Map divides only 13 counties and splits only 12 precincts. *See* pp.4-5, *supra*. There are multiple reasons for this Court to conclude that policing partisan gerrymanders on direct appeal is no proper role for this Court. But even if the Court someday discerned a test for identifying true outliers, that test would leave the 2016 Map undisturbed.

CONCLUSION

This Court should set this case for plenary consideration.

Respectfully submitted,

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October 1, 2018

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Appendix A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:16-CV-1026

COMMON CAUSE, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

No. 1:16-CV-1164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

Filed: Aug. 27, 2018

Before: Wynn, Circuit Judge, and Osteen, District Judge, and Britt, Senior District Judge

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MEMORANDUM OPINION

WYNN, Circuit Judge, wrote the opinion, in which BRITT, Senior District Judge, concurred. OSTEEN, JR., District Judge, concurs in part and dissents in part.

* * *

In these consolidated cases, two groups of Plaintiffs allege that North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan") constitutes a partisan gerrymander in violation of Article I of the Constitution, the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. After conducting a four-day trial and carefully considering the parties' evidence and briefing, this Court awarded judgment in Plaintiffs' favor on all of their claims and enjoined the State from using the 2016 Plan in future elections. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 598 (M.D.N.C. 2018), *vacated sub nom. Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) (mem.). On July 25, 2018, the Supreme Court vacated that judgment, and remanded the case to this Court for reconsideration in light of the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which addressed what evidence a plaintiff must put forward to establish Article III

standing to lodge a partisan vote dilution claim under the Equal Protection Clause.

As further explained below, we conclude that, under the test set forth in *Gill*, at least one Plaintiff registered to vote in each of the thirteen districts in the 2016 Plan has standing to assert an Equal Protection challenge to each of those districts. In particular, such Plaintiffs introduced evidence establishing that each of their districts is "packed or cracked" and, as a result, that their votes "carry less weight than [they] would carry in another, hypothetical district." *Id.* at 1931. We further conclude that *Gill* did not call into question—and, if anything, supported—this Court's previous determination that Plaintiffs have standing to assert partisan gerrymandering claims under Article I and the First Amendment.

As to the merits, a common thread runs through the restrictions on state election regulations imposed by Article I, the First Amendment, and the Equal Protection Clause: the Constitution does not allow elected officials to enact laws that distort the marketplace of political ideas so as to intentionally favor certain political beliefs, parties, or candidates and disfavor others. In particular, Article I preserves inviolate the right of "the People" to elect their Representatives, and therefore bars the States from enacting election regulations that "dictate electoral outcomes" or "favor or disfavor a class of candidates." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995). Similarly, the First Amendment prohibits election regulations that "restrict the speech of some elements of our society in order to enhance the relative

voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam). And the Equal Protection Clause embodies the foundational constitutional principle that the State must govern "impartially"—that "the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation." *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part). That the framers of the Constitution and the Reconstruction Amendments sought to protect this principle through three different constitutional provisions only reinforces its centrality to our democratic system.

Partisan gerrymandering—"the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)—strikes at the heart of this foundational constitutional principle. By definition, partisan gerrymandering amounts to an effort to dictate electoral outcomes by favoring candidates of one party and disfavoring candidates of another. *Thornton*, 514 U.S. at 833-34. By intentionally ensuring that Representatives from one party have a disproportionate voice in Congress, it also "restrict[s] the speech of some elements of our society"—voters who do not support the policies embraced by the favored party—and "enhance[s] the relative voice of others"—voters who support the favored party. *Buckley*, 424 U.S. at 48-49. And by favoring the viewpoints of one group of voters over another, it runs afoul of the Government's constitutional duty to "treat its voters as standing in

the same position, regardless of their political beliefs or party affiliation." *Davis*, 478 U.S. at 166.

Put differently, by intentionally seeking to entrench a favored party in power and make it difficult—if not impossible—for candidates of parties supporting disfavored viewpoints to prevail, partisan gerrymandering "seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). But "'[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market,' and *the people lose when the government is the one deciding which ideas should prevail.*" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (emphasis added) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Partisan gerrymanders, therefore, "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Turner Broad.*, 512 U.S. at 64 (internal quotation marks omitted).

That is precisely what the Republican-controlled North Carolina General Assembly sought to do here. The General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on "political data"—that is, past election results specifying whether, and to what extent, particular voting precincts had favored Republican or Democratic candidates, and therefore were likely to do so in the future—to draw a districting plan that would ensure Republican candidates would

prevail in the vast majority of the State's congressional districts, and would continue to do so in future elections. Ex. 1007. And the Republican-controlled General Assembly achieved that goal. As detailed below, the 2016 Plan led to Republican candidates prevailing by "safe" margins in the vast majority of the State's thirteen congressional districts. Put differently, the General Assembly's Republican majority "decid[ed] which ideas [w]ould prevail" in the State's congressional elections. *Becerra*, 138 S. Ct. at 2375. In doing so, they deprived Democratic voters "of their natural political strength" by making it difficult for such voters to raise money, attract strong candidates, and motivate fellow party members and independent voters to campaign and vote. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

Legislative Defendants[1] drew a plan designed to subordinate the interests of non- Republican voters not because they believe doing so advances any democratic, constitutional, or public interest, but because, as the chief legislative mapdrawer openly acknowledged, t*he General Assembly's Republican majority* "think[s] electing Republicans is better than electing Democrats." Ex. 1016, at 34:21-23. But that is not a choice the Constitution allows legislative mapdrawers to make. Rather, "those who govern should be the *last* people to help decide who *should*

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[1] Senator Robert Rucho, in his official capacity as co-chair of the Joint Select Committee on Congressional Redistricting (the "Committee"); Representative David Lewis, in his official capacity as co-chair of the Committee; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate.

govern." *McCutcheon v. Fed Election Comm'n.*, 572 U.S. 185, 134 S. Ct. 1434, 1441-42 (2014) (plurality op. of Roberts, C.J.). Indeed, "the core principle of [our] republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Leg.*, 135 S. Ct. at 2677 (internal quotation marks omitted). Accordingly, and as further explained below, we conclude, with one narrow exception,[2] that Plaintiffs prevail on all of their constitutional claims.[3]

I. Background

A. The Modern History of Redistricting in North Carolina

Over the last 30 years, North Carolina voters repeatedly have asked state and federal courts to pass judgment on the constitutionality of the congressional districting plans drawn by their state legislators. The first such challenge involved a redistricting plan adopted by the North Carolina General Assembly after the 1990 census, which increased the size of North Carolina's congressional delegation from 11 to 12 members. *See Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 633-34 (1993). When the General Assembly set out to redraw the state's congressional districts to incorporate the new seat, the Department of Justice, pursuant to its "max-black" policy, pushed for the creation of a second majority-black district to

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[2] As further explained below, we hold that Plaintiffs failed to adduce sufficient evidence to support their partisan vote dilution challenge under the Equal Protection Clause to District 5. *See infra* Part III.B.2.e.

[3] This opinion constitutes our findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

augment, it maintained, the representation of the state's African-American voters in Congress. *Id.* at 635. In response, the General Assembly prepared a revised district map that included the majority-black First and Twelfth Districts (the "1992 Plan"). *Id.*

Several dozen North Carolina voters, most of whom were Republican, challenged the 1992 Plan as a partisan gerrymander, in violation of the Equal Protection Clause, the First Amendment, and Article I, Section 2 of the United States Constitution. *Pope v. Blue*, 809 F. Supp. 392, 394-95, 397-98 (W.D.N.C. 1992), *aff'd* 506 U.S. 801 (1992). A divided three-judge panel dismissed the action, holding that the plaintiffs failed to adequately allege that the redistricting plan had a legally cognizable "discriminatory effect" on any "identifiable political group," under the standard set forth in the Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality op.). *Pope*, 809 F. Supp. at 397.

Separately, a group of North Carolina voters challenged the 1992 Plan as a racial gerrymander, in violation of the Equal Protection Clause. *Shaw I*, 509 U.S. at 636-37. After several years of litigation, the Supreme Court held that the General Assembly's use of race as the predominant factor in drawing the second majority-black district in the 1992 Plan violated the Equal Protection Clause, and enjoined the use of that district in future elections. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905-18 (1996). In 1997, a politically divided General Assembly enacted a remedial plan expected to elect six Republican and six Democratic Representatives, rendering each party's share of the state's congressional delegation

proportional to its share of the statewide vote in the most recent congressional election. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 412-13 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001); *id.* at 423-24 (Thornburg, J., dissenting). In 2001, after several more years of litigation, the Supreme Court approved that remedial plan. *See Easley*, 532 U.S. 234 (holding that three-judge panel's finding that race constituted the predominant motivation in redrawing remedial districts was not supported by substantial evidence).

Just as litigation regarding the 1992 Plan came to an end, the results of the 2000 census entitled North Carolina to another seat in Congress, and the General Assembly again set out to redraw the state's congressional districts to include the additional seat. The resulting plan, which was adopted in 2001 (the "2001 Plan"), was used in each of the State's congressional elections between 2001 and 2010. In all but one of these elections, the party receiving more statewide votes for their candidates for the House of Representatives also won a majority of the seats in North Carolina's congressional delegation (the only exception being the 2010 election, in which Republicans won 54 percent of votes statewide but only 6 of the 13 seats). Exs. 1021-25. Although the 2001 Plan did not include any majority-black districts, black voters in the First and Twelfth Districts were consistently successful in electing their preferred candidates. *Harris v. McCrory*, 159 F. Supp. 3d 600, 606-07 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). Unlike the 1992 Plan, the 2001 Plan did not generate significant federal litigation. *Id.* at 607.

B. The Drawing of the 2016 Plan

In 2010, for the first time in more than a century, North Carolina voters elected Republican majorities in both the North Carolina Senate and the North Carolina House of Representatives, giving Republicans exclusive control over the decennial congressional redistricting process.[4] *See id.* at 607. The House of Representatives and Senate each established redistricting committees, which were jointly responsible for preparing a proposed congressional redistricting plan. *Id.* Representative David Lewis, in his capacity as the senior chair of the House Redistricting Committee, and Senator Robert Rucho, in his capacity as senior chair of the Senate Redistricting Committee, were responsible for developing the proposed redistricting plan. *Id.*

Through private counsel, the committees engaged Dr. Thomas Hofeller, who had previously worked as the redistricting coordinator for the Republican National Committee, to draw the new congressional districting plan. *Id.* Concurrent with his work on the 2011 North Carolina congressional redistricting plan, Dr. Hofeller also served on a "redistricting team" established as part of the national Republican State Leadership Committee's ("RSLC") Redistricting Majority Project, commonly referred to as "REDMAP." Ex. 2015, at ¶ 13. According to RSLC, REDMAP sought to elect Republican candidates to state legislatures so that Republicans would control such legislatures' redistricting efforts and thereby "solidify

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[4] Under the North Carolina Constitution, the Governor lacks the authority to veto redistricting legislation. *See* N.C. Const. art. II, § 22.

conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade." *Id.* at ¶ 10. With regard to North Carolina, in particular, REDMAP sought to "[s]trengthen Republican redistricting power by flipping [state legislative] chambers from Democrat to Republican control." Ex. 2020.

Representative Lewis and Senator Rucho, both of whom are Republican, orally instructed Dr. Hofeller regarding the criteria he should follow in drawing the new districting plan. Dep. of Thomas B. Hofeller ("Hofeller Dep.") 20:7-19, Jan. 24, 2017, ECF Nos. 101-34, 110-1. According to Dr. Hofeller, Representative Lewis and Senator Rucho's "primar[y] goal" in drawing the new districts was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." *Id.* at 123:1-7.

In accordance with Representative Lewis and Senator Rucho's instructions, Dr. Hofeller testified that he sought "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 127:19-22. In order to minimize the electoral opportunities of Democratic candidates, Dr. Hofeller used the results of past statewide elections to predict whether a particular precinct or portion of a precinct was likely to vote for a Republican or Democratic congressional candidate in future elections. *See id.* at 132:22-134:13, 159:20-160:12. According to Dr. Hofeller, "past voting behavior," as reflected in "past election results," is "the best predictor of future election success." Ex. 2037.

Past election data have become "the industry standard" for predicting the partisan performance of a districting plan, he explained, because "as more and more voters . . . register non-partisan or independent," party registration data have decreased in predictive value. *Id.*

Using past election data to "draw maps that were more favorable to Republican candidates," Dr. Hofeller moved district lines "to weaken Democratic strength in Districts 7, 8, and 11 . . . by concentrating Democratic voting strength in Districts 1, 4, and 12." Ex. 2043, at 33-34. Additionally, according to Dr. Hofeller, "[t]he General Assembly's goal [in 2011] was to increase Republican voting strength in New Districts 2, 3, 6, 7, and 13. This could only be accomplished by placing all the strong Democratic [census voting districts ("VTDs")][5] in either New Districts 1 or 4." Hofeller Dep. 116:19-117:25; Ex. 2036, at 4 (Dr. Hofeller averring that "[t]he Republican strategy was to weaken Democratic strength in Districts 7, 8, and 11; and to completely revamp District 13, converting it into a competitive GOP district."). Dr. Hofeller testified that to "improve[] GOP voting strength" in Districts 2 and 9, he "concentrat[ed] Democratic voting strength in Districts 1, 4 and 12." Ex. 2036, at 4. Dr. Hofeller conceded that, by making these changes, the 2011

[5] Counties in North Carolina draw precinct lines based on the latest census. The General Assembly created VTDs on January 1, 2008, defined by the precinct lines as they existed on that date. N.C. Gen. Stat. § 163-132.1B. For the most part, precincts and VTDs in North Carolina remain the same, although since January 1, 2008, some counties have divided certain VTDs into multiple precincts.

Plan "diminished . . . [t]he[] opportunity to elect a Democratic candidate in the districts in which [he] increased Republican voting strength." Hofeller Dep. 128:17-21. All told, Dr. Hofeller testified that he redrew Districts 2, 3, 6, 7, 8, 9, 11, and 13 to increase Republican voting strength in those districts, and, to do so, he concentrated Democratic voters in Districts 1, 4, and 12.

Claiming (incorrectly) that Section 2 of the Voting Rights Act required the creation of majority-black districts "where possible," Representative Lewis and Senator Rucho also directed Dr. Hofeller to draw two majority-black districts in the state. *Harris*, 159 F. Supp. 3d at 608. This goal worked hand-in-hand with the General Assembly's partisan objective because, as Legislative Defendants acknowledge, "race and politics are highly correlated." Ex. 2043, at ¶ 120. Thus, Dr. Hofeller drew the map to further concentrate black voters, who are more likely to vote for Democratic candidates, into District 1 and District 12, where Dr. Hofeller already was planning to concentrate Democratic voting strength. *Harris*, 159 F. Supp. 3d at 607-09. As a result, the proportion of black voters in those districts increased from 47.76 percent to 52.65 percent and from 43.77 percent to 50.66 percent, respectively. *Id.* The General Assembly enacted the 2011 Plan on July 28, 2011. *Id.* at 608.

North Carolina conducted two congressional elections using the 2011 Plan. In 2012, Republican candidates received a minority of the statewide vote (49%), Ex. 3023, but won a supermajority of the seats in the State's congressional delegation (9 of 13), Ex. 1020. In 2014, Republican candidates received 54

percent of the statewide vote, and won 10 of the 13 congressional seats. Ex. 1019.

Meanwhile, voters living in the two majority-black districts challenged the 2011 Plan in both state and federal court, alleging that lines for the two districts constituted unconstitutional racial gerrymanders. *Harris*, 159 F. Supp. 3d at 609-10. The Supreme Court of North Carolina twice ruled that the 2011 Plan did not violate the state or federal constitution. *Dickson v. Rucho*, 781 S.E.2d 404, 410-11 (N.C. 2015), *vacated*, 137 S. Ct. 2186 (2017) (mem.); *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.). However, on February 5, 2016, a three-judge panel presiding in the U.S. District Court for the Middle District of North Carolina struck down Districts 1 and 12 as unconstitutional racial gerrymanders and enjoined their use in future elections. *Harris*, 159 F. Supp. 3d at 627. Following argument, the Supreme Court affirmed the *Harris* panel's decision in its entirety. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

With both chambers of the North Carolina General Assembly still controlled by Republicans—and elected under one of the most widespread racial gerrymanders ever confronted by a federal court, *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017)—Representative Lewis and Senator Rucho again took charge of drawing the remedial districting plan. On February 6, 2016, Representative Lewis once more engaged Dr. Hofeller to draw the remedial plan. Dep. of Rep. David Lewis ("Lewis Dep.") 44:2-4, Jan. 26, 2017, ECF Nos. 101-33, 108-3, 110-3, 110-4; *see also*

Ex. 4061. Soon thereafter, Representative Lewis spoke with Dr. Hofeller over the phone regarding the drawing of the new plan. Lewis Dep. 44:12-24; Ex. 4061. Even before he spoke with Representative Lewis, Dr. Hofeller had begun working on a remedial plan using redistricting software and data on his personal computer. Hofeller Dep. 130:2-9.

On February 9, 2016, Representative Lewis and Senator Rucho met with Dr. Hofeller at his home and provided him with more detailed oral instructions regarding the criteria he should follow in drawing the remedial plan. Ex. 4061; Lewis Dep. 48:19-49:7; Dep. of Sen. Robert Rucho ("Rucho Dep.") 170:13-170:17, Jan. 25, 2017, ECF Nos. 101- 32, 110-5. Once again, Representative Lewis and Senator Rucho did not reduce their instructions to Dr. Hofeller to writing. Lewis. Dep. 60:1-13. In addition to directing Dr. Hofeller to remedy the racial gerrymander, Representative Lewis and Senator Rucho again directed Dr. Hofeller to use political data—precinct-level election results from all statewide elections, excluding presidential elections, dating back to January 1, 2008—in drawing the remedial plan. Ex. 2043, at ¶ 38; Lewis Dep. 162:24-163:7; Hofeller Dep. 100:3-102:5, 180:10-16. Representative Lewis and Senator Rucho further instructed Dr. Hofeller that he should use that political data to draw a map that would maintain the existing partisan makeup of the state's congressional delegation, which, as elected under the racially gerrymandered plan, included 10 Republicans and 3 Democrats. Ex. 2043, at ¶ 38; Lewis Dep. 162:24-163:7; Hofeller Dep. 175:19-23, 178:14-20, 188:19-190:2. And Representative Lewis and Senator Rucho instructed Dr. Hofeller "to change

as few" of the district lines in the 2011 Plan as possible in remedying the racial gerrymander. Lewis Dep. 75:25-76:2.

With these instructions, Dr. Hofeller continued to prepare draft redistricting plans on his personal computer. To achieve Representative Lewis and Senator Rucho's partisan objectives—and in accordance with his belief that "past voting data" best predict future election results—Dr. Hofeller drew the draft plans using an aggregate variable he created to predict partisan performance. For each census block, the variable compared the sum of the votes cast for Republican candidates in seven statewide races occurring between 2008 and 2014 with the sum of the average total number of votes cast for Democratic and Republican candidates in those same races. Exs. 1017, 2002, 2039, 2043 at ¶¶ 18, 47, 49, 50; Dep. of Thomas Hofeller, Vol. II ("Hofeller Dep. II") 262:21-24, Feb. 10, 2017, ECF No. 110-2.

Dr. Hofeller testified that he used the averaged results from the seven elections so as "to get a pretty good cross section of what the past vote had been," Hofeller Dep. 212:16-213:9, and "[t]o give [him] an indication of the two-party partisan characteristics of VTDs," Hofeller Dep. II 267:5-6. Dr. Hofeller explained that "he had drawn numerous plans in the state of North Carolina over decades," and in his "experience[,] . . . the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it." Ex. 2045, at 525:6-10; Hofeller Dep. at 149:5-18. "So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every

subsequent election. The same would be true for Republican precincts." Ex. 2045, at 525:14-17; *see also* Hofeller Dep. II at 274:9-12 ("[I]ndividual VTDs tend to carry . . . the same characteristics through a string of elections.").

When he drew district lines, Dr. Hofeller was constantly aware of the partisan characteristics of each county, precinct, and VTD. Displaying the partisanship variable on his computer screen by color-coding counties, VTDs, or precincts to reflect their likely partisan performance, Ex. 5116, at ¶ 8, fig. 1; Hofeller Dep. 103:5-105:24; Hofeller Dep. II 267:18-278:4, Dr. Hofeller would use the partisanship variable to assign a VTD "to one congressional district or another," Hofeller Dep. 106:23-107:1, 132:14-20, and "as a partial guide" in deciding whether and where to split VTDs or counties, *id.* at 203:4-5; *see also id.* at 202:2-5; Hofeller Dep. II at 267:10-17. Dr. Hofeller further averred that partisanship considerations were the principal factor governing his placement of district lines within split counties. Ex. 5001, at 7-8 ("For the most part, the internal boundaries of split counties were drawn using a composite percentage of seven statewide political races.").

In assigning a county, VTD, or precinct to a particular district, Dr. Hofeller also sought to preserve the "core" constituency of the districts in the 2011 Plan. Ex. 5001, at ¶ 31. Using his partisanship variable—and in accordance with his effort to preserve the "cores" of the districts in the 2011 Plan—Dr. Hofeller drew, for example, Districts 1, 4, and 12 to be "predominantly Democratic," as those districts had

been under the 2011 Plan. Hofeller Dep. 192:7-16. After drawing a draft plan, Dr. Hofeller also would use his seven-election variable to assess the partisan performance of the plan on a district-by-district basis and as a whole. *Id.* at 247:18-23; Hofeller Dep. II 283:15-19, 284:20-285:4. Dr. Hofeller then would convey his assessment of the partisan performance of each district to Representative Lewis. Hofeller Dep. II 290:17-25.

The following day, February 10, 2016, Dr. Hofeller met with Representative Lewis and Senator Rucho and showed them several draft redistricting plans. Rucho Dep. 31:16-31:18, 37:7-37:8. "Nearly every time" he reviewed Dr. Hofeller's draft maps, Representative Lewis assessed the partisan performance of the 2016 Plan as a whole and each "individual voter district[]" using the results from North Carolina's 2014 Senate race between Senator Thom Tillis and former Senator Kay Hagan, which was, in Representative Lewis's opinion, "the closest political race with equally matched candidates who spent about the same amount of money." Lewis Dep. 63:9-64:17. Representative Lewis visited Dr. Hofeller's house several more times over the next few days to review additional draft remedial plans. On either February 12 or February 13, Dr. Hofeller presented the near-final 2016 Plan to Representative Lewis, which Representative Lewis found acceptable. *Id.* at 77:7-20. Using the results of the Tillis- Hagan race, Representative Lewis concluded that the 2016 Plan would yield the "10-3 Republican advantage" the Chairs had intended. *Id.* at 128:29.

On February 12, 2016, the leadership of the North Carolina General Assembly appointed Representative Lewis and Senator Rucho as co-chairs of a newly formed a Joint Select Committee on Congressional Redistricting (the "Committee"), comprised of 25 Republican and 12 Democratic legislators, to draw the remedial district plan. Ex. 2009. On February 15, 2016—two days after Dr. Hofeller completed drawing the 2016 Plan—the co-Chairs held a public hearing on the redistricting effort. Ex. 1004. Dr. Hofeller did not attend the public hearing. Rucho Dep. 55:4-6. The Committee also solicited written comments regarding the redistricting efforts on its website. *Id.* at 55:10-23. Dr. Hofeller was not apprised of any of the comments made at the public hearing or in the written submissions. *Id.* at 55:4-56:13. Because Dr. Hofeller finished drawing the 2016 Plan before the public hearing and the opening of the window for members of the public to submit written comments, Hofeller Dep. 177:9-21, the 2016 Plan did not reflect any public input.

On February 16, 2016—three days after Dr. Hofeller, at Representative Lewis and Senator Rucho's direction, had completed drawing the remedial maps, *id.*; Ex. 5001, at ¶ 33—the Committee met for the first time. At that meeting, Representative Lewis and Senator Rucho proposed the following criteria to govern the drawing of the remedial districts:

> Equal Population: The Committee will use the 2010 federal decennial census data as the sole basis of population for the establishment of districts in the 2016 Contingent

Congressional Plan. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.

Contiguity: Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

Political Data: The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting districts ("VTDs") should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.

Partisan Advantage: The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Twelfth District: The current General Assembly inherited the configuration of the Twelfth District from past General

Assemblies. This configuration was retained because the district had already been heavily litigated over the past two decades and ultimately approved by the courts. The Harris court has criticized the shape of the Twelfth District citing its "serpentine" nature. In light of this, the Committee shall construct districts in the 2016 Contingent Congressional Plan that eliminate the current configuration of the Twelfth District.

Compactness: In light of the Harris court's criticism of the compactness of the First and Twelfth Districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of the current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact. Reasonable efforts shall be made not to divide a county into more than two districts.

Incumbency: Candidates for Congress are not required by law to reside in a district they seek to represent. However, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan.

Ex. 1007. No other criteria were discussed by the Committee or in legislative debate on the 2016 Plan.

Representative Lewis explained the relationship between the "Political Data" and "Partisan Advantage" criteria as follows: the Partisan Advantage criterion "contemplate[s] looking at the political data . . . and as you draw the lines, if you're trying to give a partisan advantage, you would want to draw lines so that more of the whole VTDs voted for the Republican on the ballot than they did the Democrat." Ex. 1005, at 57:10-16. And he further explained that "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage." *Id.* at 54. Representative Lewis "acknowledge[d] freely that this would be a political gerrymander," which he maintained was "not against the law." *Id.* at 48:4-6.

Democratic state Senator Floyd McKissick, Jr., objected to the "Partisan Advantage" criterion, stating that "ingrain[ing]" the 10-3 advantage in favor of Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, Democratic congressional candidates had received more votes on a statewide basis than Republican candidates. *Id.* at 49:16-50:5, 50:14-22. In response, Representative Lewis said that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it[would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 50:7-10. Democratic Committee members also expressed concern that the Partisan Advantage criterion would "bake in partisan advantage that was achieved

through the use of unconstitutional maps." *Id.* at 62:1-3. In response, Representative Lewis again reiterated that "the goal" of the criterion "is to elect 10 Republicans and 3 Democrats." *Id.* at 62:18-19.

That same day, Committee members adopted, on a bipartisan basis, the Equal Population, Contiguity, Twelfth District, and Incumbency criteria. *Id.* at 14:16-18:3, 21:9-24:18, 91:17-94:17, 95:15-98:20. The remaining two criteria—Political Data and Partisan Advantage—were adopted on party-line votes. *Id.* at 43:21-47:5, 67:2-69:23. Additionally, the Committee authorized the chairmen to engage a consultant to assist the Committee's Republican leadership in drawing the remedial plan. Ex. 2003.

Also on February 16, 2016, after receiving authorization to hire a redistricting consultant, Representative Lewis and Senator Rucho sent Dr. Hofeller an engagement letter, which Dr. Hofeller signed that same day. Ex. 2003. Upon his formal engagement, Dr. Hofeller downloaded the 2016 Plan, which he had completed several days earlier, from his personal computer onto a legislative computer. Lewis Dep. 138:6-8; Ex. 1009, at 45:7-45:11; Ex. 1014, at 21:10-21:24; Ex. 4061. Democratic Committee members were not allowed to consult with Dr. Hofeller nor were they allowed access to the state computer systems to which he downloaded the 2016 Plan. Ex. 1011, at 36:9-20; Ex. 1014, at 44:23-45:15; Ex. 2008. According to Representative Lewis, Senator Rucho, and Dr. Hofeller, the 2016 Plan adhered to the Committee's Partisan Advantage and Political Data criteria. Ex. 1014, at 36:25-37:6; Ex. 1016, at 37:3-7; Hofeller Dep. 129:14-15.

The following day, Representative Lewis and Senator Rucho presented the 2016 Plan to the Committee. Ex. 1008. As part of the presentation, Representative Lewis provided Committee members with spreadsheets showing the partisan performance of the proposed districts in twenty previous statewide elections. Ex. 1017. Representative Lewis stated that he and Senator Rucho believed that the 2016 Plan "will produce an opportunity to elect ten Republican members of Congress," but it was "a weaker map than the [2011 Plan]" from the perspective of Partisan Advantage. Ex. 1008, at 12:3-7. The Committee approved the 2016 Plan by party-line vote. *Id.* at 67:10-72:8.

On February 19, 2016, the North Carolina House of Representatives debated the 2016 Plan. During that debate, Representative Lewis further explained the rationale behind the Partisan Advantage criterion, stating: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." Ex. 1016, at 34:21-23. Following that debate, the North Carolina Senate and North Carolina House of Representatives approved the 2016 Plan, with one slight modification,[6] on February 18 and February 19, respectively, in both cases by party-line votes. Ex. 1011, at 110:13-22; Ex. 1016, at 81:6-16.

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[6] During a Senate Redistricting Committee meeting on February 18, 2017, the 2016 Plan was slightly modified by moving two whole precincts and one partial precinct between Districts 6 and 13 to avoid placing two incumbents in the same district. Ex. 1009, at 53:2-54:14; Ex. 1014, at 22:21-23:10; Lewis Dep. 138:6-139:2.

The 2016 Plan splits 13 counties and 12 precincts. Ex. 5023. Under several mathematical measures of compactness, the districts created by the 2016 Plan are, on average, more compact than the districts created by the 2011 Plan. Ex. 5048. In accordance with the Chairs goals of protecting incumbents and preserving the "cores" of the districts in the 2011 Plan, 10 of the 13 districts (Districts 1, 2, 3, 4, 5, 6, 7, 10, 11, and 12) in the 2016 Plan retain at least 50 percent of the population in their corresponding 2011 version. Ex. 5001, Table 1. Representative Lewis acknowledged as much, testifying that "[m]any of the[districts in the 2016 Plan] look basically the same as they did in the 2011 map." Lewis Dep. 61:15-16. For example, Representative Lewis noted that, like the 2011 Plan, the 2016 Plan split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between Districts 10 and 11. *Id.* at 62:11-19. Notwithstanding the General Assembly's stated goal of protecting incumbents, the 2016 Plan paired 2 of the 13 incumbents elected under the unconstitutional 2011 Plan (David Price previously elected in District 4 and George Holding previously elected in District 13). Ex. 2010, at 15-19.

The *Harris* plaintiffs filed objections to the Plan with the three-judge court presiding over the racial gerrymandering case. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *1 (M.D.N.C. June 2, 2016). Among those objections, the *Harris* plaintiffs asked the court to reject the 2016 Plan as an unconstitutional partisan gerrymander. *Id.* at *2. Noting that the Supreme Court had not agreed to a standard for adjudicating partisan gerrymandering claims and that the "plaintiffs ha[d] not provided the

Court with a 'suitable standard'" for evaluating such claims, the court rejected the partisan gerrymandering objection "as presented." *Id.* at *3 (quoting *Ariz. State Leg.*, 135 S. Ct. at 2658). The court twice made clear, however, that its "denial of plaintiffs' objections *does not* constitute or imply an endorsement of, or foreclose any additional challenges to, the [2016 Plan]." *Id.* at *1, *3 (emphasis added).

In November 2016, North Carolina conducted congressional elections using the 2016 Plan. In accordance with the objective of the Partisan Advantage criterion, Republican candidates prevailed in 10 of the 13 (76.92%) congressional districts established by the 2016 Plan. Ex. 1018. Republican candidates received 53.22 percent of the statewide vote. Ex. 3022. Republican candidates prevailed in each of the ten districts Dr. Hofeller and the Chairs intended and expected Republican candidates to prevail (Districts 2, 3, 5, 6, 7, 8, 9, 10, 11, and 13), and Democratic candidates prevailed in each of the three districts Dr. Hofeller and the Chairs intended and expected to be "predominantly Democratic" (Districts 1, 4, and 12). Exs. 3022, 5116.

C. Procedural History

On August 5, 2016, Common Cause, the North Carolina Democratic Party, and fourteen North Carolina voters[7] (collectively, "Common Cause

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[7] The individual plaintiffs in the Common Cause action are Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; and Russell G. Walker, Jr.

Plaintiffs"), filed a complaint alleging that the 2016 Plan constituted a partisan gerrymander. Compl., *Common Cause v. Rucho*, No. 1:16-CV-1026, Aug. 5, 2016, ECF No. 1. The League of Women Voters of North Carolina (the "League") and twelve North Carolina voters[8] (collectively, "League Plaintiffs," and together with Common Cause Plaintiffs, "Plaintiffs") filed their partisan gerrymandering action on September 22, 2016. Compl., *League of Women Voters of N.C. v. Rucho*, No. 1:16-CV-1164, Sept. 22, 2016, ECF No. 1. Both parties named as defendants Legislative Defendants; A. Grant Whitney, Jr., in his official capacity as Chairman of the North Carolina State Board of Elections (the "Board of Elections"); the Board of Elections; and the State of North Carolina (collectively, with Chairman Whitney and the Board of Elections, "State Defendants," and with Legislative Defendants, "Defendants").

In their operative complaints, both Common Cause Plaintiffs and League Plaintiffs allege that the 2016 Plan violates the Equal Protection Clause, by intentionally diluting the electoral strength of individuals who previously opposed, or were likely to oppose, Republican candidates, and the First Amendment, by intentionally burdening and retaliating against supporters of non-Republican candidates on the basis of their political beliefs and association. First Am. Compl. for Decl. J. and Inj.

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[8] The individual plaintiffs in the League action are William Collins, Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; and Willis Williams.

Relief ("Common Cause Compl.") ¶¶ 25-45, *Common Cause v. Rucho*, No. 1:16-CV-1026, Sept. 7, 2016, ECF No. 12; Am. Compl. ("League Compl.") ¶¶ 69-83, *League of Women Voters of N.C. v. Rucho*, No. 1:16-CV-1164, Feb. 10, 2017, ECF No. 41. Plaintiffs allege that the General Assembly diluted the votes of supporters of non-Republican candidates through "cracking"—dispersing members or supporters of a disfavored party or group across a number districts so that they are relegated to minority status in each of those districts—and "packing"—concentrating members or supporters of the disfavored party or group in a particular district or limited number of districts so as to dilute the voting strength of supporters of the disfavored party or group in the remaining districts. Common Cause Compl. ¶ 35; League Compl. ¶ 6.

Common Clause Plaintiffs further allege that the 2016 Plan violates Article I, section 2 of the Constitution, which provides that members of the House of Representatives will be chosen "by the People of the several States," by usurping the right of "the People" to select their preferred candidates for Congress, and Article I, section 4, by exceeding the States' delegated authority to determine "the Times, Places and Manner of holding Elections" for members of Congress. Common Cause Compl. ¶¶ 46-54.

On February 7, 2017, this Court consolidated the two actions for purposes of discovery and trial. Order, Feb. 7, 2017, ECF No. 41. Three days later, League Plaintiffs amended their complaint to reflect the results of the 2016 congressional election conducted under the 2016 Plan and empirical analyses of those results.

On February 21, 2017, Defendants moved to dismiss both complaints under Federal Rule of Civil Procedure 12(b)(6), principally asserting that (1) *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), which the Supreme Court summarily affirmed, 113 S. Ct. 30 (1992), required dismissal of Plaintiffs' actions, and (2) the Supreme Court's splintered opinions regarding the justiciability of—and, to the extent such claims are justiciable, the legal framework for—partisan gerrymandering claims foreclosed Plaintiffs' claims. Mot. to Dismiss for Failure to State a Claim, Feb. 21, 2017, ECF No. 45. In a memorandum opinion and order entered March 3, 2017, this Court denied Defendants' motions to dismiss. *Common Cause v. Rucho*, 240 F. Supp. 3d 376 (M.D.N.C. 2017); Order, Mar. 3, 2017, ECF No. 51.

Beginning on October 16, 2017, this Court held a four-day trial, during which the Common Cause Plaintiffs, League Plaintiffs, and Legislative Defendants introduced evidence and presented testimony from their expert witnesses. The parties also stipulated to the admission of numerous additional exhibits as well as extensive deposition testimony. Although counsel for the State Defendants attended trial, they did not participate and took no position as to how this Court should resolve the case.

In post-trial briefing, League Plaintiffs set forth a single, three-part test for determining whether a state congressional redistricting plan violates the First and Fourteenth Amendments. Under their proposed test, a plaintiff alleging that a state redistricting body engaged in unconstitutional partisan gerrymandering bears the burden of proving: (1) that the redistricting

body enacted the challenged plan with the intent of discriminating against voters who support candidates of a disfavored party and (2) that the challenged plan had a "large and durable" discriminatory effect on such voters. League of Women Voters Pls.' Post-Trial Br. ("League Br.") 3, Nov. 6, 2017, ECF No. 113. If the plaintiff makes such a showing, then the burden shifts to the governmental defendant to provide (3) a legitimate, non-partisan justification for the plan's discriminatory effect. *Id.*

League Plaintiffs pointed to the Political Advantage and Partisan Advantage criteria as well as the chairmen's official explanations of those criteria as evidence of the General Assembly's intent to discriminate against voters who support Democratic candidates. *Id.* at 7-8. As to the plan's discriminatory effects, League Plaintiffs introduced expert analyses of the 2016 Plan's alleged "partisan asymmetry" to establish that the plan makes it substantially more difficult for voters who favor Democratic candidates to translate their votes into representation, and that this substantial difficulty is likely to persist throughout the life of the 2016 Plan. *Id.* at 12-16. Finally, League Plaintiffs asserted that Legislative Defendants failed to provide any evidence of a legitimate justification for the 2016 Plan's alleged partisan asymmetry, such as the state's political geography or other legitimate redistricting goals. *Id.* at 21-24.

By contrast, Common Cause Plaintiffs advanced distinct legal frameworks for their First Amendment, Equal Protection, and Article I claims. Regarding the First Amendment, Common Cause Plaintiffs asserted that the 2016 Plan's disfavoring of voters who

previously opposed Republican candidates or associated with non-Republican candidates or parties amounts to viewpoint discrimination and passes constitutional muster only if narrowly tailored to serve a compelling state interest. Common Cause Pls.' Post-Trial Br. ("Common Cause Br.") 5-8, Nov. 6, 2017, ECF No. 116. According to Common Cause Plaintiffs, the General Assembly's use of individuals' past voting history to assign such individuals to congressional districts with the purpose of advantaging Republican candidates on a statewide basis constitutes evidence of viewpoint discrimination. *Id.* at 7-15. Common Clause Plaintiffs further contended that Legislative Defendants provided no compelling interest justifying such viewpoint discrimination. *Id.* at 9.

Turning to the Equal Protection Clause, Common Cause Plaintiffs suggested that the level of scrutiny to which a court must subject a redistricting plan turns on the degree to which the redistricting body intended to pursue partisan advantage. *Id.* at 15-17. According to Common Cause Plaintiffs, the General Assembly predominantly pursued partisan advantage in drawing the 2016 Plan, warranting application of strict scrutiny. *Id.* Under that standard, Legislative Defendants must show that the plan was narrowly tailored to advance a compelling state interest, Common Cause Plaintiffs maintained. *Id.* As proof of the General Assembly's predominant intent to burden voters who support non-Republican candidates, Common Cause Plaintiffs pointed to the Political Data and Partisan Advantage criteria, the chairmen's explanations of the purpose behind those criteria, and expert analyses showing that the 2016 Plan is an "*extreme statistical outlier*" with regard to its pro-

Republican tilt relative to thousands of other simulated districting plans conforming to non-partisan districting principles. *Id.* at 17. Common Cause Plaintiffs further argued that, even if this Court found that the General Assembly did not draw the 2016 Plan with a predominantly partisan motive, the 2016 Plan nonetheless failed constitutional muster under intermediate or rational basis scrutiny. *Id.* at 18-19.

Finally, Common Cause Plaintiffs alleged that the 2016 Plan exceeds the General Assembly's delegated authority under Article I, section 4—commonly referred to as the "Elections Clause"—because it amounts to an unconstitutional effort "'to dictate electoral outcomes'" and "'to favor . . . a class of candidates.'" *Id.* at 20-21 (quoting *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001)). And Common Clause Plaintiffs further asserted that the 2016 Plan violates Article I, section 2 because it gives voters who favor Republican candidates "'a greater voice in choosing a Congressman'" than voters who favor candidates put forward by other parties. *Id.* at 22-23 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964)).

In response, Legislative Defendants first argued that both sets of Plaintiffs lack Article III standing to assert any of their claims. Legislative Defs.' Post-Trial Br. ("Leg. Defs.' Br.") 12, Nov. 6, 2017, ECF No. 115. With regard to Plaintiffs' Equal Protection claim, in particular, Legislative Defendants asserted that the Equal Protection Clause does not permit statewide standing for partisan gerrymandering claims and that Plaintiffs lacked standing to lodge district-by-district partisan gerrymandering challenges, notwithstanding

that at least one individual Plaintiff who is a registered Democrat resided in each of the State's thirteen congressional districts. *Id.* at 12-14.

Legislative Defendants next contended that, even if Plaintiffs have standing, neither set of Plaintiffs had offered a judicially manageable standard under *any* constitutional provision for evaluating a partisan gerrymandering claim; therefore, they claimed, Plaintiffs' actions must be dismissed as raising nonjusticiable political questions. *Id.* at 9. To that end, Legislative Defendants criticized Plaintiffs' expert statistical analyses, in particular, on grounds that such analyses are "a smorgasbord of alleged 'social science' theories" that fail to answer what Legislative Defendants see as the fundamental question in partisan gerrymandering cases: "how much politics is too much politics in redistricting?" *Id.* at 2, 9-11. As to the merits, Legislative Defendants asserted that the 2016 Plan was not a "partisan gerrymander"—as they define that term—because, among other reasons, (1) the General Assembly did not try to "maximize" the number of Republican seats, and (2) the districts created by the 2016 Plan conform to a number of traditional redistricting principles such as compactness, contiguity, and adherence to county lines. *Id.* at 3, 7-8.

In a memorandum opinion and order entered January 9, 2018, this Court first rejected Legislative Defendants' justiciability and standing arguments, holding that Plaintiffs had put forward judicially manageable standards for adjudicating their claims and that the individual and organizational Plaintiffs had standing to assert district-by-district and

statewide challenges to the 2016 Plan under each of the constitutional provisions under which Plaintiffs seek relief. *Common Cause*, 279 F. Supp. 3d at 608-36. The Court then unanimously held that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. *Id.* at 636-72, 683-90; *id.* at 693-96, 698 (Osteen, J., concurring in part). And a majority of the panel further concluded that the 2016 Plan violated the First Amendment. *Id.* at 672-83 (majority op.). Having found that the 2016 Plan violated the Constitution, the Court enjoined the State from conducting further elections using the 2016 Plan and gave the General Assembly an opportunity to draw a (second) remedial plan for use in the 2018 election. *Id.* at 690.

Soon thereafter, Legislative Defendants unsuccessfully moved this Court to stay our order pending review by the Supreme Court. *Common Cause v. Rucho*, 284 F. Supp. 3d 780, 782 (M.D.N.C. 2018). Legislative Defendants then successfully sought a stay from the Supreme Court. *Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.). Several months later, on June 25, 2018, the Supreme Court vacated this Court's judgment, remanding the case for reconsideration in light of *Gill*, which addressed what evidence a plaintiff must put forward to establish Article III standing to assert a partisan gerrymandering claim under the Equal Protection Clause based on a vote dilution theory.

This Court invited the parties to submit briefing regarding the impact of *Gill* on our January 9, 2018, opinion and order striking down the 2016 Plan as an unconstitutional partisan gerrymander. Having

carefully considered the Supreme Court's opinion in *Gill* and the parties' briefing, we conclude that at least one of the named Plaintiffs residing in each of the State's thirteen congressional districts has standing to lodge a partisan vote dilution challenge under the Equal Protection Clause to each district in the 2016 Plan. And we further hold that *Gill* does not call into question our earlier conclusions that Plaintiffs have standing to assert First Amendment and Article I challenges to the 2016 Plan, and that all of Plaintiffs' constitutional claims are justiciable.

Turning to the merits, we conclude that Plaintiffs' evidence establishes that 12 of the 13 districts in the 2016 Plan violate the Equal Protection Clause because, in drawing each of those 12 districts, the General Assembly's predominant intent was to dilute the votes of voters who favored non-Republican candidates; the General Assembly's manipulation of each of those district's lines has had the effect of diluting such voters' votes; and no legitimate state interest justifies that dilution. We further reaffirm our previous conclusion that the 2016 Plan violates the First Amendment by unjustifiably imposing burdens on Plaintiffs based on their previous and ongoing political expression and affiliation. Finally, we again hold that the 2016 Plan violates Article I by exceeding the scope of the General Assembly's delegated authority to enact congressional election regulations and interfering with the right of "the People" to choose their Representatives.

II. Jurisdictional Arguments

Before addressing the merits of Plaintiffs' claims, we first address Legislative Defendants' threshold

standing and justiciability arguments. As detailed below, we conclude that some, but not all, Plaintiffs have standing to assert partisan vote dilution claims under the Equal Protection Clause; that Plaintiffs have standing to assert partisan gerrymandering claims under the First Amendment; and that Common Cause Plaintiffs have standing to assert their claims under Article I of the Constitution. We further conclude that Plaintiffs' partisan gerrymandering claims are not barred by the political question doctrine, either in theory or as proven.

A. Standing

Article III's "case" or "controversy" requirement demands that a plaintiff demonstrate standing—that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). To establish standing, a plaintiff first must demonstrate "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and some internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (alterations in original) (quoting *Simon v.*

E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43). Plaintiffs bear the burden of establishing their standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

Importantly, the Supreme Court repeatedly has admonished that courts must assess a plaintiff's standing on a claim-by-claim basis. *Gill*, 138 S. Ct. at 1934 ("[S]tanding is not dispensed in gross." (internal quotation marks omitted)). Put differently, "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

With regard to each of Plaintiffs' three claims, Legislative Defendants do not dispute that to the extent Plaintiffs suffered an injury-in-fact, the injury was caused by the 2016 Plan. Nor do they dispute that, for each of Plaintiffs' claims, the asserted injuries are redressable by a favorable decision of this Court. Accordingly, we must determine whether Plaintiffs have suffered an injury-in-fact for each of the three claims at issue: (1) that the 2016 Plan violates the Equal Protection Clause of the Fourteenth Amendment by diluting Plaintiffs' votes on the basis of invidious partisanship; (2) that the 2016 Plan violates the First Amendment by burdening Plaintiffs' rights to engage in political speech and association; and (3) that the 2016 Plan violates Article I of the

Constitution by "dictat[ing] electoral outcomes," by "favor[ing] . . . a class of candidates," *Cook*, 531 U.S. at 523, and by giving voters who favor Republican candidates "a greater voice in choosing a Congressman" than voters who favor candidates put forward by other parties, *Wesberry*, 376 U.S. at 14.

1. Equal Protection Clause

a. Background

In *Gill*, the Supreme Court addressed what constitutes an injury-in-fact sufficient to give rise to Article III standing to assert a partisan gerrymandering claim under the Equal Protection Clause based on a vote dilution theory. 138 S. Ct. at 1930-31. There, twelve Wisconsin voters lodged a statewide challenge to all ninety-nine districts in the State Assembly districting plan, principally alleging that the plan as a whole violated the Equal Protection Clause by intentionally diluting the votes of individuals who supported Democratic candidates. *Id.* at 1923-24. Four of the plaintiff-voters further alleged in the complaint that "they lived in State Assembly districts where Democrats have been cracked or packed." *Id.* at 1924. At trial, however, the plaintiffs' evidence focused on the mapmakers' intent to draw a plan that would favor Republican candidates statewide and on the statewide partisan effects of the map. *Id.* at 1931-32. And none of the individual plaintiffs "sought to prove that he or she lived in a cracked or packed district." *Id.* at 1932. Following trial, the district court held that each of the plaintiffs suffered an injury-in-fact giving rise to Article III standing to assert a *statewide* Equal Protection challenge to the districting plan because their

evidence established that, "[a]s a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly" and therefore that "the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly [and] disproportionately . . . reduced for the life of [the districting plan]." *Whitford v. Gill*, 218 F. Supp. 3d 837, 927-28 (W.D. Wisc. 2016) (first three alterations in original) (internal quotation marks omitted), *vacated* 138 S. Ct. at 1929, 1934.

The Supreme Court rejected the district court's holding that a plaintiff challenging a districting plan on grounds that it violates the Equal Protection Clause by diluting the plaintiff's vote on the basis of partisanship has standing to challenge a plan statewide. *Gill*, 138 S. Ct. at 1931. Emphasizing "that a person's right to vote is 'individual and personal in nature,'" the Court held that "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Id.* at 1930 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). When a plaintiff alleges that a districting plan dilutes his vote on the basis of partisanship, the Court explained, "[t]hat harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931. Put differently, the injury giving rise to such a claim "arises through a voter's placement in a 'cracked' or 'packed' district." *Id.*

In reaching this conclusion, the Court explicitly analogized partisan gerrymandering claims premised

on vote dilution to *Shaw*-type racial gerrymandering claims, for which the Court has "held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered." *Id.* at 1930 (citing *United States v. Hays*, 515 U.S. 737, 744-45 (1995)). In a *Shaw*-type racial gerrymandering case, a plaintiff can establish that the lines of her district were drawn on the basis of race "through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). And like *Gill*'s reference to "hypothetical district[s]," 138 S. Ct. at 1931, a plaintiff in such a racial gerrymandering case can establish a burden on her Fourteenth Amendment rights by introducing an alternative districting plan, which conforms to a legislature's legitimate districting objectives and traditional redistricting criteria, under which the plaintiff's vote would not have been diluted based on her race. *See, e.g.*, *Cooper*, 137 S. Ct. at 1478-81; *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

Applying this precedent, the *Gill* Court concluded that several forms of evidence relied on by the plaintiffs failed to establish an injury-in-fact. First, the Court held that testimony by one named plaintiff, William Whitford, that the districting plan undermined his ability "to engage in campaign activity to achieve a [Democratic] majority in the Assembly and the Senate" did not establish an injury in fact for two reasons: (a) Whitford conceded on cross examination that *his district* was not cracked or

packed and that the plan "did not affect the weight of his vote" and (b) the Supreme Court never has recognized a "shared interest in the composition of 'the legislature as a whole'" as an individual legal interest. *Gill*, 138 S. Ct. at 1924-25, 1932. Second, the Court said that the plaintiffs' direct evidence that the mapmakers intended the districting plan to strengthen the electoral prospects of Republican candidates did not support standing because the injury-in-fact requirement "turns on effect, not intent, and requires a showing of a burden on the plaintiffs votes that is actual or imminent, not conjectural or hypothetical." *Id.* at 1932 (internal quotation marks omitted). Finally, the Court said that the plaintiffs' statistical analyses of the districting plan's "partisan asymmetry"—that the plan does not allow supporters of the two principal parties to translate their votes into representation with equal effectiveness—did not establish the requisite district-specific injury because the analyses "are an average measure" and therefore "do not address the effect that a gerrymander has on the votes of particular citizens." *Id.* at 1933.

The instant case meaningfully differs from *Gill*. To begin, unlike the plaintiffs in *Gill* who "failed to meaningfully pursue their allegations of individual harm," *id.* at 1932, Common Cause Plaintiffs, in particular, have alleged, argued, and proven district-specific injuries *throughout* the course of this litigation. For example, each individual Common Cause Plaintiff alleged in their complaint that his or her vote is "diluted or nullified as a result of his placement in [his or her particular district]." Common Cause Compl. ¶¶ 2(d)-(q). The Common Cause Complaint further alleged that the 2016 Plan "pack[s]

as many Democratic voters as possible in the First, Fourth, and Twelfth Congressional Districts" and "dilut[es] or nullif[ies] the votes of the remaining Democratic voters who reside outside of these three districts by dispersing (or 'cracking') all remaining Democratic voters among the other ten districts," and therefore that "[t]he 2016 Plan as a whole, *and each of the thirteen individual districts*" are unconstitutional. *Id.* ¶¶ 35, 37, 45 (emphasis added).

Common Cause Plaintiffs also sought, obtained, and introduced at trial—before the Supreme Court decided *Gill*—district-specific evidence of cracking and packing. For example, Common Cause Plaintiffs requested that Defendants admit, for each district, that Dr. Hofeller included or excluded counties and parts of counties in particular districts or divided counties between particular districts to achieve the General Assembly's partisan objective for each district. Ex. 2043, at 23-33. Additionally, Common Cause Plaintiffs deposed Dr. Hofeller and Representative Lewis regarding why boundaries for specific districts were drawn in a specific location and the political consequence of those boundaries. *E.g.*, Hofeller Dep. 1927-12; Lewis Dep. 50:20-51:1, 62:2-19, 64:10-17. And Common Cause Plaintiffs' statistical evidence provides not only an "average measure" of the 2016 Plan's cracking and packing, but also district-specific evidence of cracking and packing. Ex. 3040, at 18, 30, 39.

Common Cause Plaintiffs' *pre-trial* Proposed Findings of Fact also forecasted that they would introduce numerous pieces of evidence establishing that the 2016 Plan manipulated lines of specific

districts and thereby cracked and packed likely Democratic voters solely for the benefit of the Republican Party. Findings of Fact & Conclusions of Law Filed by the Common Cause Pls. 21, 28, 36-37, No. 1:16-CV-1026, June 5, 2017, ECF No. 65. And Common Cause Plaintiffs' *post-trial* Proposed Findings of Fact likewise asked this Court to make numerous district-specific findings as to the discriminatory burden imposed by each of the districts in the 2016 Plan. Common Cause Pls.' Post-Trial Findings of Fact & Conclusions of Law ("Common Cause FOF") 12-16, 28-36, No. 1:16-CV-1026, Nov. 6, 2017, ECF No. 117. There can be no question that Common Cause Plaintiffs have "meaningfully pursued" a district-by-district vote dilution claim under the Equal Protection Clause. *Gill*, 138 S. Ct. at 1932.

Additionally, unlike the *Gill* plaintiffs, who resided in a small minority of the State Assembly districts that they challenged, *see id.* at 1923, 1931, named Common Cause Plaintiffs reside and are registered to vote in each of the 13 congressional districts included in the 2016 Plan, Exs. 3024-38. Accordingly, unlike the *Gill* plaintiffs, the Common Cause Plaintiffs are not complaining of gerrymandering in districts in which they do not reside.

In contrast, prior to *Gill*, League Plaintiffs framed their Equal Protection claim as a statewide challenge, rather than a district-specific challenge. *See, e.g.*, League of Women Voters of N.C. Pls.' Final Proposed Findings of Fact & Conclusions of Law ("League FOF") 81, No. 1:16-CV-1026, Nov. 6, 2017, ECF No. 112

("Plaintiffs' injury is concrete and particularized because as a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to Congress."). And several League Plaintiffs testified that their vote was diluted because Democratic candidates' share of the State's congressional delegation was not proportionate to the share of congressional votes cast for Democratic candidates statewide. *E.g.*, Dep. of Elliott J. Feldman ("Feldman Dep.") 20:8-16, Mar. 24, 2017, ECF No. 101-20; Dep. of Annette Love ("Love Dep.") 12:3-18, Apr. 7, 2017, ECF No. 101-1.

But unlike in *Gill*—which did not include an organizational plaintiff and in which the individual plaintiffs resided in a small minority of the districts challenged—Defendants stipulated prior to trial that the League has members in each of the State's thirteen congressional districts, and that at least one League member in each of those districts is registered as a Democrat and supports and votes for Democratic candidates. *See* Trial Tr. II, at 140-41; Ex. 4080. Also unlike the plaintiffs in *Gill*—who failed to develop any district-specific evidence of cracking or packing—League Plaintiffs alleged that specific districts were cracked or packed and introduced district-specific evidence to support such allegations. In their complaint, for example, League Plaintiffs stated that "[a]mong 'cracked' districts in which the prevailing candidate received less than 60 percent of the vote Republican candidates won *all six* of them (Districts 2, 5, 6, 8, 9, and 13). Conversely, the one 'packed' district in which the prevailing candidate received more than

70 percent of the vote (District 1) was won by a Democratic candidate." League Compl. ¶ 64.

Additionally, League Plaintiffs introduced into evidence—again, before the Supreme Court decided *Gill*—numerous county or county group maps color-coded on a precinct-by-precinct basis using Dr. Hofeller's partisanship variable to demonstrate that a particular district group in the 2016 Plan divided (or cracked) concentrations of non- Republican voters in the county or that a particular district in the 2016 Plan packed concentrations of non-Republican voters in the county. Exs. 4008, 4066 (Buncombe County); Exs. 4009, 4067 (Cumberland County); Exs. 4010, 4068 (Guilford County); Exs. 4011, 4069 (Johnston County); Exs. 4012, 4070 (Mecklenburg County); Exs. 4013, 4071 (Pitt County), Exs. 4014, 4072 (Wake and Durham Counties); Exs. 4015, 4073 (Wilson County); Ex. 4074 (Bladen County). And Mary Trotter Klenz, who is a Democratic voter and member of the League, testified that she believes the congressional district in which she is registered to vote, District 9, is the product of invidious partisan gerrymandering because it is a result of a legislative effort to divide Mecklenburg County along partisan lines and thereby render Democratic candidates "less competitive" than they were in the previous version of her district. 30(b)(6) Dep. of the League of Women Voters of N.C. by Mary Trotter Klenz ("Klenz Dep.") 65:23-66:12, Apr. 4, 2017, ECF No. 101-28 ("[T]he way the district is drawn . . . this little, bitty piece is in Mecklenburg County in my neighborhood and then goes all the way . . . along the state line over to Bladen County . . . so it's even less competitive. When it was more in Mecklenburg, at least you had

the . . . continuity of Mecklenburg . . . [b]ut now its so spread out that it's just ridiculous."). Several other League Plaintiffs also testified to district-specific injuries. *E.g.* Dep. of Carol Faulkner Fox ("Fox Dep.") 19:25, 20:9-12, Mar. 22, 2017, ECF No. 101-4; Dep. of Aaron J. Sarver ("Sarver Dep.") 25:2-26:18, Apr. 10, 2017, ECF No. 101-23.

Likewise, League Plaintiffs introduced into evidence several alternative districting plans generated through computer simulation by Dr. Jowei Chen, a political science professor at the University of Michigan—all of which conform to the General Assembly's non-partisan districting criteria, *see infra* Part III.B.1.a—or created by Dr. Hofeller that did not display the same degree of cracking and packing of Democratic voters in particular districts as the 2016 Plan, exs. 4016-33. Based on that evidence, League Plaintiffs' Proposed Findings of Fact asked this Court to make numerous findings that, in specific counties, the lines of particular districts were drawn to pack or crack likely Democratic voters. League FOF ¶¶ 125-35.

And after the Supreme Court vacated this Court's opinion and judgment for reconsideration in light of *Gill*, League Plaintiffs proffered additional evidence to support their standing to lodge a district-by-district vote dilution claim under the Equal Protection Clause to each district in the 2016 Plan. In particular, a declaration by the director of the League identified specific precincts in each of the thirteen congressional districts in which at least one League member is registered to vote and regularly votes as a Democrat. Decl. of Walter L. Salinger 2-4, July 10, 2018, ECF No.

129-1. Furthermore, a supplemental declaration by Dr. Chen demonstrated that, in all but one of those League members' districts, the votes of those members would have carried more weight, as measured by Dr. Hofeller's precinct-level partisanship variable, in the districting plan generated by Dr. Chen that maximally advances, subject to certain constraints, the General Assembly's non-partisan redistricting objectives

("Plan 2-297"). Supp. Decl. of Jowei Chen ("Second Chen Decl.") 2-3, 6-7, July 11, 2018, ECF No. 129-2.[910]

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[9] League Plaintiffs and Common Cause Plaintiffs each submitted a supplemental declaration by Dr. Chen regarding Plaintiffs' standing. Second Chen Decl.; Decl. of Dr. Jowei Chen ("Third Chen Decl."), July 11, 2018, ECF No. 130-2. As further explained below, at trial Dr. Chen offered testimony and opinions based on 3,000 computer-generated districting plans drawn to conform to the General Assembly's nonpartisan districting criteria. *See infra* Part III.B.a.ii. Prior to trial, Plaintiffs disclosed to Defendants each of those 3,000 plans as well as numerous forms of descriptive information about the plans, including the two-party vote share for each district in each of the plans, as measured by Dr. Hofeller's partisanship variable. Plaintiffs also disclosed in discovery the address of the residences of each individual Plaintiff. All of that information was admitted into evidence at trial.

Dr. Chen's supplemental declarations—which Plaintiffs submitted after the Supreme Court decided *Gill* and remanded this case for reconsideration under the standing framework set forth therein—report the two-party vote share, as measured by Dr. Hofeller's partisanship variable, in each individual Plaintiff's district in either Plan 2-297 or 2,000 of Dr. Chen's computer-generated plans and compare that vote share to the district-by-district results observed in the 2016 election using the 2016 Plan. Each declaration, therefore, amounts to a new presentation of data and analyses already disclosed to Legislative Defendants and admitted into evidence. Additionally, Legislative Defendants deposed Dr. Chen regarding his supplemental declarations and, following that deposition, were afforded the opportunity to submit additional briefing to this Court regarding the supplemental declarations and their impact on Plaintiffs' standing. In such circumstances, we exercise our discretion to admit Dr. Chen's supplemental declarations into evidence. *See, e.g.*, *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 816 (D.S.C. 2011) (admitting supplemental expert report when supplement "clarif[ied]" earlier expert testimony and opposing party had opportunity to question expert regarding supplemental report).

[10] Plan 2-297 was one of 1,000 plans randomly generated by Dr. Chen that protect more incumbents and split fewer counties than the 2016 Plan. Second Chen Decl. 2; Ex. 2010, at 15; *see also infra* Part III.B.1.a.ii. The most significant constraint imposed by Dr. Chen in determining which of those 1,000 plans maximally advanced the General Assembly's non-partisan districting objectives is that Dr. Chen considered only those simulated districting plans that would have elected seven Republican candidates and six Democratic candidates based on Dr. Hofeller's partisanship variable. Second Chen. Decl. 2. Nearly fifty-three percent of the 1,000 randomly generated plans would have elected seven Republicans and six Democrats based on Dr. Hofeller's partisanship variable, a significantly higher percentage than the next two most common delegations observed in Dr. Chen's sample. Ex. 2010, at 16 (reporting that 19.4% of plans would have elected six Republican candidates and that 25.8% of plans would have elected eight Republican candidates, according to Dr. Hofelelr's partisanship variable).

Legislative Defendants object to this constraint on grounds that it effectively imposes, they maintain, a "proportional" representation. Leg. Defs.' Br. on Standing ("Leg. Defs.' Standing Br.") 11, Aug. 7, 2018, ECF No. 140. To be sure, the Supreme Court has stated that the Constitution does not *require* that the two-party make-up of a state's congressional delegation be proportionate to the two-party statewide congressional vote. *Bandemer*, 478 U.S. at 132 (plurality op.). But selecting the modal outcome in a randomly generated sample, which outcome happens to not favor either party, does not amount to imposing a proportionality requirement. Rather, it simply amounts to selecting a plan with a congressional delegation that most commonly occurs as a result of a state's political geography and non-partisan districting objectives. And even if Dr. Chen had sought to impose a proportionality requirement, the Supreme Court has held that it is constitutionally permissible for a state legislature to seek to draw a "districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). Accordingly, contrary to Legislative Defendants' argument, in identifying a "hypothetical" plan in

The most significant difference between this case and *Gill*, however, is that, as demonstrated below, Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts testified to, introduced evidence to support, and, in all but one case, ultimately proved the type of dilutionary injury the Supreme Court recognized in *Gill*. *See infra* Part II.A.1.b. And all of those Plaintiffs identified at least one alternative districting plan—and in many cases hundreds of alternative districting plans—that more effectively conforms to the General Assembly's non-partisan redistricting criteria, but nonetheless places the Plaintiff in a district in which the Plaintiff's vote would "carry [more] weight.[11] *Gill*, 138 S. Ct. at 1931.

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which their votes would "carry more weight," *Gill*, 138 S. Ct. at 1931, Plaintiffs were not barred from relying on a plan that "rough[ly] approximat[ed]" the statewide political strength of the two parties, *Gaffney*, 412 U.S. at 752.

[11] Legislative Defendants further object to the use of Plan 2-297 and Dr. Chen's other 1,999 computer-generated plans as comparators on grounds that a number of the districts in those plans are more favorable to Democratic candidates than their counterparts in the 2016 Plan. Leg. Defs.' Standing Br. 13-18. According to Legislative Defendants, Dr. Chen's plans thereby "harm Republican voters in the very same way as alleged by [Plaintiffs] here." *Id.* at 18.

But given that (1) the General Assembly's Republican leadership intentionally drew the 2016 Plan to advantage Republican candidates, *see* Ex. 1007, and that (2) the 2016 Plan is an "extreme statistical outlier" with regard to its favorability to Republican candidates, *see infra* Part III.B.1.a.ii, it is unsurprising that Dr. Chen's alternative plans—which were drawn without regard to partisan favoritism and to conform to the General Assembly's non-partisan districting objectives—would be more favorable to Democratic candidates. *Cf. Covington*, 238 F. Supp. 3d at 450 (explaining, in racial

b. Plaintiffs' District-Specific Standing Evidence

District 1 runs along the eastern side of North Carolina's border with Virginia. Ex. 1001. As discussed more fully below, District 1 amounts to a successful effort by the General Assembly to concentrate, or pack, voters who were unlikely to support a Republican candidate, and thereby dilute such voters' votes. *See infra* Part III.B.2.a. Common Cause Plaintiff Larry Hall resides in District 1, is a registered Democrat, and typically votes for Democratic candidates. Ex. 3031; Dep. of Larry Hall ("Hall Dep.") 12:8-9, 8:11-14, 30:17-19, 32:10-22, 17:22-24, Apr. 5, 2017, ECF No. 101-2. Hall testified that the 2016 Plan's packing of Democratic voters in District 1 had the effect of diluting his vote. Hall Dep. at 15:8-14 ("[T]he 2016 Plan . . . changed the district, and the impact of my vote . . . was reduced."). Hall's vote would have carried greater weight in numerous other "hypothetical district[s]," *Gill*, 138 S. Ct. at 1931—of 2,000 simulated districting plans generated by Dr. Chen to conform to the General Assembly's nonpartisan redistricting criteria all but 3 of the

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gerrymandering case, that "the fact that the [remedial] districts happen to reduce [the black voting age population] in the redrawn districts, while increasing it in adjoining districts, is to be expected whenever a plan replaces racial predominance with other redistricting principles" (internal quotation marks and alterations omitted)). Accordingly, contrary to Legislative Defendants' claim, that Dr. Chen's plans are more favorable to Democratic voters and candidates in no way establishes that those plans subject Republican voters to the same form of invidious partisan discrimination that the 2016 Plan inflicts on non- Republican candidates and voters.

plans, including Plan 2-297, would have placed Hall into a less Democratic-leaning district, as measured by Dr. Hofeller's precinct-level partisanship variable, Third Chen Decl. 4, 6-8, 11.

District 2 includes all or part of six counties running along the border between North Carolina's piedmont and coastal plains regions. Ex. 1001. As explained more fully below, District 2 reflects a successful effort by the General Assembly to crack concentrations of Democratic voters, and thereby dilute such voters' votes. *See infra* Part III.B.2.b. Common Cause Plaintiff Douglas Berger, who is registered as a Democrat and usually votes for Democratic candidates, resides in District 2. Ex. 3024; Dep. of Douglas Berger ("Berger Dep.") 29:6-9, 34:7-13; 65:13-18; 67:20-25, 69:3-9, Apr. 21, 2017, ECF No. 101-8. Berger testified that prior to the 2011 redistricting, he was assigned to a highly competitive district, with the prevailing candidate in the 2010 election winning by "just a few hundred votes." Berger Dep. 32:5-22. But his district is no longer "competitive" as a result of the redistricting, he testified, with Democratic candidates lacking any meaningful chance at prevailing. *Id.* at 6:14-20 (noting that District 2 was "the secondmost competitive district . . . which involved a 13 percentage point loss by the Democratic candidate"); *see also id.* at 73:2-8 (stating that the General Assembly's "primary focus has been to look at how each of the people in this district have voted and . . . all the people that have certain a political view or view similar to my view, we've been . . . aggregated and relegated to a position where we can't have our views reflected"). By contrast, over 99 percent of the simulated districting plans generated by Dr. Chen,

including Plan 2-297, would have assigned Berger to a more Democratic-leaning district. Third Chen Decl. 4, 6-8, 11.

District 3 encompasses a number of counties in northeast North Carolina, many of which border the Atlantic Ocean or Intracoastal Waterway. Ex. 1001. As explained more fully below, Plaintiffs alleged, and ultimately proved, that in drawing District 3 the General Assembly cracked likely Democratic voters and submerged such voters in a district in which a Republican candidate would prevail. *See infra* Part III.B.2.c. Common Cause Plaintiff Richard Taft—who resides in District 3 and is a registered Democrat who typically votes for Democratic candidates—testified that "District 3 is still designed . . . to disperse [his Democratic] vote around," and that his "vote really is meaningless . . . because the Republican majority is set and there is no way a candidate who is a Democrat can win in that district." Ex. 3036; Dep. of Richard Taft, MD ("R. Taft Dep.") 14:12-14, 24:25-25:11, Mar. 30, 2017, ECF No. 101-10. Mr. Taft's wife, Cheryl Lee Taft, likewise testified that the manipulation of District 3's lines adversely affected the weight of her vote. Dep. of Cheryl Taft ("C. Taft Dep.") 26:1-5, Mar. 30, 2017, ECF No. 101-11. By contrast, over 95 percent of the 2,000 simulated districting plans generated by Dr. Chen, including Plan 2-297, would have placed the Tafts in a more Democratic-leaning district. Third Chen Decl. 4, 6-8, 11.

District 4 runs through the center of Wake County, southern Durham County, and Orange County, connecting concentrations of Democratic voters in the Cities of Raleigh, Durham, and Chapel

Hill. Exs. 1001, 3019. As detailed more fully below, Dr. Hofeller, acting at Representative Lewis and Senator Rucho's direction, intended to and did in fact pack likely Democratic voters in District 4 and, in doing so, diluted such voters' votes. *See infra* Part III.B.2.d. League Plaintiff Carol Fox—who lives in Durham County in District 4 and votes for Democratic candidates—testified that District 4 "was packed"—i.e., "drawn so that all of the Democrats are smooshed together so that they're going win with a huge surplus of votes needed." Fox Dep. 19:25, 20:9-12. Common Cause Plaintiff Alice Bordsen also is registered to vote in District 4 and has historically voted for Democratic congressional candidates. Ex. 3026; Dep. of Alice Louise Bordsen ("Bordsen Dep.") 37:1-2, Apr. 18, 2017, ECF No. 101-15. Bordsen testified that she believes District 4 is the product of "intentional packing" and is "super pack[ed]." Bordsen Dep. at 33:8-16, 34:16-17. Approximately, 80 percent of the districting plans in Dr. Chen's 2,000-plan sample would have placed Bordsen in a district with fewer likely Democratic voters.[12] Third Chen Decl. 4, 6-8.

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[12] Common Cause Plaintiff Morton Lurie, who resides in District 4, also alleged that he suffered a dilutionary injury in fact attributable to 2016 Plan's redrawing of District 4's boundaries. Unlike the other individual Common Cause Plaintiffs, Lurie is a registered *Republican* who typically votes for *Republican* candidates, including the Republican congressional candidate in District 4 in the 2016 election. Ex. 3032; Dep. of Morton Lurie ("Lurie Dep.") 8:5-7, 9:8, 20:1-5, Apr. 5, 2017, ECF No. 101-12. Lurie, who the 2016 Plan moved from a district in which a Republican candidate prevailed, testified that the 2016 plan "dilute[s] the value of [his] vote" because "there's no chance of a Republican winning in the 4th District." *Id.* at 25:15-20. Lurie makes a compelling argument that the 2016 Plan

District 5 spans ten whole counties in the northwest corner of the State. Ex. 1001. Plaintiffs introduced evidence, but ultimately fail to prove, that District 5 reflects an effort by the General Assembly to submerge Democratic voters in a safe Republican district. *See infra* Part III.B.2.e. Common Cause Plaintiff William H. Freeman lives in District 5, is registered as a Democrat, and voted against the Republican congressional candidate in the 2016 election. Ex. 3029; Dep. of William Halsey Freeman ("Freeman Dep.") 6:24-7:7, Apr. 7, 2017, ECF No. 101-14. Freeman testified that as a result of the redistricting plans drawn by Dr. Hofeller, Representative Lewis, and Senator Rucho, the lines of District 5 are "much worse" for Democratic candidates. Freeman Dep. 18:25-19:3, 19:14-23. Freeman further testified that "because of the way [District 5 is drawn], there is no remote chance of any

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has had the effect of diluting his vote: more than 91 percent of the districting plans generated by Dr. Chen placed Lurie into a district more favorable to the Republican candidates Lurie has historically supported. Third Chen Decl. 4, 6-8. Unlike the Democratic Plaintiffs who reside in District 4, however, Lurie has difficulty establishing that the General Assembly assigned *him* to that district in an effort to dilute *his* vote. In particular, the General Assembly would seemed to have preferred that Lurie lived elsewhere so that his Republican vote would not be "wasted" in a district the General Assembly drew to be "predominantly Democratic." Hofeller Dep. 192:7-16. But because Lurie elected to live in a precinct predominantly populated by likely Democratic voters, the General Assembly had little option but to assign Lurie to a district drawn so that a Democratic candidate would prevail. Because other Plaintiffs have standing to lodge an Equal Protection partisan vote dilution challenge to District 4, we need not—and thus do not—definitively address Lurie's standing.

Democrat winning, so my vote is just a total waste." *Id.* at 17:17-25. More than half of the 2,000 simulated districting plans generated by Dr. Chen placed Freeman in a district more favorable to Democratic candidates. Third Chen Decl. 4, 6-9. And in Dr. Chen's Plan 2-297, the Republican vote share in Freeman's district, as measured by Dr. Hofeller's partisanship variable, would decline from 56.15 percent to 49.30 percent. *Id.* at 11.

District 6 spans all or part of six counties in central North Carolina. Ex. 1001. As explained more fully below, District 6 reflects a successful effort by the General Assembly to crack likely Democratic voters and thereby dilute their votes by submerging them in a safe Republican district. *See infra* Part III.B.2.f. Common Cause Plaintiff Meltzer A. Morgan, Jr., is affiliated with the Democratic Party and typically votes for Democratic candidates. Ex. 3034; Dep. of Melzer Aaron Morgan, Jr. ("Morgan Dep.") 5:11-14, 15:7-17, 16:2-7, April 7, 2017, ECF No. 101-16. Between 2002 and 2010, Morgan was assigned to District 13, which consistently elected Democratic candidates. *See* Morgan Dep. 10:18-23. But as a result of the redistricting, Morgan now is assigned to District 6, which he characterized as "tilted" for Republicans and "not competitive." *Id.* at 23:7-8. By contrast, approximately 78 percent of the 2,000 simulated districting plans generated by Dr. Chen would have placed Morgan in a district less favorable to Republican candidates. Third Chen Decl. 4, 6-9. For example, the predicted Republican vote share in Morgan's district in Plan 2-297 (51.49%) is approximately three percentage points lower than the

predicted Republican vote share in District 6 (54.46%). *Id.* at 11.

District 7 includes all or part of nine counties located in the southeast corner of the State. Ex. 1001. As detailed below, District 7 cracks concentrations of Democratic voters and has the effect of submerging such voters in a safe Republican district. *See infra* Part III.B.2.g. Common Cause Plaintiff Cynthia Boylan—who resides in District 7, is a registered Democrat, and typically votes for Democratic candidates, Ex. 3027—testified that although Democratic candidates historically prevailed in the district by narrow margins, "the way [District 7] was redrawn was to give the Republican nominee the advantage of being elected in the . . . [d]istrict," Dep. of Cynthia Boylan ("Boylan Dep.") 18:1-9, Apr. 5, 2017, ECF No. 101-17. Nearly 64 percent of the 2,000 districting plans generated by Dr. Chen, including Plan 2-297, placed Boylan in a district more favorable to Democratic candidates, as measured by Dr. Hofeller's partisan performance variable. Third Chen Decl. 4, 6-9, 11.

District 8 takes on a snake-like shape, running through all or part of seven counties in south central North Carolina. Ex. 1001. As explained more fully below, District 8 was intended to, and does in fact, dilute the voting strength of Democratic voters by cracking concentrations of likely Democratic voters. *See infra* Part III.B.2.h. Common Cause Plaintiff Coy E. Brewer, Jr., lives in Cumberland County—which is in District 8—is a registered Democrat, and typically votes for Democratic candidates. Ex. 3025; Dep. of Coy E. Brewer, Jr. ("Brewer Dep.") 44:15-16, Apr. 18, 2017,

ECF No. 101-18. Brewer testified that historically "all" of the congressional districts that included parts of Cumberland County were "reasonably competitive." Brewer Dep. 50:1-7. But as a result of the redistricting, which split a concentration of likely Democratic voters in Cumberland County, District 8 is no longer "competitive" for Democratic candidates, according to Brewer. *Id.* at 51:9-17. By contrast, over 99 percent of the districting plans generated by Dr. Chen to conform to the General Assembly's non-partisan districting criteria, including Plan 2-297, placed Brewer in a district that was less heavily tilted in favor of Republicans. Third Chen Decl. 4, 6-9, 11.

District 9 runs through all or part of eight counties that lie directly south of District 8, connecting the southern portion of the City of Charlotte with rural Bladen County. Ex. 1001. As detailed more fully below, Plaintiffs alleged, and ultimately proved, that in drawing District 9, the General Assembly cracked likely Democratic voters and submerged them in a district in which a Republican candidate was much more likely to prevail. *See infra* Part III.B.2.i. The 2016 Plan places Common Cause Plaintiff John Morrison McNeill—who lives in Robeson County, is affiliated with the Democratic party, and typically votes for Democratic candidates, ex. 3033; Dep. of John Morrison McNeill ("McNeill Dep.") 33:3-7, April 5, 2017, ECF No. 101-19—in District 9, ex. 3033. McNeill testified that unlike earlier districting plans, the version of District 9 in the 2016 Plan connects south Charlotte, which is predominantly Republican, and Robeson County, which he said includes low-income, rural voters who favor Democratic policies like Obamacare—areas that have "little in common."

McNeill Dep. 26:9-27:14. More than 97 percent of the 2,000 districting plans generated by Dr. Chen, including Plan 2-297, placed in McNeill in a more Democratic-leaning district. Third Chen Decl. 4, 6-9, 11. Similarly, League member Klenz, who lives in the Mecklenburg County section of District 9, testified that the General Assembly redrew District 9 to make Democratic candidates "less competitive" by connecting "a little, bitty piece" of Mecklenburg County, which is composed of heavily Republican precincts, with rural counties many miles away, including Bladen County. Klenz Dep. 65:23-66:12. And Plan 2-297 demonstrates that it was possible for the General Assembly to draw a districting plan that does not join Mecklenburg County's predominantly Republican precincts, including the precinct in which Klenz lives, with predominantly rural counties in Eastern North Carolina like Bladen and Robeson, where McNeill lives. *See* Second Chen Decl. 2-3.

District 10 spans all or part of eight counties, running from Charlotte's eastern suburbs to the foothills of the Appalachian Mountains. Ex. 1001. As explained below, in drawing District 10, the General Assembly intended to, and did in fact, dilute the voting strength of Democratic voters by cracking concentrations of such voters and submerging those voters in a safe Republican district. *See infra* Part III.B.2.j. League Plaintiff John Quinn, III, resides in Buncombe County in District 10, is member of the Democratic Party, and voted for the Democratic congressional candidate in the 2016 election. Dep. of John J. Quinn, III ("Quinn Dep.") 10:18-11:2, 11:10-18, 17:1-3, 21:24-25, 37:20-25, Apr. 10, 2017, ECF No. 101-22. Quinn testified that the 2016 Plan splits

Buncombe County and the City of Asheville between District 10 and District 11, and thereby cracks a concentration of voters that are politically cohesive (and tend to vote Democratic), unlike his previous district which did not divide Buncombe County and was "the single most competitive district in the State." Quinn Dep. 26:17-23, 38:20-25. Quinn further testified that District 10 is "certainly not compact at all." *Id.* at 26:25. Plan 2-297 does not divide Buncombe County and assigns Quinn to a district that is more favorable to Democratic candidates. Second Chen Decl. 2, 4-7 (reporting that district that includes Asheville in Plan 2-297, District 1, has predicted Republican vote share of 52.62 percent, as opposed to predicted Republican vote share of 58.17 percent in District 10 of the 2016 Plan)

District 11 encompasses almost all of the southwest corner of the State, with the sole exception being a bulbous protrusion of District 10 that takes in a portion of Buncombe County and the City of Asheville. Ex. 1001. As explained more fully below, District 11 reflects a successful effort by the General Assembly to crack a naturally occurring concentration of Democratic voters, and thereby create a safe Republican district. *See infra* Part III.B.2.k. The 2016 Plan assigned Common Cause Plaintiff Jones P. Byrd, who is a registered Democrat and typically votes for Democratic congressional candidates, to District 11. Ex. 3028; Dep. of Jones P. Byrd ("Byrd Dep.") 27:2-4, Apr. 20, 2017, ECF No. 101-24. Prior to 2011, District 11 included all of Buncombe County, Byrd testified, but the 2016 Plan, like the 2011 Plan, "sliced and diced" Buncombe County by "mov[ing] a core of the Democratic concentration out of the district, and

put[ting] it in a district where it would be diluted." Byrd Dep. 20:4-5, 20:23-21:16, 21:22-22:1, 31:14-32:3. Under the 2016 Plan, Democratic "votes don't really matter in either [district]," he further explained, because both districts were drawn to ensure Republican candidates would prevail. *Id.* at 32:15-18. Notably, *all* 2,000 districting plans generated by Dr. Chen, including Plan 2-297, would have placed Byrd into a district more favorable to Democratic candidates, as measured by Dr. Hofeller's partisanship variable. Third Chen Decl. 4, 6-11. Similarly, League Plaintiff Aaron Sarver—who resides in Asheville in District 11 and is a registered Democrat who votes for Democratic candidates, Sarver Dep. 25:2-9, 45:15-17, 47:14-48:6—testified that because "Asheville is divided into two Congressional Districts the political voice is diluted" and "the 10th or 11th are not winnable" for Democratic candidates, *id.* at 25:2-26:18. Plan 2-297 does not divide the City of Asheville or Buncombe County and assigns Sarver to a district that is more favorable to Democratic candidates. Second Chen Decl. 3, 4-7 (reporting that district that includes Asheville in Plan 2-297, District 1, has predicted Republican vote share of 52.62 percent, as opposed to predicted Republican vote share of 57.11 percent in District 11 in the 2016 Plan).

District 12 contains all of Mecklenburg County, with the exception of a pizza-slice- shaped section of predominantly Republican precincts in the southeastern portion of the county, which are assigned to District 9. Exs. 1001, 3017. As explained below, District 12 amounts to a successful effort by the General Assembly to pack Mecklenburg County voters

who were unlikely to support a Republican congressional candidate and thereby dilute such voters' votes. *See infra* Part III.B.2.l. Common Cause Plaintiff John W. Gresham lives in District 12 and is a registered Democrat who typically votes for Democratic candidates. Ex. 3030; Dep. of John West Gresham ("Gresham Dep.") 8:7-9, 9:16-18, 37:12-14, Mar. 24, 2017, ECF No. 101-24. Gresham testified that the 2016 Plan "pack[s]" likely Democratic voters in Mecklenburg County, and thereby "diluted" his vote. Gresham Dep. 25:5, 37:18-21. By comparison, over 99 percent of the districting plans in Dr. Chen's 2,000-plan sample, including Plan 2-297, placed Gresham into a district with fewer likely Democratic voters. Third Chen Decl. 4, 6-11.

Finally, District 13 includes all or parts of five counties in central North Carolina. Ex. 1001. As demonstrated more fully below, Plaintiffs' evidence proves District 13 was intended to, and does in fact, dilute the voting strength of Democratic voters by cracking concentrations of likely Democratic voters. *See infra* Part III.B.2.m. Common Cause Plaintiff Russell Walker, Jr., resides in District 13, is a registered Democrat, and typically votes for Democratic candidates, including in the 2016 congressional election. Ex. 3037; Dep. of Russell Grady Walker, Jr. ("Walker Dep.") 29:24, Apr. 7, 2017, ECF No. 101-27. Walker testified that the 2016 Plan "diluted" his vote because "there was no chance for a qualified person who was not a Republican to have much of a shot at" winning in District 13. Walker Dep. 29:17-23. Nearly 90 percent of the 2,000 districting plans generated by Dr. Chen, including Plan 2-297 placed Walker in a district more favorable to

Democratic candidates. Third Chen Decl. 4, 6-11; Clarification Regarding Paragraph Describing Plaintiff Russell Walker in July 11, 2018 Supp. Decl. of Jowei Chen 2, July 24, 2018, ECF No. 136-1.

Because Plaintiffs in each of the State's thirteen congressional districts both testified that and introduced direct and circumstantial evidence that "the particular composition of the voter's own district . . . caus[ed] his [or her] vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district," *Gill*, 138 S. Ct. at 1931, we conclude that such Plaintiffs have standing to assert partisan vote dilution claims under the Equal Protection Clause to each of those districts.[13] Additionally, because at least one of these

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[13] Legislative Defendants nevertheless claim that Plaintiffs who support Democratic candidates and live in Districts 1, 4, and 12—which elected Democratic candidates in the 2016 election—lack standing to assert a partisan vote dilution claim under the Equal Protection Clause because such Plaintiffs' "candidate of choice" was elected in those districts, Leg. Defs.' Standing Br. 8—a position Judge Osteen embraces in his partial dissent, *post* at 303-05. But *Gill* states that a plaintiff can suffer a dilutionary injury as a result of "*packing*," as well as "cracking." 138 S. Ct. at 1931 (emphasis added). When a district is packed, the injured individuals necessarily elect their candidate of choice, albeit by an overwhelming margin. Accordingly, contrary to Legislative Defendants' contention, *Gill* contemplated that individuals placed in packed districts—like Districts 1, 4, and 12—would have standing, notwithstanding the election of their candidate of choice. That result is consistent with the Court's racial gerrymandering jurisprudence—to which *Gill* expressly appealed—which holds that those members of a particular race that are packed into a district have standing to assert a racial gerrymandering claim, notwithstanding that the district elected their candidate of choice. *Id.* at 1930; *see also, e.g.*, *Covington*, 137

Plaintiffs—who, again, reside in each of the State's thirteen congressional districts—is affiliated with the Democratic Party, we further conclude that Plaintiff North Carolina Democratic Party has standing to raise a partisan vote dilution challenge to each district

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S. Ct. at 2211 (affirming district court finding that state legislative districting plan packed African-Americans into 28 majority- African-American districts; plaintiffs included African-American voters who resided in packed districts and were able to elect their candidate of choice); *Cooper*, 137 S. Ct. at 1469, 1473, 1482 (affirming district court finding that 2011 Plan unconstitutionally "pack[ed]" African-American voters into Districts 1 and 12, notwithstanding that Plantiff African-American voters were able to elect their candidate of choice in those districts).

For the same reason, we reject Legislative Defendants' argument that Plaintiffs who "live in districts that either elected Republicans in 2016 or which have elected Republicans under prior maps adopted by a Democratic-controlled General Assembly" lack standing. Leg. Defs.' Br. at 8. Contrary to Legislative Defendants' argument, *Gill*'s discussion of standing does not focus on—or even mention—whether a plaintiff's "candidate of choice" prevailed. Rather, it requires courts to determined whether a particular district was "packed" or "cracked" and whether the vote of a plaintiff who resides in that district would "carry more weight" under an alternative plan. 138 S. Ct. at 1930-31. As is the case with Plaintiffs who live in packed districts, it is the intentional dilution of the voting strength of voters who support non-Republican candidates—not the outcome of a particular election—that injures those Plaintiffs who were cracked into a safe Republican district. If the votes of such Plaintiffs had not been diluted on the basis of invidious partisanship—and therefore their districts had not been drawn so as to allow the Republican candidate to prevail by a "safe" margin—then the elected officials, facing a close re-election race, may have been more responsive to issues supported by Democratic voters and such voters would have had a better chance electing their preferred candidate in future elections.

in the 2016 Plan. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). Likewise, at a minimum, the League has standing to assert a partisan vote dilution challenge to District 9 because, as explained above, League member Klenz lives in that district and testified to and provided evidence that her vote was diluted on the basis of invidious partisanship.[14] *Id.*

c. Several Individual and Organizational Plaintiffs Lack Standing under Gill

We further conclude that, under *Gill*, several named Plaintiffs lack standing to lodge a partisan vote dilution claim under the Equal Protection Clause. In particular, several named Plaintiffs testified that they believe their vote was diluted by the 2016 Plan *as a*

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[14] Because at least one Plaintiff with standing to assert an Equal Protection partisan vote dilution claim lives in each of the State's thirteen congressional districts, we need not—and thus do not—decide whether the League has standing to challenge all thirteen districts under such a theory. In particular, we do not decide whether, by itself, evidence that an organization (1) has a member in each district in a plan (2) who supports an allegedly disfavored party and (3) lives in a precinct that would be assigned to a district more favorable to the allegedly disfavored party under an alternative plan confers standing on the organization to lodge a partisan vote dilution challenge to each district in the plan.

whole, rather than by the lines of their particular district. For example, League Plaintiff Elliot Feldman—who resides in District 9 and is a registered Democrat, Ex. 4055 –testified that he was "aggrieved [by] the present situation whereby Democrats can have . . . 51, 52 percent of the vote for . . . congressional [candidates], and then wind up [with] about 30 percent [of the seats] here on the congressional level," Feldman Dep. 20:8-13. Feldman further agreed this his "problem with the districts is that the number of Republicans elected is not proportional to the vote that Republicans receive in statewide elections." *Id.* at 30:12-16. Similarly, League Plaintiff Annette Love, who resides in District 1, testified that her "problem is with the plan as a whole, *not [her] specific district*." Love Dep. 12:16-18 (emphasis added). According to Love, the 2016 Plan is "unfair" to supporters of Democratic candidates, like herself, because "we have 3 representatives [in Washington] versus I believe it's 10" Republican representatives. *Id.* at 12:10-15.

Other individual Plaintiffs similarly testified that they felt injured by the plan *as a whole*—not the boundaries of their specific district—because the partisan composition of the State's congressional delegation was not proportionate to the two-party share of the statewide vote. Dep. of William Collins ("Collins Dep.") 16:5-19, Mar. 30, 2017, ECF No. 101-5 (League Plaintiff who lives in District 1 stating he believes "statewide the plan is not fair because "10 to 3" ratio of Republicans to Democrats in congressional delegation "doesn't really project the right numbers."); Dep. of Elizabeth Evans ("Evans Dep.") 21:14-22:18, Apr. 7, 2017, ECF No. 101-7 ("I have a problem with

the plan statewide. . . . I'm part of a majority party [Democratic] in North Carolina, but I have only three representatives."); Dep. of Willis Williams ("Williams Dep.") 26:13-27:22, March 30, 2017, ECF No. 101-6 ("[T]he problem with the plan is that statewide it disadvantages Democrats."). And organizational plaintiff Common Cause likewise testified that its Equal Protection Clause challenge was solely premised on a statewide theory of injury. 30(b)(6) Dep. of Common Cause by Bob Phillips ("Phillips Dep.") 16:24-17:4, Apr. 14, 2017, ECF No. 101-29.

As explained above, *see supra* Part II.A.1.a, *Gill* held that partisan vote dilution claims under the Equal Protection Clause must proceed district-by-district, and therefore that a plaintiff cannot rely on an alleged "statewide" injury to support such a claim, 183 S. Ct. at 1931, as these specific Plaintiffs seek to do. Likewise, *Gill* stated that the Supreme Court never has recognized a "shared interest in the composition of the legislature as a whole" as an individual interest giving rise to a vote dilution claim, 138 S. Ct. at 1924-25, 1932 (internal quotation marks omitted), meaning that these Plaintiffs cannot rely on the composition of the State's congressional *delegation* to establish their individual injury. Accordingly, these Plaintiffs lack standing to assert a partisan vote dilution claim under the Equal Protection Clause.[15]

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[15] Because at least one Plaintiff with standing to assert an Equal Protection partisan vote dilution claim lives in each of the State's thirteen congressional districts, we need not—and thus do not—decide whether the remaining individual Plaintiffs—Maria Palmer, Gunther Peck, Ersla Phelps, Janie Sumpter, and Robert

2. First Amendment

Having concluded that at least one Plaintiff has standing to lodge a partisan vote dilution challenge under the Equal Protection Clause to each of the thirteen districts in the 2016 Plan, we next address whether Plaintiffs have standing to assert their First Amendment claims. Partisan gerrymandering implicates the "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Put differently, "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment.'" *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (alteration in original) (quoting *Vieth*, 541 U.S. at 314).

Among other types of "burden[s]" on First Amendment rights, partisan gerrymandering "*purposely* dilut[es] the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016) (three-judge panel). This dilutionary aspect of the First Amendment injury associated with partisan gerrymandering echoes the districtspecific injury giving rise to a partisan vote

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Wolf—have standing to assert a partisan vote dilution claim under the Equal Protection Clause.

dilution claim under the Equal Protection Clause. *See id.* (explaining that "while a State can dilute the value of a citizen's vote by placing him in an overpopulated district, a State can also dilute the value of his vote by placing him in a particular district because he will be outnumbered there by those who have affiliated with a rival political party. In each case, the weight of the viewpoint communicated by his vote is 'debased'" (quoting *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 693-94 (1989)). As detailed above, at least one Plaintiff in each of the State's thirteen congressional districts has adequately alleged such a dilutionary injury. *See supra* Part II.A.1.b.

Partisan gerrymandering also implicates "distinct," non-dilutionary First Amendment injuries, such as infringing on "the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring); *id.* at 1938 ("[T]he associational harm of a partisan gerrymander is distinct from vote dilution."); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (explaining that the Supreme Court "ha[s] repeatedly held that freedom of association is protected by the First Amendment," including "the right of individuals to associate for the advancement of political beliefs"). These associational harms "ha[ve] nothing to do with the packing or cracking of any single district's lines." *Gill*, 138 S. Ct. at 1939. Rather, "the valued association and the injury to it are statewide, [and] so too is the relevant standing requirement." *Id.*

Individual Plaintiffs testified to legally cognizable non-dilutionary injuries to their First Amendment

right to engage in political association. In particular, individual Plaintiffs testified to decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates. For example, League Plaintiff Elizabeth Evans, who served as the Secretary of the Granville County Democratic Party and worked on the Democratic Party's canvassing and get-out-the-vote efforts, testified that she had difficulty convincing fellow Democrats to "come out to vote" because, as a result of the gerrymander, "they felt their vote didn't count." Evans Dep. 12:24-16:12. Common Cause Plaintiff Melzer Morgan, who is a member of the Democratic Party, testified that "[t]he drawing of the districts mean[s] that. . . you don't have a very vibrant Democratic Party because there is not much hope of prevailing at various levels" as a result of the gerrymander. Morgan Dep. 23:2-5, 27:21-24. Morgan further testified that individuals inclined to support Democratic candidates have refused to give money to the Democratic congressional candidate in his Greensboro district, in particular, because they say there is "no sense in us giving money to that candidate because [she] is unlikely to prevail, notwithstanding the merit of [her] position." *Id.* at 23:20-25. And League Plaintiff John Quinn, who is "very active" in his local Democratic Party in District 11, testified that he has had difficulty "rais[ing] money," "recruit[ing] candidates," and "mobiliz[ing] a campaign" for a Democratic candidate in his district because the district was drawn to strongly favor Republican candidates. Quinn Dep. 24:13-14, 38:20-39:34.

Other individual Plaintiffs who support and work on behalf of the Democratic Party and Democratic

candidates also testified at length regarding the adverse effects of the 2016 Plan on the ability of their party to perform its core functions. Berger Dep. 73:11-74:1, 79:10-13; Brewer Dep. 52:2-13; Fox Dep. 51:18-52:9; Palmer Dep. 27:4-29:21, 32:13-34:17 50:10-23; Dep. of Gunther Peck ("Peck Dep.") 27:8-24, 34:6-20, March 22, 2017, ECF No. 101-3; Quinn Dep. 31:19-32:3, 37; C. Taft Dep. 17:6-11; Sarver Dep. 26:9-27:23, 34:8-15, 37:18-39:4; Walker Dep. 29:17-30:8. The Supreme Court has recognized that these types of non-dilutionary harms constitute cognizable First Amendment injuries. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (finding that plaintiff was injured by election law that made "[v]olunteers . . . more difficult to recruit and retain, media publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign").

As Justice Kagan recognized in *Gill*, "what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations)." 138 S. Ct. at 1938; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."). "By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). That is the case here. The North Carolina Democratic Party testified that "with the way the congressional districts were drawn, it indicates that only three [districts] would elect Democrats and the others will not be able to elect Democrats [which]

makes it extremely difficult to raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts." *See* 30(b)(6) Dep. of N.C. Democratic Party by George Wayne Goodwin ("Goodwin Dep.") 97:18-98:5, April 17, 2017, ECF Nos. 110-7, 101-30. Additionally, "[t]he way the districts are drawn these days, it's harder to recruit candidates given that the deck seems to be stacked, at least in congressional districts," the party testified. *Id.* at 27:17-20; *see also id.* at 42:12-25 (identifying particular districts in which Democratic Party had difficulty recruiting candidates).

Plaintiff organizations the League and Common Cause also testified to associational injuries attributable to the 2016 Plan. The League engages in statewide voter education, registration, and "get out the vote" efforts. Klenz Dep. 44:15-25, 59:16-17. Due to a lack of voter interest attributable to the gerrymander, the League had difficulty fulfilling its mission of "inform[ing] . . . [and] engag[ing] voters in the process of voting and civic participation in their government." *Id.* 59:16-17. Additionally, as a result of the 2016 Plan, the League has had difficulty providing opportunities for its members and other voters to interact with "candidate[s] that [were] expected to win and projected to win," because those candidates were often not "motivated" to participate "in voter forums, debates, [or] voter guides, because the outcome is so skewed in favor or in disfavor of one or the other." *Id.* at 60:6-10. Accordingly, the League has established that the 2016 Plan's invidious partisan discrimination burdens its mission. *See Ohio A Philip Randolph Inst.*

v. Smith, No. 1:18-CV-357, 2018 WL 3872330, at *4 (S.D. Ohio Aug. 15, 2018) (three-judge panel) (finding, post-*Gill*, that the Ohio League of Women Voters had standing to assert First Amendement partisan gerrymandering claim because "the map makes it more difficult to engage voters through their education, registration, and outreach efforts, and by deterring and discouraging their members and other Ohio voters from engaging in the political process" (internal quotation marks and alterations omitted)); *League of Women Voters of Mich. v. Johnson*, slip op. at 13, No. 2:17-CV- 14148 (E.D. Mich. May 16, 2018), ECF No. 54 (three-judge panel) (same, in case in which Michigan League of Women Voters asserted partisan gerrymandering challenge to Michigan districting plan).

Common Cause and its members work, on a statewide basis, to educate the public about voting-related issues and "advocate for more open, honest and accountable government." Phillips Dep. 35:9-10, 37:25-39:9, 71:6-8, 150:2-7. As part of that effort, Common Cause has long advocated for redistricting reform, and legislation providing for non-partisan redistricting. *Id.* at 20:20-21:13. In North Carolina, in particular, Common Cause worked with Republican legislators in the 2000s and Democratic legislators in the 2010s to enact legislation providing for non-partisan redistricting, and Common Cause developed and advocated for a non-partisan congressional districting plan as an alternative to the 2016 Plan. *Id.* at 21:9-13, 29:6-11, 150:8-15. As a redistricting plan expressly designed to achieve "Partisan Advantage," Ex. 1007, the 2016 Plan runs directly contrary to the non-partisan approach to redistricting—and the open

and accountable government—for which Common Cause and its members have long advocated. Accordingly, the 2016 Plan has burdened the rights of members of the League and Common Cause "to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30.

In sum, we conclude both individual and organizational Plaintiffs have standing to assert their First Amendment challenge to the 2016 Plan. And we further conclude that because these injuries are statewide, such Plaintiffs have standing to lodge a First Amendment challenge to the 2016 Plan as a whole. *Gill*, 138 S. Ct. at 1939.

3. Article I

The injuries underlying Common Cause Plaintiffs' Article I claims—which allege that the 2016 Plan exceeds the General Assembly's authority under the Elections Clause and usurps the power of "the People" to elect their representatives—also do not stop at a single district's lines. In invoking Article I, Plaintiffs allege that North Carolina's districting map upsets a fundamental balance established by the Constitution. As explained in more detail below, the grant of power to state legislatures to regulate federal elections in Article I, section 4 is akin to an enumerated power of Congress. *See infra* Part V; Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 263-64 (2006). This is "[b]ecause any state authority to regulate election to [congressional] offices could not precede their very creation by the Constitution"; accordingly, "such power 'had to be delegated to, rather than reserved by, the States.'" *Cook v. Gralike*, 531 U.S.

510, 522 (2001) (quoting *Thornton*, 514 U.S. at 804). Thus, "the States may regulate the incidents of elections . . . only within the exclusive delegation of power under the Elections Clause." *Id.* at 523. Here, Common Cause Plaintiffs allege that the General Assembly's partisan gerrymandering exceeds the scope of that power and therefore upsets the constitutional balance established by Article I.

These Plaintiffs' Article I claim, therefore, is premised on federalism. "The Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34; *see also Cook*, 531 U.S. at 527 (Kennedy, J., concurring) ("[A state] simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, § 4."). Accordingly, if Plaintiffs are correct in their assertions about the General Assembly's actions, then, in enacting the 2016 Plan, the General Assembly acted beyond its constitutional authority in direct contravention of a delicate balance of governmental powers established in Article I. *See Thornton*, 514 U.S. at 841 (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable . . . as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States."). Establishing such a structural harm can confer standing. *See Bond v. United States*, 564 U.S. 211, 221-22 (2011) ("An

individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."); *see also Ariz. State Leg.*, 135 S. Ct. at 2695 (Scalia, J., dissenting) ("[W]e have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm.").

To be sure, bringing a claim that implicates a structural harm does not absolve litigants from the requirement to allege particularized injuries. *See Lance v. Coffman*, 549 U.S. 437, 440 (2007) (per curiam). In *Lance*, the Colorado state legislature was initially unable to agree on a new congressional redistricting map after the 2000 census, so the state court drew and implemented a new map. *See id.* at 437-38. Several years later, in 2003, the state legislature finally passed a new redistricting plan. *See id.* at 438. The state attorney general, however, sought to enjoin implementation of the map on grounds that the Colorado Constitution prohibits more than one redistricting after each census. *See id.* The state supreme court held that the new map indeed violated the state constitution and could not take effect. *See id.* Subsequently, four voters brought suit in federal court alleging that the ruling of the Colorado Supreme Court violated the Elections Clause of the U.S. Constitution by preventing the Colorado legislature from exercising its constitutionally-granted power of

regulating elections. *See id.* at 441. But the Supreme Court held that the voters lacked standing to bring such a suit because "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed." *Id.* at 442. The Court described the voters' claims as "precisely the kind of undifferentiated, generalized grievance about the conduct of the government" that is insufficient to confer standing. *Id.* Rather, the voters needed to cite more than "the right, possessed by every citizen, to require that the Government be administered according to law." *Id.* at 440.

In *Lance*, the Supreme Court specifically differentiated the generalized injuries of the plaintiffs in that case from the individualized injuries alleged by the plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the plaintiffs lived in five Tennessee counties and challenged the state districting plan "apportioning the members of the General Assembly among the State's 95 counties." 369 U.S. at 187-88, 204. The alleged injury was based on a vote dilution theory: "appellants assert . . . that [the current apportioning] disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties." *Id.* at 207-08. And although the entire state map was ultimately redrawn in that case, *Gill* clarified that the *Baker* plaintiffs' claims were only brought on a district-by-district basis, because they were based on an alleged injury of vote dilution. *See Gill*, 138 S. Ct. at 1930-31.

Unlike the plaintiffs in *Lance*—and like the plaintiffs in *Baker*—at least one Plaintiff residing in

each district in the 2016 Plan alleges and offers proof of the type individualized dilutionary injuries the Court recognized in *Gill*. *See supra* Part II.A.1.b. Those injuries-in-fact establish such Plaintiffs' standing to lodge their structural claim under Article I. *Bond*, 564 U.S. at 221-22.

Plaintiffs also allege and prove additional non-dilutionary injuries, including injuries to their associational rights. *See supra* Part II.A.2. As discussed above, these injuries include, among others, difficulty recruiting candidates due to the perceived lack of competitiveness of elections, difficulty raising money, and difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions. *Id.* And, as Justice Kagan made clear, such injuries, if statewide in scope, admit statewide standing. *See id.*

Several circuits also have relied on these types of associational injuries when finding that organizations had standing to assert claims under Article I. For example, in *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), the Republican Party of Texas declared that one of its candidates, who had already won the primary election for the U.S. House of Representatives in one of Texas' districts, was no longer eligible to run due to a change in his residency. *See id.* at 584-85. The Texas Republican Party thus sought to replace the candidate on the general election ballot with a new candidate. *See id.* Before the Republican Party could do so, however, the Democratic Party sought injunctive relief. *See id.* at 585. The district court found that the Republican Party had impermissibly added a residency

requirement to running for the U.S. House of Representatives, which the Qualifications Clause of the Constitution prohibited. *See id.* Accordingly, the district court permanently enjoined the chairwoman of the Republican Party from finding the first candidate to be ineligible and from replacing him on the ballot with another Republican candidate. *See id.*

The Republican Party appealed. Among its arguments was that the residency requirement for candidates for the House of Representatives was a permissible use of the authority conferred to the State under the Elections Clause. *See id.* at 590-91. The Fifth Circuit rejected this argument. The court found that the Republican Party's actions were not performed in a "'nondiscriminatory, politically neutral fashion,'" *id.* at 590 (quoting *Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999)), nor did they fall within the limited grant of power provided by the Elections Clause, *id.* at 591.

Relevant here, the Fifth Circuit found that the Texas Democratic Party had standing to bring these claims. For direct standing, the court found that the Democratic Party would suffer an economic injury because "it would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Id.* at 586 (internal quotation marks omitted). Furthermore, the Party would also have standing as a result of "harm to its election prospects." *Id.* More specifically, "if the [Republican Party] were permitted to replace [the original candidate] with a more viable candidate, then [the Democratic Party's] congressional candidate's chances of victory would be reduced." *Id.* Additionally,

other "Democratic candidates, like county commissioners and judges, would suffer due to the change's effect on voter turnout and volunteer efforts." *Id.*

Like the Legislative Defendants here, the Republican Party in *Benkiser* argued that such ill effects were not injuries-in-fact sufficient to confer standing. The Fifth Circuit disagreed, admonishing that "[v]oluminous persuasive authority shows otherwise." *Id.* at 587 & n.4 (collecting cases). The court held that "a political party's interest in a candidate's success is not merely an ideological interests. Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interest. While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes." *Id.* (internal citation omitted). The same is true in this case. The North Carolina Democratic Party has an interest in electing its candidates to office, and the inability to recruit candidates, raise funds, and get voters to the polls create injuries-in-fact sufficient to confer standing.[16] *See supra* Part II.A.2.

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[16] The Fifth Circuit also found that the Democratic Party had associational standing on behalf of its candidates. *See Benkiser*, 459 F.3d at 587. The Fifth Circuit held that the Republican Party's actions "threaten [the Democratic candidate's] election prospects and campaign coffers," and that "[p]ersuasive authorities establish that such injuries are sufficient to give a candidate standing to protest the action causing the harm." *Id.* at 587 & n.4 (collecting cases). Again, the same is true in this case.

Two challenges to a Kansas law requiring proof of citizenship to register to vote—decided by two separate circuits—similarly establish that an individual who suffers an injury-in-fact as a result of an election regulation has standing to assert a structural challenge to the regulation under Article I. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (holding that because the "new obstacles" created by the Kansas law "unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm"); *see also Fish v. Kobach*, 840 F.3d 710, 716 n.5 (10th Cir. 2016) (holding that Plaintiffs, including the League of Women Voters of Kansas, have standing to challenge the law). Further still, although the Supreme Court did not specifically address standing in *Thornton*, the Court nonetheless ruled on the merits of the case when several citizens and the League of Women Voters of Arkansas brought suit challenging a law that violated both the Qualifications Clause and the Elections Clause. *See* 514 U.S. 779. Several other cases provide similar tacit support. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013) (addressing the merits in a case brought by a collection of non-profit organizations to a state law that fell outside the scope of the Elections Clause); *Tashjian*, 479 U.S. at 2017 (addressing the merits in a case brought by the Republican Party challenging a law outside the scope of the Elections Clause and stating that although "[t]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I,

§ 4, cl. 1," that power "does not justify . . . the abridgment of fundamental rights, such as the right to vote [or] the freedom of political association." (citing *Wesberry*, 376 U.S. at 6-7)); *Anderson*, 460 U.S. at 792 (finding that plaintiff was injured by an election law that made "[v]olunteers . . . more difficult to recruit and retain, media publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign").

In sum, as the Supreme Court held in *Bond*, citizens have standing in cases "assert[ing] injury from governmental action taken in excess of the authority that federalism defines," 564 U.S. at 220—that is, when a "government acts in excess of its lawful powers," *id.* at 222—so long as the plaintiffs still have the requisite injury-in-fact. Here, Common Cause Plaintiffs' Article I claim is grounded in that same principle of federalism. They claim that the North Carolina General Assembly has overstepped the limited grant of power provided by the Elections Clause, thereby giving it too much influence over the National Legislature. Like in *Wesberry*, these actions, if true, "defeat [a] principle solemnly embodied" in the Constitution. 376 U.S. at 14; *see also Cook*, 531 U.S. at 528 (Kennedy, J., concurring) ("The dispositive principle in this case is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government. The principle is that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside. . . . The idea of federalism is that a National Legislature enacts law which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most

secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office"); *Thornton*, 514 U.S. at 842 (Kennedy, J., concurring) ("Nothing in the Constitution or The Federalist Papers, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives"). The harm suffered by Plaintiffs as a result of this potential violation of the Constitution's structure, however, manifests itself through individual dilutionary and associational injuries. Accordingly, we find that such injuries are sufficient injuries-in-fact on behalf of the individual plaintiffs, as well as on behalf of the Democratic Party of North Carolina and Common Cause. Furthermore, because these structural and associational harms have statewide implications, we find that such injuries are sufficient to confer standing on a statewide basis. *See Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring).

* * * * *

In conclusion, we find and conclude that individual and organizational Plaintiffs in each congressional district have alleged and suffered dilutionary injuries-in-fact attributable to the 2016 Plan, and, based on those injuries, have standing to assert a partisan vote dilution challenge to each of those districts. We further find and conclude that individual and organizational Plaintiffs have standing to assert a statewide First Amendment claim. And those Common Cause Plaintiffs who have alleged and proven injuries-in-fact also have standing to seek relief under Article I.

B. Justiciability

Next, Legislative Defendants argue that although partisan gerrymandering claims are justiciable "in theory," Plaintiffs' specific partisan gerrymandering claims should be dismissed because, as alleged and proven, they raise nonjusticiable political questions. Leg. Defs.' FOF 93. The political question doctrine dates to Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and rests on the principle that certain disputes are not appropriate for or amenable to resolution by the courts because they raise questions constitutionally reserved to the political branches, *id.* at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

The political question doctrine has played a central role in apportionment cases. The Supreme Court set forth its current test for determining whether a claim raises a political question in a case dealing with the justiciability of one-person, one-vote claims. *See Baker v. Carr*, 369 U.S. 186 (1962). Prior to *Baker*, in *Colegrove v. Green*, 328 U.S. 549 (1946), several Justices took the position that certain apportionment challenges raised political questions because the Constitution expressly delegated authority over apportionment to the States, subject to the supervision of Congress, thereby leaving no place for judicial review.[17] *Id.* at 553-55.

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[17] In *Baker*, the Court concluded that a majority of the *Colegrove* Court did not dismiss the action on justiciability grounds. *Baker*, 369 U.S. at 234-35.

Baker confronted a one-person, one-vote challenge under the Equal Protection Clause to a state legislative districting plan. The Court concluded such claims were justiciable, and distinguished *Colegrove* on grounds that *Colegrove* involved a challenge under the Guaranty Clause, Article IV, Section 4, which the Court had previously held was not "the source of a constitutional standard for invalidating state action." 369 U.S. at 209-10, 223 (citing *Taylor v. Beckham*, 178 U.S. 548 (1900)). In concluding that one-person, one-vote apportionment claims are justiciable, *Baker* held that an issue poses a political question if there is:

> A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Applying this test, the Court concluded one-person, one-vote claims were justiciable under the Fourteenth Amendment because they involved a determination of "the consistency of state action with the Federal Constitution"—a question

constitutionally assigned to the Judiciary. *Id.* at 226. The Court further emphasized that the resolution of the question was "judicially manageable" because "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* The Court subsequently extended *Baker*'s justiciability holding to one-person, one-vote challenges to congressional districts under Article I, Section 2. *See Wesberry*, 376 U.S. at 5-6.

1. Governing Law

In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court applied the *Baker* framework to partisan gerrymandering claims, holding that such claims do not raise nonjusticiable political questions, *see id.* at 123 (plurality op.); *id.* at 161-65 (Powell, J., concurring in part and dissenting in part). Writing for the Court, Justice White emphasized that the Court had previously concluded that one-person, one-vote and racial gerrymandering claims were justiciable, thereby establishing that apportionment claims implicating "issue[s] of representation" are justiciable. *Id.* at 124 (plurality op.). Justice White further stated that there was no reason to believe that the "standards . . . for adjudicating this political gerrymandering claim are less manageable than the standards that have been developed for racial gerrymandering claims." *Id.* at 125. Although the Court recognized the justiciability of partisan gerrymandering claims under the Equal Protection

Clause, a majority could not agree as to the substantive standard for proving such claims. *Compare id.* at 127-37, *with id.* at 161-62 (Powell, J., concurring in part and dissenting in part).

The Court revisited the justiciability of partisan gerrymandering claims in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Conceding "the incompatibility of severe partisan gerrymanders with democratic principles," *id.* at 292 (plurality op.), a four-justice plurality nonetheless took the position that no judicially manageable standard exists to adjudicate partisan gerrymandering claims and therefore would have reversed *Bandemer*'s holding of justiciability, *id.* at 281. Justice Kennedy agreed with the plurality that the *Vieth* plaintiffs had failed to put forward a legally cognizable standard for evaluating partisan gerrymandering claims, therefore warranting dismissal of the action for failure to allege "a valid claim on which relief may be granted." *Id.* at 306, 313 (Kennedy, J., concurring in the judgment). But Justice Kennedy rejected the plurality's conclusion that partisan gerrymandering claims are categorically nonjusticiable. *See id.* at 309-10. And the remaining four Justices agreed with Justice Kennedy's refusal to reverse *Bandemer*'s justiciability holding. *Id.* at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court . . . share the view that, even if these appellants are not entitled to prevail, it would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future."). Two years later, the Supreme Court again refused to revisit *Bandemer*'s holding that partisan gerrymandering claims are justiciable. *League of United Latin Am. Citizens v.*

Perry (*LULAC*), 548 U.S. 399, 414 (2006). And the Supreme Court's most recent partisan gerrymandering decision, *Gill*, expressly declined to address the justiciability of such claims, 138 S. Ct. at 1929 (majority op.), with Justice Kagan, joined by three other Justices, reaffirming that "[c]ourts have a critical role to play in curbing partisan gerrymandering," *id.* at 1941 (Kagan, J., concurring).

Accordingly, under controlling Supreme Court precedent, a challenge to an alleged partisan gerrymander presents a justiciable case or controversy. *See Common Cause*, 240 F. Supp. 3d at 387. For good reason.

As the Supreme Court recently held, "'partisan gerrymanders . . . are incompatible with democratic principles.'" *Ariz. State Leg.*, 135 S. Ct. at 2658 (quoting *Vieth*, 541 U.S. at 292 (plurality op.)) (alterations omitted). That statement accords with the unanimous conclusion of the Justices in *Vieth*. *See* 541 U.S. at 292 (plurality op.) (recognizing "the incompatibility of severe partisan gerrymanders with democratic principles"); *id.* at 312, 316-17 (Kennedy, J., concurring) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated."); *id.* at 326 (Stevens, J., dissenting) ("State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial"); *id.* at 345 (Souter, J., dissenting) ("[T]he

increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine."); *id.* at 360 (Breyer, J., dissenting) (holding that redistricting plan violates Constitution if it amounts to an "*unjustified* use of political factors to entrench a minority in power").

On its most fundamental level, partisan gerrymandering violates "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Leg.*, 135 S. Ct. at 2677 (internal quotation marks omitted); *see also Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them." (quoting Alexander Hamilton in 2 Debates of the Federal Constitution 257 (J. Elliott ed. 1876))). Put differently, partisan gerrymandering represents "'an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.'" *LULAC*, 548 U.S. at 456 (Stevens, J., concurring in part and dissenting in part) (quoting *Balderas v. Texas*, Civ. Action No. 6:01CV158, App. to Juris. Statement 209a-10a (E.D. Tex. 2006)). To that end, partisan gerrymandering leads to a "cascade of negative results . . . : indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's

problems." *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring) (internal quotation marks omitted).

Partisan gerrymandering runs contrary to both the structure of the republican form of government embodied in the Constitution and fundamental individual rights preserved by the Bill of Rights. As detailed more fully below, partisan gerrymandering of congressional districts constitutes a structural violation because it insulates Representatives from having to respond to the popular will, and instead renders them responsive to state legislatures or, as in this case, political factions thereof. *See infra* Part V. Unlike the Senate, which, at the time of the founding, represented the interests of the States, the Framers intended for the House of Representatives to be the governmental body directly responsive to "the People." U.S. Const. Art. I, § 2; *see also Wesberry*, 376 U.S. at 13 (explaining that "William Samuel Johnson of Connecticut had summed [the Great Compromise] up well: 'in one branch the people, ought to be represented; in the other, the States'"). As James Madison explained, "it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] *should have an immediate dependence on, and an intimate sympathy with, the people*." *See* The Federalist No. 52 (James Madison), at 295 (Clinton Rossiter ed., 1999) (emphasis added). On this point, both the Federalists and Anti-Federalists agreed. *See e.g.*, James Madison, *Notes of Debates in the Federal Convention of 1787* 39 (W. W. Norton & Co. 1987) (1787) (hereinafter "*Debates*") (reporting that George Mason "argued strongly for an election of the larger branch by the people. It was to

be the grand depository of the democratic principle of the government."); *id.* at 167 (reporting that James Wilson stated that he "considered the election of the first branch by the people not only as the corner Stone, but as the foundation of the fabric: and that the difference between a mediate and immediate election was immense"). "When that moment does not come—when legislators can entrench themselves in office despite the people's will—the foundation of effective democratic governance dissolves." *Gill*, 138 S. Ct. at 1940-41 (Kagan, J., concurring).

Emphasizing that the House of Representatives was the repository of the People's power, the Framers repeatedly expressed concern about state legislatures, or political factions thereof, interposing themselves between Representatives and the People. For example, James Madison explained that "[i]t is *essential*" that a Republican government "derive[its powers] from the great body of society, *not from an inconsiderable proportion or a favored class of it*; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic." The Federalist No. 39 (James Madison), at 209 (second emphasis added); *Debates* at 40 (reporting that James Wilson stated that "[a]ll interference between the general and local government should be obviated as much as possible"). The Framers expressed particular concern that State legislatures would seek to influence Congress by enacting electoral regulations that favored candidates aligned with, and responsive to, the interests of the legislatures, rather than the public at large. *See Debates* at 167 (reporting that Rufus King

expressed concern that "the Legislatures would constantly choose men subservient to their own views as contrasted to the general interest; and that they might even devise modes of election that would be subversive of the end in view"). Surveying these and other founding era authorities, the Supreme Court recognized that "[i]t would defeat the principle solemnly embodied in the Great Compromise . . . to hold that, within the states, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." *Wesberry*, 376 U.S. at 14. Partisan gerrymandering—drawing district lines to enhance the electoral power of voters who support a favored party and diminish the electoral power of voters who support disfavored parties—amounts to a legislative effort "to give some voters a greater voice in choosing a Congressman than others," *id.*, contrary to the republican system put in place by the Framers.

Partisan gerrymandering also runs afoul of rights that "are individual and personal in nature," *Reynolds*, 377 U.S. at 561, because it subverts the foundational constitutional principle that the State govern "impartially"—that "the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation." *Davis*, 478 U.S. at 166 (Powell, J., concurring in part and dissenting in part); *see also infra* Part III. And partisan gerrymandering infringes on core political speech and associational rights by "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression

of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment); *see also infra* Part IV.

That partisan gerrymandering encroaches on these individual rights by undermining the right to vote—the principle vehicle through which the public secures other rights and prevents government overreach—magnifies the constitutional harm. As the Supreme Court explained in *Wesberry*, "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote]" because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." 376 U.S. at 17-18. To that end, the Supreme Court long has held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

A partisan gerrymander that is intended to and likely has the effect of entrenching a political party in power undermines the ability of voters to effect change when they see legislative action as infringing on their rights. And as James Madison warned, a legislature that is itself insulated by virtue of an invidious gerrymander can enact additional legislation to restrict voting rights and thereby further cement its unjustified control of the organs of both state and federal government.[18] *See Debates* at 424 ("[T]he

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[18] A separate three-judge panel of this Court concluded that the General Assembly unjustifiably, and therefore unconstitutionally, relied on race in drawing lines surrounding

twenty-eight districts in North Carolina's 2011 state legislative redistricting plan—among the largest racial gerrymanders ever confronted by a federal court. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016). The Supreme Court summarily affirmed that decision without dissent. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.). The *Covington* panel subsequently held that several districts redrawn by the General Assembly in an effort to remedy the constitutional violation constituted racial gerrymanders themselves, *Covington v. North Carolina*, 283 F. Supp. 3d 410, 429-42 (M.D.N.C. 2018)—a decision the Supreme Court again affirmed, 138 S. Ct. 2548, 2552-54 (2018). The legislature elected under the racially gerrymandered 2011 plan has enacted, and continues to enact, voting- and election-related legislation that has been struck down by state and federal courts as unconstitutional or violative of federal law. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214-15 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) (mem.); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 352 (4th Cir. 2016); Order, *Poindexter v. Strach*, No. 5:18-CV-366 (Aug. 22, 2018), ECF No. 22 (holding that statute retroactively removing candidates from the ballot who were qualified and previously had been approved to appear on the ballot likely violated the candidates' rights under the First and Fourteenth Amendments); *N.C. State Conf. of the NAACP v. Bipartisan Bd. of Elections & Ethics Enforcement*, No. 1:16-CV-1274, 2018 WL 374 8172, at *12-13 (M.D.N.C. Aug. 7, 2018) (holding that state statute authorizing individual voters to challenge registrations of other voters on change-of-residency grounds violated National Voter Registration Act); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 951 (M.D.N.C. 2017); Order on Injunctive Relief, *Cooper v. Berger*, No. 18-CVS-9805 (Wake Cty. Super. Ct. Aug. 21, 2018) (three-judge panel) (holding that ballot language adopted by the General Assembly to describe two amendments to the North Carolina Constitution proposed by the General Assembly "misleads and does not sufficiently inform the voters" regarding the substance of the amendments and thereby likely violates the State Constitution); *Cooper v. Berger*, No. 16-CVS-15636 (Wake Cty. Super. Ct. Mar. 17, 2017) (three-judge panel) (striking down portions of two statutes, which stripped the then recently elected

inequality of the Representation in the Legislatures of particular States, would produce like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter."). That is precisely what occurred in the late Eighteenth Century when Democratic legislatures used aggressive partisan gerrymanders to secure Democratic control of the House of Representatives and then, by virtue of that control, restrict earlier federal efforts to enforce the Fifteenth Amendment in the South, thereby facilitating the return of de jure and de facto segregation. *See* Erik J. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 94-121 (2013).

The Constitution sharply curtails restrictions on electoral speech and the right to vote because, in our republican form of democracy, elected representatives in power have a strong incentive to enact legislation or policies that preserve their position and those of their fellow partisans, at the expense of public interest. As Justice Scalia explained, "[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). Casting a vote and associating with a political party are among the most fundamental forms of "election-time speech." *See Williams*, 393 U.S.

Democratic Governor of a broad variety of powers, including powers related to supervision of State Board of Elections, on separation-ofpowers grounds).

at 30 (recognizing "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); *Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 254 (1961) ("The revolutionary intent of the First Amendment is . . . to deny to [the government] authority to abridge the freedom of the electoral power of the people."). Partisan gerrymandering is no different than legislative efforts to curtail other forms of election-time speech because in both cases "[p]oliticians have deep-seated incentives to bias translation of votes into seats." Engstrom, *supra* at 192. Accordingly, because partisan gerrymandering encroaches on individuals' right to engage in "election-time speech"—including the right to vote—allegations of partisan gerrymandering "must be carefully and meticulously scrutinized" by the judiciary. *Reynolds*, 377 U.S. at 562.

Because partisan gerrymandering targets voting rights, the deference to the policy judgments of the political branches animating the political question doctrine is inapplicable. In *Wesberry*, the defendant state asserted that claims premised on malapportionment of congressional districts raise political questions because the Elections Clause—which empowers state "Legislatures," subject to congressional regulation, to "prescribe[] . . . The Times, Places and Manner of holding Elections

for . . . Representatives"—textually commits districting and apportionment questions to Congress and the States. 376 U.S. at 6-7. In rejecting that argument, the Supreme Court refused to "support . . . a construction [of the Elections Clause] that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*." *Id.* In sum, "[t]he right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." *Id.*

Further, "a textually demonstrable constitutional commitment" of authority to a coordinate branch provides the strongest basis for treating a claim as a political question. *Vieth*, 541 U.S. at 278 (plurality op.) (characterizing the "textually demonstrable constitutional commitment" test as the most "importan[t] and certain[]" test for the existence of a political question). Given that the Supreme Court has recognized that the importance of the right to vote warrants not treating malapportionment claims as political questions, notwithstanding the alleged textual commitment of such claims in the Elections Clause, a purported lack of judicially manageable standards provides an even weaker basis for "stripp[ing] of judicial protection" the right to vote when a legislature seeks to destroy that right through partisan gerrymandering.[19] *Wesberry*, 376 U.S. at 6-7.

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[19] We further note that a majority of the Supreme Court *never* has found that a claim raised a nonjusticiable political question

Importantly, and contrary to Legislative Defendants' claims, the judiciary's refusal to treat alleged infringements on the right to vote—like claims of partisan gerrymandering—as political questions reflects an effort to *advance* the interests served by the political question doctrine, rather than usurp the role of the political branches. As the Supreme Court has explained, "[t]he voting rights cases, indeed, have

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solely due to the alleged absence of a judicially manageable standard for adjudicating the claim. Rather, in each case in which the Supreme Court has found a claim nonjusticiable under the political doctrine, the Court has principally pointed to a textual commitment of the challenged action to a political branch in finding the claim nonjusticiable. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 228-36 (1993) (holding that challenge to the procedure Senate adopted for "try[ing]" impeachment, U.S. Const. Art. I, § 3, cl. 6, raised nonjusticiable political question); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that claim premised on the "organizing, arming, and disciplining" of members of the National Guard involved issue "committed expressly to the political branches of government"). In *Vieth*, Justice Kennedy's controlling opinion explained why the Court has declined to rely on an alleged lack of judicial manageable standards as an exclusive basis for finding a claim nonjusticiable:

> Relying on the distinction between a claim having or not having a workable standard . . . involves a difficult proof: proof of a categorical negative[–]proof that no standard could exist. This is a difficult proposition to establish, for proving a negative is a challenge in any context.

Vieth, 541 U.S. at 311 (Kennedy, J., concurring). Legislative Defendants have failed to provide any "proof that no standard could exist" for evaluating a partisan gerrymandering claim. Accordingly, we decline Legislative Defendants' request that we take the unprecedented step of dismissing a claim under the political question doctrine solely due to an alleged lack of judicially manageable standards for resolving the claim.

represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government." *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973). Put differently, because the judiciary jealously protects the right to vote—and thereby ensures that the People retain the means to counteract any encroachment by the political branches on substantive individual rights—the judiciary can give the political branches greater latitude to make substantive policy decisions. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 102 (1980) (explaining that by "devoting itself instead to policing the mechanisms by which [our constitutional] system seeks to ensure that our elected representatives will actually represent," the judiciary "recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives").

In sum, partisan gerrymandering infringes on a variety of individual rights and does so by targeting the right to vote—the constitutional mechanism through which the People repel legislative encroachment on their rights. The Supreme Court long has recognized that when the Constitution preserves individual rights, courts have an obligation to enforce those rights. *Marbury*, 5 U.S. at 166 ("[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the

laws of his country for a remedy."). We find no basis to disregard that obligation here.

Notably, the State defendant in *Reynolds* made arguments against judicial oversight of state redistricting identical to those advanced by Legislative Defendants here—namely, that it is improper for courts to embroil themselves in inherently political issues and that courts lack the capability of identifying a judicially manageable standard to determine whether, and to what degree, malapportionment violates the Constitution. Rejecting each of these arguments, the Supreme Court reaffirmed the principle first recognized by Chief Justice Marshall in *Marbury*: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds*, 377 U.S. at 566. Our oath and our office impose that same obligation here.

2. Legislative Defendants' Arguments Against Justiciability

Legislative Defendants nonetheless argue that, regardless of whether partisan gerrymandering claims are justiciable "in theory," this Court should dismiss Plaintiffs' claims as nonjusticiable because Plaintiffs have failed to put forth a "judicially manageable standard" for resolving their claims. Leg. Defs.' Br. 2, 11, 17; Leg. Defs.' FOF 93. Legislative Defendants argue that the analytical frameworks and empirical analyses advanced by Plaintiffs fail to provide a judicially manageable standard for three reasons. First, Legislative Defendants assert that

Plaintiffs' legal frameworks and expert analyses fail to address, much less resolve, what Legislative Defendants see as the fundamental question bearing on the constitutionality of partisan gerrymandering: "how much politics is too much politics in redistricting"? Leg. Defs.' Br. 2, 9-11. Second, Legislative Defendants argue that the empirical analyses on which Plaintiffs rely—which Legislative Defendants characterize as "a smorgasbord of alleged 'social science' theories"—lack any constitutional basis, and instead amount to "academically inspired proposed judicial amendments to the Constitution." *Id.* at 2, 17. Finally, Legislative Defendants maintain that allowing the judiciary to strike down a redistricting plan as a partisan gerrymander would interfere with the political branches' decision, rendered pursuant to Congress's authority under the Election Clause, to require election of representatives from single-member districts. *Id.* at 13. We reject all three arguments.

a. Failure To Draw Line Between Acceptable and "Too Much" Partisanship

Legislative Defendants' assertion that any judicially manageable partisan gerrymandering framework must distinguish "reasonable" partisan gerrymandering from "too much" partisan gerrymandering rests on the premise that some degree of invidious partisan gerrymandering—again, defined by the Supreme Court as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Leg.*, 135 S. Ct. at 2658—is

constitutionally permissible. To justify that premise, Legislative Defendants assert that (i) the Elections Clause assigns election regulation—and districting, in particular—to political bodies, and thereby contemplates that politics will play a role in the drawing of district lines, rendering questions of partisan gerrymandering "best left to the political branches," Leg. Defs.' FOF 93; (ii) historical practice indicates that the founding generation viewed some amount of partisan gerrymandering as constitutionally permissible; and (iii) the Supreme Court repeatedly has sanctioned at least some degree of partisan gerrymandering. None of these three claims is correct.

i.

Legislative Defendants are correct that the Elections Clause delegates primary responsibility to state legislatures—or other redistricting bodies established pursuant to state law—to draw congressional districts. *See Ariz. State Leg.*, 135 S. Ct. at 2668, 2677. But neither founding era authorities nor Supreme Court precedent supports Legislative Defendants' contentions that the Elections Clause's assignment of election regulation to *political* bodies contemplates such bodies engaging in some degree of invidious *partisan* discrimination in the regulation of elections—the conduct at issue here—or that such efforts would be immune from judicial review.

On the contrary, scholars agree that "[t]he idea of political parties, representing institutionalized divisions of interest, was famously *anathema* to the Framers, as it had long been in Western political thought." Daryl J. Levinson & Richard H. Pildes,

Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2320 (2006) (emphasis added); *see also, e.g.*, James A. Gardner, *Can Party Politics Be Virtuous*, 100 Colum. L. Rev. 667, 667 (2000) ("The generation of Americans that founded the United States and wrote its Constitution feared and despised political parties."); Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1484-85 (1994) ("The Framers of our Constitution were quite outspoken in voicing their dislike for 'factions' and 'parties.'").

For example, James Madison, the principal author of the Constitution, characterized "factions" as a "disease" and a dangerous vice that "tainted our public administration." The Federalist No. 10, at 46 (James Madison). In defending the Elections Clause, Alexander Hamilton similarly decried the "diseases of faction." The Federalist No. 61, at 343 (Alexander Hamilton). And in his 1796 Farewell Address, George Washington spoke at length about the "baneful effect of the spirit of party" and the "interest and duty of a wise people to discourage and restrain it." George Washington, Farewell Address (1796), *available at* http://avalon.law.yale.edu/18th_century/washing.asp.[20]

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[20] In full, Washington warned that:

> This spirit [of party], unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy.

The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of the individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.

Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosity of one part against another, foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which finds a facilitated access to the government through the channels of party passions. Thus the policy and the will of one country are subject to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the administration of the government and serve to keep alive the spirit of liberty. This within certain limits is probably true; and in governments of a monarchical cast, patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of a popular character, in governments purely elective, it is a spirit not to be encouraged. From their natural tendency, it is certain there will always be enough of that spirit for every salutary purpose. And there being constant danger of excess, the effort ought to be by force of public opinion,

As illustrated by Washington's address, "[t]he founders' antipathy toward political parties rested on their belief that parties were the vehicles by which self-interested groups and individuals—'factions,' in their terminology—coordinated and pressed their efforts to seize political power." Gardner, *supra* at 668. "Once in possession of power, factions could be expected to use it to pursue their own private self-interest at the expense of the common good, a course of behavior that political theorists since Aristotle have judged to be a defining characteristic of bad government." *Id.*

This "antipathy" for political parties played a central role in the drafting of the Elections Clause, in particular: the most hotly contested issue at the constitutional convention regarding the Election Clause dealt with whether, and to what extent, the federal government should be empowered to displace the States' authority to administer and regulate elections. On the one hand, James Madison argued that "the Legislatures of the States ought not to have the uncontrouled right of regulating the times places and manner of holding elections [as i]t was impossible to foresee all the abuses that might be made of the discretionary power." *Debates* at 423. "Whenever the State Legislatures had a favorite measure to carry, they would take care so *to mould their regulations as to favor the candidates they wished to succeed*,"

> to mitigate and assuage it. A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.

George Washington, Farewell Address (1796).

Madison explained. *Id.* at 424 (emphasis added). Likewise, Alexander Hamilton argued that the federal government should have some supervisory authority over the States' regulation of elections because there was no reason to believe that "it is less probable that *a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors*, than that a similar spirit should take possession of the representatives of thirteen States, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests." The Federalist No. 61, at 342 (emphasis added).

On the other hand, delegates who opposed federal intrusion on state regulation of elections saw such intrusion "as an avenue through which Congress might perpetuate itself in power or . . . *institute unfair at-large voting methods in the states so as to favor particular interests*." Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1036 (2005) (emphasis added); Br. of *Amici Curiae* Historians in Supp. of Appellees ("Historians' Br.") at 14, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017) ("Importantly, delegates arguing against Madison['s position on the Elections Clause] did not claim that such entrenchment was a state's right or somehow acceptable—rather, they countered that the greater fear was that Congress might abuse its power to entrench itself."). Thus, although the delegates disagreed as to whether, and to what extent, to place authority over the regulation of congressional elections in the federal government, they were *united* in their view that the Constitution should be drafted

to minimize the possibility that political bodies controlled by partisan "factions" would adopt electoral regulations designed to favor the controlling party. *See* Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 Harv. L. Rev. 1196, 1201 (2004). Put differently, the founders disagreed as to whether empowering the federal government to establish election regulations or devolving such power to the States was more likely to forestall the universally feared abuse of such regulations by political bodies—and political parties controlling such bodies, in particular—but they *agreed* that the Elections Clause should be written so as to prevent the enactment of election regulations motivated by invidious partisanship. More significantly, due to the framers' antipathy for political parties, the Constitution as whole—not just the Elections Clause— "was designed to discourage [political parties'] emergence." Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 81 (2004).

Accordingly, the vehement and universal condemnation of political parties by the individuals responsible for drafting and initially implementing the Constitution—including in their debates regarding the Elections Clause—contradicts Legislative Defendants' claim that the Elections Clause's assignment of election regulation to political bodies amounts to constitutional acquiescence in invidiously partisan election regulations, like the 2016 Plan. There is a wide gulf between legislative mapdrawers taking into account *political* considerations in drawing districting lines—as the Election Clause contemplates—and *partisan*

legislative mapdrawers seeking to subordinate the interests of supporters of a rival party and entrench their fellow partisans in power, *see infra* Part II.B.2.a.iii—as the General Assembly did here and as Washington, Madison, and Hamilton warned against. Put differently, that the Elections Clause contemplates election regulations based, at least in part, on *political* considerations in no way proves that it contemplates election regulations enacted for *partisan advantage*, particularly when the Framers expressly sought to discourage the formation of political parties.

As to Legislative Defendants' related contention that questions of election regulation are "best left to the political braches" because "nothing in the Constitution gives unelected judges the authority to make . . . policy decisions overruling the decisions by elected representatives," Leg. Defs.' FOF 93, 95, that contention runs squarely into an unbroken wall of Supreme Court precedent dating back decades striking down as unconstitutional numerous state and federal election regulations—and congressional districting plans and election regulations, in particular—even though the Constitution assigns primary authority over election regulation to the political branches. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014); *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013); *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Cook v. Gralike*, 531 U.S. 510 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779

(1995); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

As the *Wesberry* Court explained in rejecting an identical argument, "since our decision in *Marbury v. Madison*," it has been recognized that federal courts have the "power . . . to protect the constitutional rights of individuals from legislative destruction," including the destruction of constitutional rights through discriminatory election regulations. 376 U.S. at 6-7. Indeed, "the need for judicial review is *at its most urgent* in [such] cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) (emphasis added).

Legislative Defendants offer no argument, nor have we identified any, as to why the conduct at issue here—a controlling party in a state legislative body enacting an election regulation designed to subordinate the interests of supporters of the party's rival and cement itself in power—should be treated as an exception to this long-recognized and -exercised role for federal courts to ensure that state and federal election laws do not violate the Constitution. Notably, the Supreme Court refused to except several of the election regulations struck down above from constitutional scrutiny, notwithstanding that the political branches enacted those regulations based on

a good faith, if ultimately constitutionally mistaken, belief that the regulations would advance democratic and public interests. *See, e.g.*, *Shelby Cty.*, 570 U.S. at 535 (striking down provision in Voting Rights Act of 1965, which Congress enacted "to address entrenched racial discrimination in voting, an insidious and pervasive evil which had been perpetuated in certain parts of the country through unremitting and ingenious defiance of the Constitution" (internal quotation marks omitted)); *Thornton*, 514 U.S. at 783-84 (striking down provision in Arkansas Constitution establishing term limits for members of the State's congressional delegation because "[t]he people of Arkansas find and declare that . . . entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers"); *Buckley*, 424 U.S. at 26-27 (striking down several provisions in the Federal Election Campaign Act of 1971, which Congress enacted to "limit the actuality and appearance of corruption" resulting from large political donations and to "equalize the relative ability of all citizens to affect the outcome of elections").

By contrast, Legislative Defendants do not argue—and never have argued—that the 2016 Plan's express partisan discrimination advances *any* democratic, constitutional, or public interest. Nor could they. Neither the Supreme Court nor any lower court has recognized any such interest furthered by partisan gerrymandering—"the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg.*, 135 S. Ct. at 2658. And as explained above,

partisan gerrymandering runs contrary to numerous fundamental democratic principles and individual rights enshrined in the Constitution. *See supra* Part II.B.1. Given (1) that the Supreme Court routinely strikes down state and federal election regulations that violate the Constitution and (2) that the Court does so even in the case of regulations adopted by the political branches to further democratic and public interests, we see no reason why the Court would create a special exception from constitutional scrutiny for election regulations, like partisan gerrymanders, enacted for an invidious purpose and which do not purport to advance any democratic or public interest. Accordingly, we decline Legislative Defendants' invitation to create such a special exception.

ii.

Having rejected Legislative Defendants' Elections Clause argument, we turn to their related contention that founding era practice indicates that the founding generation viewed some amount of partisan gerrymandering as constitutionally permissible. Setting aside the legal question of whether any approach to constitutional interpretation—including approaches grounded in ascertaining the original understanding or meaning of the Constitution—would privilege historical practice over the uniform and express statements of the Framers condemning parties and partisan election regulations, the historical evidence does not bear the weight Legislative Defendants claim.

As to the historical pedigree of gerrymanders, like the plurality in *Vieth*, we note that gerrymanders date to the colonial era. *See* Leg. Defs.' Br. 17; 541 U.S. at

274 (plurality op.). And without question, several notorious gerrymanders were drawn soon after the Founding, including the "salamander"-shaped state legislative district attributed to Massachusetts Governor Elbridge Gerry in 1812 that gave rise to the term "gerrymander." *Vieth*, 541 U.S. at 274; *see* Engstrom, *supra* at 21 ("Partisan collisions over districting pervaded the early republic, and even had antecedents in the colonial legislatures"). State legislatures gerrymandered state legislative and congressional districts to favor one candidate at the expense of another in a variety of ways: through the manipulation of district lines; by using regional or state-wide, multi-member districts, as opposed to single-member districts; and, *most commonly*, by creating districts with unequal population. Engstrom, *supra* at 22-23.

But while some amount of gerrymandering occurred in the founding era, the historical evidence does not reveal that *partisan* gerrymandering—the drawing of districts to subordinate supporters of disfavored party and entrench a favored party in power—was so widespread as to indicate that the founding generation, contrary to the express objections of the framers, viewed some amount of partisan gerrymandering as permissible. In particular, "an organized political party system did not become a recognized and accepted feature of the American political system until the Jacksonian period." Levinson & Pildes, *supra* at 2320-21; *see* James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation,"* 7 Mich. J. of Race & L. 357, 427 (2002) ("Political affiliations initially

were much more informal and localized, and did not evolve into the more organized form we commonly associate with parties until the Jacksonian Era in the 1830s."). And as late as 1824, a two-party system had emerged in only *ten percent* of the states, Engstrom, *supra* at 44, meaning that gerrymandering by one party to minimize or diminish the electoral prospects of the candidates of an opposition party—the conduct at issue here—could not have occurred in the vast majority of the country for several decades after the Constitution was ratified.

In the small minority of states in which the two-party system was sufficiently well-established to give rise to the enactment of partisan gerrymanders, such gerrymanders were widely criticized as antidemocratic and unconstitutional. For example, the newspaper cartoon that coined the term "Gerry-Mander" described partisan redistricting as "a grievous wound on the Constitution,—it in fact subverts and *changes our form of Government*, which ceases to be *Republican* as long as an *Aristocratic* House of Lords under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the *Majority*." *The Gerry-Mander, or Essex South District Formed into a Monster!*, Salem Gazette, Apr. 2, 1813. Numerous other Nineteenth-Century partisan gerrymanders, most commonly accomplished through malapportionment, faced similar condemnation from politicians, the press, the judiciary, and the public. *See* Historians' Br. at 23-34.

Even if founding-era practice did support Legislative Defendants' assertion that some degree of partisan gerrymandering was viewed as permissible—

which it does not—long-standing, and even widespread, historical practice does not immunize governmental action from constitutional scrutiny. *See, e.g.*, *Citizens United*, 558 U.S. at 365 (striking down federal statute prohibiting electioneering communications by corporations, in part, on grounds that statute unconstitutionally discriminated against corporate entities, notwithstanding that laws had been in place for approximately 100 years constraining the political speech of corporations[21]); *Reynolds*, 377 U.S. at 582 (holding that malapportionment of state legislative districts violates Equal Protection Clause, notwithstanding that malapportionment was widespread in the Nineteenth and early Twentieth Centuries). That is particularly true when, as here, the legal bases for challenging the conduct were unavailable at the time of the Founding. *See id.* The Equal Protection Clause, which fundamentally altered the relationship between the States and the federal government, post-dates the founding era by decades. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) ("There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."); *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 715 (4th Cir. 2016) (Wilkinson, J.) ("Of course, the Reconstruction Amendments . . . materially altered the division of labor [between the federal government

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[21] *See id.* at 394 (Stevens, J., dissenting) (noting that "Congress ha[d] placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907")

and the States] established by the Framers for the regulation of elections."). Likewise, the Supreme Court did not recognize the incorporation of the First Amendment against the States through the Fourteenth Amendment until 1943. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). And until the Reconstruction Congress adopted Section 1983, there was no mechanism for a plaintiff to challenge a congressional redistricting plan as a partisan gerrymander under Article I or any other federal constitutional provision. *See* The Enforcement Act of 1871, 17 Stat. 13 (1871), *codified as amended at* 42 U.S.C. § 1983.

Accordingly, even if some degree of partisan gerrymandering had been acceptable during the founding era, that does not mean that the ratification of the Fourteenth Amendment and the incorporation of the First Amendment against the States did not subsequently render unconstitutional the drawing of district lines to frustrate the electoral power of supporters of a disfavored party. That is precisely what the Supreme Court concluded in holding that racial gerrymandering and malapportionment violated the Constitution, notwithstanding that both practices were widespread during the Nineteenth and early Twentieth Centuries. *See Reynolds*, 377 U.S. at 556 n.30, 567 n.43; *Gomillion v. Lightfoot*, 364 U.S. 339, 345-46 (1960).

iii.

Legislative Defendants' contention that the Supreme Court has sanctioned some degree of partisan gerrymandering—the drawing of district lines to undermine the electoral prospects of

supporters of candidates of a disfavored party—fares no better. To be sure, the Supreme Court has recognized certain *purposes* for which a state redistricting body may take into account political data or partisan considerations in drawing district lines. For example, in appropriate circumstances, a legislature may draw district lines to avoid the pairing of incumbents. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Likewise, the Supreme Court has held that a state redistricting body does not violate the Constitution by seeking "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Gaffney*, 412 U.S. at 752. And the Supreme Court has recognized that a redistricting body may draw district lines to respect political subdivisions or maintain "communities of interest." *Abrams v. Johnson*, 521 U.S. 74, 100 (1997).

But the Supreme Court's acceptance of state legislatures' reliance on partisan considerations and political data for certain purposes does not establish that a state legislature may pursue *any* political or partisan objective, as Legislative Defendants contend. In particular, the Supreme Court never has recognized that a legislature may draw district lines for the purpose of diminishing or minimizing the voting strength of supporters of a particular party or citizens who previously voted for representatives of a particular party—the legislative action challenged here. On the contrary, the Supreme Court recently held that such efforts are "incompatible with democratic principles." *Ariz. State Leg.*, 135 S. Ct. at 2658 (alteration omitted); *see also Reynolds*, 377 U.S. at 578-79 (condemning "[i]ndiscriminate districting,

without any regard for political subdivision or natural or historical boundary lines, [as] little more than an *open invitation to partisan gerrymandering*" (emphasis added)). And in approving the "proportionality" gerrymander in *Gaffney*, the Court expressly distinguished gerrymanders that seek "to minimize or eliminate the political strength of any group or party."[22] 412 U.S. at 754; *see also id.* at 751 ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to minimize or cancel out the voting strength of racial *or political* elements of the voting population." (emphasis added) (internal quotation marks omitted)). Likewise, the Supreme Court did not include burdening or punishing citizens for voting for candidates from an opposing party among its list of "legitimate" redistricting factors that justify deviating from population equality in congressional districts. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306-07 (2016).

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[22] For this reason, Legislative Defendants misplace reliance on the Supreme Court's decision in *Easley*. Leg. Defs.' Br. 6. Unlike the 2016 Plan, which was drawn by a Republican-controlled General Assembly to disfavor supporters of Democratic candidates, *see supra* Part I.B.; *infra* Part III.A.1.i, the districting plan at issue in *Easley* was drawn by a politically divided General Assembly to "fairly allocate political power to the parties in accordance with their voting strength," *Gaffney*, 412 U.S. at 754; *see also Cromartie*, 133 F. Supp. 2d at 412-13; *id.* at 423-24 (Thornburg, J. dissenting). Accordingly, the districting plan at issue in *Easley* advanced a recognized legitimate districting objective.

In sum, neither the constitutional delegation of redistricting to political bodies, nor historical practice, nor Supreme Court precedent supports Legislative Defendants' assertion that it is sometimes permissible for a state redistricting body to draw district lines for the sole purpose of diminishing the electoral power of voters who supported or are likely to support a disfavored party or candidate. Because the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering, we believe a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an "acceptable" level of partisan gerrymandering from "excessive" partisan gerrymandering. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment) (recommending against "a standard that turns on whether partisan interests in the redistricting process were excessive" because a government body is "culpable" regardless of whether it seeks to maximize its partisan advantage or "proceeds by a more subtle effort, capturing less than all the seats in each State"). Rather, the framework should distinguish partisan gerrymandering from the results of legitimate districting objectives, including those objectives that take into account political data or permissible partisan considerations. Put differently, "[a] determination that a gerrymander violates the law must rest . . . on a conclusion that [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. As explained below, we conclude that Plaintiffs' proposed legal frameworks and supporting evidence do just that.

That being said, our conclusion that twelve of the thirteen districts in the 2016 Plan violate the Equal Protection Clause *does not rest* on our determination that States lack authority to engage in partisan gerrymandering—the intentional drawing of district lines to undermine the electoral prospects of candidates of a disfavored party and entrench a favored party in power—in drawing congressional districts. In particular, we assume that a congressional district amounts to an unconstitutional partisan gerrymander *only if* the legislative body's *predominant* purpose in drawing the district was to subordinate the interests of supporters of a disfavored party and entrench a representative from a favored party in power. *See infra* Part III.A.1. Accordingly, under the standard on which we rely on to strike down those twelve districts, a state legislative body may engage in some degree of partisan gerrymandering, so long as it was not predominantly motivated by invidious partisan considerations.

Notably, the Supreme Court has treated predominance as a judicially manageable standard in the gerrymandering context. In particular, the Court has endorsed predominance as the standard for determining how much consideration of race is "too much" in the drawing of legislative district lines. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (recognizing that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make," but nonetheless holding that a racial gerrymandering plaintiff may prevail by showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

particular district"). Given that *Gill* expressly analogized partisan gerrymandering claims to racial gerrymandering claims, 138 S. Ct. at 1930, and that predominance is a judicially manageable standard for distinguishing acceptable consideration of race from "too much" consideration of race, the predominance standard we apply constitutes a judicially manageable standard from distinguishing "too much" partisan gerrymandering from an acceptable level of partisan gerrymandering, to the extent that partisan gerrymandering ever is constitutionally acceptable.

b. The Judicial Manageability of Plaintiffs' Empirical Analyses

Legislative Defendants next argue that the empirical analyses introduced by Plaintiffs do not offer a judicially manageable standard for adjudicating partisan gerrymandering claims, but instead are "a smorgasbord of alleged 'social science' theories" that lack any constitutional basis. Leg. Defs.' Br. 2. As detailed more fully below, Plaintiffs offer two groups of empirical analyses to support their Equal Protection and First Amendment claims. The first group of analyses relies on thousands of computer-generated districting plans that conform to most traditional redistricting criteria, including those relied on by the General Assembly in drawing the 2016 Plan. According to Plaintiffs, when these plans are evaluated using the precinct-by-precinct results of recent North Carolina elections, the 2016 Plan is an "extreme statistical outlier" with regard to the degree to which it disfavors voters who oppose Republican candidates. *See infra* Parts III.B.1.a-b. Plaintiffs assert that these analyses prove that the General

Assembly intended to burden voters who supported non-Republican candidates, that the 2016 Plan had the effect of burdening such voters, and that that effect was not attributable to another legitimate redistricting objective. The second group of analyses assess the 2016 Plan's "partisan symmetry"—whether the plan allows supporters of the two principal parties to translate their votes into representation with equal effectiveness. *See infra* Part III.B.1.b.ii. According to Plaintiffs, a variety of measures of the 2016 Plan's partisan symmetry reveal that, throughout the life of the plan, supporters of non-Republican candidates will likely have a significantly more difficult time translating their votes into representation.

Legislative Defendants are correct that none of these empirical analyses appear in the Constitution. But Plaintiffs need not show that a particular empirical analysis or statistical measure appears in the Constitution to establish that a judicially manageable standard exists to resolve their constitutional claims. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (holding that "an apportionment plan with a maximum population deviation under 10% falls within th[e] category" of "minor deviations . . . from mathematical equality among state legislative districts [that] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment," notwithstanding that the plain language of the Constitution references no such statistical threshold). Rather, Plaintiffs must identify cognizable constitutional standards to govern their claims, and provide credible *evidence* that Defendants have violated those standards. And contrary to Legislative

Defendants' assertions, Plaintiffs do not seek to constitutionalize any of the empirical analyses they have put forward to support their claims, nor does this Court do so. Instead, Plaintiffs argue that these analyses provide *evidence* that the 2016 Plan violates a number of well-established constitutional standards—that the government act impartially, not infringe the right to vote, not burden individuals based on the exercise of their rights to political speech and association, and not allow state legislatures to dictate electoral outcomes or interpose themselves between the voters and their representatives in Congress.

The Supreme Court long has relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law. In the context of the Equal Protection Clause, in particular, the Supreme Court has relied on statistical and social science evidence as proof that a government action was motivated by discriminatory intent or had a discriminatory effect—the same purposes for which Plaintiffs seek to use such evidence here. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court held that an ordinance providing a municipal board of supervisors with the discretion to grant or withhold its consent to use wooden buildings as laundries, although neutral on its face, was administered in a manner that discriminated on the basis of national origin, *id.* at 366, 374. As proof, the Court noted that the board withheld consent from 200 individuals, "all of whom happen to be Chinese subjects," whereas "eighty others, not Chinese subjects, [we]re permitted to carry

on the same business under similar conditions." *Id.* at 374.

Likewise, in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court cited numerous academic studies of the psychological impact of segregation on children and youth as evidence that "[s]eparate educational facilities are inherently unequal," and therefore violate the Equal Protection Clause, *id.* at 494-95 & n.11. And the Supreme Court has recognized that "[s]tatistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies." *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974). The Court also embraced the use of statistical evidence to determine whether a governmental body was justified, under the Fourteenth Amendment, in using "race-based measures to ameliorate the effects of past discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-77 (1989) (plurality op.); *see also id.* at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.").

The Supreme Court also has relied on statistical and social science evidence in cases involving voting rights and redistricting, in particular. For example, to support their racial gerrymandering claim, the plaintiffs in *Gomillion* alleged that the City of Tuskegee, Alabama, redrew its municipal boundaries "to remove from the city all save only four or five of its

400 Negro voters while not removing a single white voter or resident." 364 U.S. at 341. The Court concluded that the plaintiffs alleged adequate facts to support a claim under the Equal Protection Clause, explaining that "[i]f these allegations upon a trial remain uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a *mathematical demonstration*, that the legislation is solely concerned with segregating white and colored voters." *Id.* (emphasis added). More recently, the Court relied on statistical analyses to strike down as unconstitutional the coverage formula in Section 4(b) of the Voting Rights Act, citing evidence that the gap between white and black voter registration percentages had fallen substantially since Congress first adopted the coverage formula in 1965, as had the percentage of proposed voting changes facing objections from the Attorney General. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2626 (2013). And of particular note, in its decision holding that the 2011 Plan constituted a racial gerrymander, the Supreme Court in part relied on an expert statistical analysis—which found that the General Assembly disproportionately moved blacks into the racially gerrymandered districts, even when controlling for party registration—as proof that the General Assembly predominantly relied on race, rather than partisan considerations, in drawing district lines. *Cooper*, 137 S. Ct. at 1477-78.

Contrary to Legislative Defendants' assertion that Plaintiffs must identify a specific empirical test derived from the language of the Constitution to prove the existence of a judicially manageable standard to adjudicate their constitutional claims, in none of these

cases did the Supreme Court hold that the particular statistical or social science analyses upon which it relied had—or had to have—constitutional pedigree, or that the plaintiff had to identify a specific empirical threshold, across which the relevant constitutional provision would be violated. For example, the *Gomillion* Court did not state that a statistical analysis revealing that the municipal boundary plan had fenced out, say, only 80 percent of blacks, as opposed to 99 percent, would be inadequate to establish a constitutional violation. Nor did the Court require that the plaintiffs identify the particular percentage of fenced-out blacks at which a boundary plan would violate the Equal Protection Clause. Likewise, the *Brown* Court did not point to any specific constitutional basis for its reliance on psychological research demonstrating the impact of segregation on children and youth, nor did it require the plaintiffs to identify a specific degree of adverse psychological impact necessary to support an Equal Protection claim. And the *Shelby County* Court did not require the states seeking invalidation of the coverage formula to identify a specific gap between white and black voter registration percentages or a specific percentage of proposed voting changes facing objections from the Attorney General at which Congress would be constitutionally barred from displacing the states' rights to administer elections. Rather, in all of the cases, the Supreme Court treated the empirical analyses as *evidence* of a violation of an established constitutional standard—that governmental entities must act impartially, that governmental entities must not invidiously discriminate based on race or national origin, that the federal government may not interfere

in traditional areas of state authority absent a compelling justification, and that the federal government must have a legitimate reason for subjecting the laws of certain states to more intrusive scrutiny than those of other states.

Contrary to Legislative Defendants' assertion, therefore, courts are not foreclosed from considering statistical analyses and "'social science' theories" as evidence of a violation of a constitutional or statutory standard. Leg. Defs.' Br. 2. But that does not mean courts must blindly accept such analyses either. On the contrary, in all cases courts play an essential gatekeeping role in ensuring that an expert analysis—including each analysis introduced by Plaintiffs and Legislative Defendants—is sufficiently reliable, in that it "is based on sufficient facts or data," "is the product of reliable principles and methods," and the principles and methods have "been reliably applied . . . to the facts of the case." Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). And when, as here, the court also serves as the finder-of-fact, the court must carefully weigh empirical evidence, and discount such evidence's probative value if it fails to address the relevant question, lacks rigor, is contradicted by more reliable and compelling evidence, or is otherwise unworthy of substantial weight.

Here, in arguing that Plaintiffs' empirical evidence fails to provide a judicially manageable standard for adjudicating their claims, Legislative Defendants identify what they see as a number of specific flaws, limitations, and weaknesses of that evidence—that the partisan asymmetry measures

cannot be applied in all states, that the simulated maps fail to take into account certain criteria on which the General Assembly relied, that several of the analyses rely on hypothetical election results, to name a few. We find these objections either unfounded or insufficiently compelling to overcome the significant probative value of the analyses, *see infra* Part III. Tellingly, as evidenced by their consistent placement of "social science" in quotation marks and their characterization of Plaintiffs' evidence as "academically inspired," Legislative Defendants' judicial manageability argument more aptly rests on the belief that we should dismiss Plaintiffs' actions as nonjusticiable simply because much of the evidence upon which Plaintiffs' rely has its genesis in academic research and is the product of an effort by scholars to apply novel, and sometimes complex, methodological approaches to address a previously intractable problem. Such an argument must fail as a matter of fact and law.

As a matter of fact, we recognize that the application of Plaintiffs' empirical methods to redistricting, to date, has largely occurred in academic research. *But see Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) (relying on analysis of hundreds of computer-simulated districting plans as evidence that population deviations in municipal districting plan were attributable to illegitimate partisan purpose rather than legitimate redistricting objectives); *Whitford*, 218 F. Supp. 3d at 890-906 (relying on predictions of vote percentages based on historical election data, a "uniform swing analysis," and a measure of partisan asymmetry to conclude Wisconsin

legislative redistricting plan adversely affected representational rights of non-Republican voters). But the empirical methods themselves have been developed and broadly applied inside and outside of academia to address a wide variety of problems. For example, Dr. Chen testified that the computational algorithms and statistical theories he used in generating simulated redistricting plans to assess the partisan performance of the 2016 Plan are used by logistics companies to optimize their distribution chains. Trial Tr. II, at 25:2-24. And other empirical methods on which Plaintiffs' expert witnesses relied are broadly used by governments, the business community, and academia in a variety of other fields ranging from national defense, to public safety, to finance, and to health care. Trial Tr. I, at 41:4-8; Br. *Amicus Curiae* Eric S. Lander in Supp. of Appellees 23-25, *Gill v. Whitford*, No. 16-1161 (S. Ct. Aug. 31, 2017).

To hold that such widely used, and relied upon, methods cannot provide a judicially manageable standard for adjudicating Plaintiffs' partisan gerrymandering claims would be to admit that the judiciary lacks the competence—or willingness—to keep pace with the technical advances that simultaneously facilitate such invidious partisanship and provide an opportunity to remedy it. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (explaining that advances in technology in redistricting pose both a "threat"—because technology increases "the temptation to use partisan favoritism in districting"—and a "promise"—because "these new technologies may produce new methods of analysis that make more evident the precise nature of the

burdens gerrymanders impose on the representational rights of voters and parties"); *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past."). But "the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" *Reynolds*, 377 U.S. at 563 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Accordingly, the judiciary likewise has an obligation to keep pace with technological and methodological advances so it can effectively fulfill its constitutional role to police ever-more sophisticated modes of discrimination.

As a legal matter, the empirical analyses' sophistication and genesis in academic research also do not preclude this Court from concluding that Plaintiffs' claims are judicially manageable. To be sure, the statistical analyses and social science theories used by Plaintiffs' experts are more advanced than the bare descriptive statistics upon which the Supreme Court relied in *Yick Wo*, *Gomillion*, and *Shelby County*. But the Court has not hesitated to accept sophisticated or novel empirical methods as evidence. For example, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court endorsed the use of "extreme case analysis and bivariate ecological regression analysis," *id.* 52-53, in determining whether an electoral district exhibits "racially polarized" voting, within the meaning of Section 2 of the Voting Rights Act, *id.* at 61 (plurality op.). Notably, both forms of analysis derived from social science literature, as did the definition of "racially polarized" voting adopted by the Court. *Id.* at 53 nn.20-21. Outside of the voting context, the Supreme Court has embraced new social science theories and

empirical analyses to resolve a variety of constitutional and statutory disputes. *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280-81, 2285-87 (2018) (relying extensively on theoretical economic literature in holding that court reviewing antitrust challenge to a two-sided transaction platform must consider "both sides" of the market in "rule of reason" analysis); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881-82, 889-92 (2007) (appealing to "the theoretical literature" and a variety of economic analyses to support its decision to reverse century-old precedent treating vertical price restraints as a per se violation of the Sherman Act); *Utah v. Evans*, 536 U.S. 452, 465 (2002) (holding that Census Bureau's use of "hot-deck imputation" to conduct decennial census did not violate census statute or the Constitution, relying on the "technical literature" to determine whether hot-deck imputation constitutes "sampling"); *Maryland v. Craig*, 497 U.S. 836, 855, 857 (1990) (appealing to "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court" in holding that the Confrontation Clause did not categorically prohibit state laws permitting victims of child abuse to testify outside the presence of their alleged abuser).

As the judiciary's understanding and application of statistical and empirical methods have increased, it has come to appreciate that the attractive simplicity of less sophisticated methods—like the descriptive statistics relied on in *Yick Wo*, *Gomillion*, and *Shelby County*—comes with costs. In particular, descriptive statistics rarely provide, as a statistical matter, a basis for making causal inferences. *See* Jeffrey M.

Wooldridge, Econometric Analysis of Cross Section and Panel Data § 1.1 (2002) ("The notion of ceteris paribus—that is, holding all other (relevant) factors fixed—is the crux of establishing a causal relationship. Simply finding that two variables are correlated is rarely enough to conclude that a change in one variable causes a change in another."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 800 (2011) ("[C]orrelation [is] not evidence of causation."). For example, although descriptive statistics may reveal that an allegedly disfavored group of employees has a lower average salary than another group, that does not mean that the average salary difference is attributable to invidious discrimination, as the allegedly disfavored group's lower average salary may reflect a variety of nondiscriminatory reasons that can be accounted for adequately only by using more advanced statistical methods. *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988) (Posner, J.) ("Correlation is not causation."); *Ste. Marie v. E. R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981) (Friendly, J.).

Advances in statistical and empirical theory and application, therefore, have the potential to allow parties, experts, and amici to provide courts with more rigorous and probative evidence, thereby decreasing the risk that courts will render a decision that later proves to have rested on an errant empirical analysis. Consequently, it makes no practical or legal sense for courts to close their eyes to new scientific or statistical methods—as Legislative Defendants implicitly suggest—to prove or disprove claims premised on established legal standards. As Justice Kennedy recognized in *Vieth*, "new technologies may produce new methods of analysis that make more evident the

precise nature of the burdens gerrymanders impose on the representational rights of voters and parties." 541 U.S. at 312-13. That is precisely what we find Plaintiffs' empirical methods have done. *See infra* Part III.B.

More fundamentally, there is no constitutional basis for dismissing Plaintiffs' claims as judicially unmanageable—not because they are irrelevant, unreliable, or incorrectly applied, but simply because they rely on new, sophisticated empirical methods that derive from academic research. The Constitution does not require the federal courts to act like Galileo's Inquisition and enjoin consideration of new academic research, and the knowledge gained therefrom, simply because such research provides a new understanding of how to give effect to our long-established governing principles. *See* Timothy Ferris, Coming of Age in the Milky Way 97-101 (1989). That is not what the founding generation did when it adopted a Constitution grounded in the then-untested political theories of Locke, Montesquieu, and Rousseau. That is not what the Supreme Court did when it recognized that advances in our understanding of psychology had proven that separate could not be equal. And that is not what we do here.

Legislative Defendants' characterization of the empirical evidence introduced by Plaintiffs' as a "smorgasbord" also suggests that Legislative Defendants view the sheer number of analyses upon which Plaintiffs' rely as rendering their claims judicially unmanageable. Leg. Defs.' Br. 2. But when a variety of different pieces of evidence, empirical or otherwise, all point to the same conclusion—as is the

case here—courts have *greater* confidence in the correctness of the conclusion because even if one piece of evidence is subsequently found infirm other probative evidence remains. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 293, 296 (1999) (holding that exculpatory evidence withheld by government was not "material" for purposes of *Brady v. Maryland*, 373 U.S. 83 (1963), when "there was considerable forensic and other physical evidence linking [the defendant] to the crime"). Even if none of the analyses introduced by Plaintiffs could, by itself, provide definitive evidence that the 2016 Plan constitutes an unconstitutional partisan gerrymander—which we do not necessarily believe is the case—"[a] case of discrimination can . . . be made by assembling a number of pieces of evidence, none meaningful in itself, consistent with the proposition of statistical theory that a number of observations, each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: a number of weak proofs can add up to a strong proof." *Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (Posner, J.) (internal quotation marks omitted).

In sum, Plaintiffs' reliance on academically derived, social science evidence to support their partisan gerrymandering claims does not render their claims judicially unmanageable.

c. Congress's Decision To Require Single-Member Districts

Finally, Legislative Defendants contend that rejecting their nonjusticiability argument would be tantamount to nullifying the political branches'

decision to require representatives to be elected from single-member districts. *See* Leg. Defs.' Br. 13 ("[W]hat plaintiffs are asking the Court to do is *sub silentio* eliminate district-based congressional redistricting in North Carolina."). Again, we disagree.

By statute, each State must "establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative." 2 U.S.C. § 2c. Consistent with that statutory obligation, our invalidation of the 2016 Plan as an unconstitutional partisan gerrymander in no way impacts North Carolina's authority—indeed, statutory obligation—to draw a congressional redistricting plan using single-member districts. Rather, it simply requires that the General Assembly, in drawing congressional district lines, not seek to diminish or minimize the electoral power of voters who supported or are likely to support candidates of a particular party.

Of equal significance, judicial restriction of partisan gerrymandering advances the purpose behind single-member districts, rather than undermines it. The Supreme Court long has recognized that the "basic aim" of requiring districting is to "achiev[e] . . . fair and effective representations for all citizens." *Reynolds*, 377 U.S. at 565-66. To that end, "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney*, 412 U.S. at 753. The use of districting,

as opposed to elections at large, serves a number of specific beneficial purposes. For example, unlike at-large electoral systems, which in politically divided states can lead to a wholesale change in the state's congressional delegation with only a small shift in votes between parties, *see* Engstrom, *supra* at 22-28, single-member districting systems "maintain[] relatively stable legislatures in which a minority party retains significant representation," *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). Additionally, single-member districts "diminish the need for coalition governments" and thereby "make[] it easier for voters to identify which party is responsible for government decision-making (and which rascals to throw out)." *Id.* at 357. And single-member districts make it easier for a representative to understand the interests of her constituency and act on behalf of those interests because she serves a limited group of constituents, rather than the entire state. S. Rep. 90-291, at 28 (1967) (Individual Views of Sen. Bayh). The use of single-member districts comes with democratic costs, as well. Most notably, the stability achieved by single-member districts necessarily entails that a legislative body will be less responsive to shifts in popular will.

Our Supreme Court defines "partisan gerrymandering" as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Leg.*, 135 S. Ct. at 2658. Thus, by definition, partisan gerrymandering—not judicial oversight of such gerrymandering—contravenes the purpose of district-based congressional districting because it is intended *not* to "achiev[e]. . . fair and effective representations for *all* citizens," *Reynolds*, 377 U.S. at 565-66

(emphasis added), and *not* to produce a "more 'politically fair'" result, *Gaffney*, 412 U.S. at 753. And partisan gerrymandering undermines several of the specific benefits of single-member districts. It poses a risk that "a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there." *LULAC*, 548 U.S. at 470 (Stevens, J., concurring in part and dissenting in part). And by "entrenching" a party in power, *Ariz. State Leg.*, 135 S. Ct. at 2658, even in the face of shifting voter preferences, *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part), partisan gerrymandering makes it harder for voters "to throw the rascals out," *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting) (internal quotation marks omitted), magnifying the downsides to the use of single-member districts.

Not only does partisan gerrymandering contradict the purpose behind single-member districting—and enhance its drawbacks—the legislative history of Section 2c reveals that Congress did not intend for the statute to empower state legislatures to engage in partisan gerrymandering. Congress adopted the current version of the single-member district statute in 1967, in the wake of the Supreme Court's invalidation of widespread malapportionment of congressional districts in *Wesberry*. S. Rep. 90-291, at 2. The draft of the statute reported out of the House required that congressional districts be "in as reasonably a compact form as the State finds practicable." *Id.* at 4. The House intended for the compactness requirement to reflect a "congressional policy against gerrymandering" and to "prevent gerrymandering," including gerrymandering to

"attempt 'to minimize or cancel out the voting strength of racial or *political elements* of the voting population.'" *Id.* (emphasis added) (quoting *Burns v. Richardson*, 384 U.S. 73, 89 (1965)). Congress removed the compactness provision from the final version of the statute after a group of senators expressed concern that the ambiguity of the reasonableness standard would be "an invitation to gerrymander, especially to gerrymander at the expense of urban minority groups." *Id.* at 19 (Minority Views of Sens. Kennedy, Dodd, Hart, and Tydings). Accordingly, although legislators were divided as to whether the compactness provision would be an effective tool to combat gerrymandering, they agreed that the statute should not serve as an "invitation" to state legislatures to engage in gerrymandering, as we find Legislative Defendants did here.

* * * * *

In sum, we conclude that Plaintiffs have standing to lodge a partisan vote dilution challenge under the Equal Protection Clause to each of the districts in the 2016 Plan and to assert claims under the First Amendment and Article I challenging the 2016 Plan as a whole. We further hold that each of Plaintiffs' claims is justiciable, and, in reaching that conclusion, we reject Legislative Defendants' argument that Plaintiffs have failed to provide this Court with a judicially manageable standard for resolving their claims.

III. Equal Protection

Having disposed of Legislative Defendants' standing and justiciability arguments, we now turn to Plaintiffs' claims under the Equal Protection Clause of

the Fourteenth Amendment. The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Partisan gerrymandering runs afoul of the Equal Protection Clause because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party. *Cf. Lehr v. Robertson*, 463 U.S. 248, 265 (1983) ("The concept of equal justice under law requires the State to govern impartially."). Put differently, a redistricting plan violates the Equal Protection Clause if it "serve[s] *no purpose* other than to favor one segment—whether racial, ethnic, religious, economic or *political*—that may occupy a position of strength . . . or to disadvantage a politically weak segment." *Karcher*, 462 U.S. at 748 (Stevens, J. concurring).

A. Background Law

As this Court explained in denying Defendants' motions to dismiss, the Supreme Court's splintered partisan gerrymandering decisions establish that in order to prove a prima facie partisan gerrymandering claim under the Equal Protection Clause, "a plaintiff must show both [1] discriminatory intent and [2] discriminatory effects." *Common Cause*, 240 F. Supp. 3d at 387 (citing *Bandemer*, 478 U.S. at 127 (plurality op.); *id.* at 161 (Powell, J., concurring and dissenting)). Plaintiffs further propose—and we agree—that if Plaintiffs establish that the 2016 Plan was enacted with discriminatory intent and resulted in

discriminatory effects, the plan will nonetheless survive constitutional scrutiny if its discriminatory effects are attributable to the state's political geography or another legitimate redistricting objective. League Br. 21; Common Cause Br. 17-19; *see also Bandemer*, 478 U.S. at 141-42 (plurality op.) (recognizing justification step); *cf. Whitford*, 218 F. Supp. 3d at 884 ("[T]he Equal Protection clause prohibit[s] a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.").

Importantly, because the injury giving rise to a partisan vote dilution claim is personal in nature, *Gill*, 138 S. Ct. at 1930 (majority op.), partisan vote dilution claims under the Equal Protection Clause, like racial gerrymandering claims, must proceed on a district-by-district basis. Accordingly, each of the three elements of a partisan vote dilution claim must be satisfied for each district. Although the three-step framework governing partisan gerrymandering claims under the Equal Protection Clause is not in dispute, neither the Supreme Court nor the parties agree as to the standard of proof for each of those elements—or whether Plaintiffs satisfied those standards—the questions to which we now turn.

1. Discriminatory Intent

The Supreme Court long has required that a plaintiff seeking relief under the Equal Protection Clause to establish that a challenged official action can "be traced to a . . . discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). The

discriminatory purpose or intent requirement extends to Equal Protection challenges to redistricting plans, in particular, including partisan gerrymandering challenges. *See, e.g.*, *Bandemer*, 478 U.S. at 127 (plurality op.); *id.* at 161 (Powell, J., concurring in part and dissenting in part); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *see also Cooper*, 137 S. Ct. at 1463 (holding that to establish a racial gerrymandering claim under the Equal Protection Clause, a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (internal quotation marks omitted)).

To establish a discriminatory purpose or intent, a plaintiff need not show that the discriminatory purpose is "express or appear[s] on the face of the statute." *Washington*, 426 U.S. at 241. Rather, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Id.* at 242; *see also Covington*, 138 S. Ct. at 2553 (affirming district court's finding, based on "circumstantial . . . evidence concerning the shape and demographics of [the challenged] districts," that race predominated in the drawing of district lines, notwithstanding that legislature expressly directed mapdrawers not to consider race in drawing the districts).

In determining whether an "invidious discriminatory purpose was a motivating factor" behind the challenged action, evidence that the impact of the challenged action falls "more heavily" on one group than another "may provide an important starting point." *Vill. of Arlington Heights v. Metro.*

Hous. Dev. Corp., 429 U.S. 252, 266 (1977). "Sometimes a clear pattern, unexplainable on grounds other than [invidious discrimination], emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* Likewise, "[t]he historical background of the decision" may be probative of discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes," including whether the legislative process involved "[d]epartures from the normal procedural sequence." *Id.* Additionally, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports." *Id.* at 268.

Although the discriminatory intent requirement and the forms of evidence probative of such intent are well-established, it remains unclear what *type* of intent a partisan gerrymandering plaintiff must prove. As explained above, there are a number of purposes for which a state redistricting body permissibly may rely on political data or take into account partisan considerations. *See supra* Part II.B.2.a.iii. Accordingly, a plaintiff in a partisan gerrymandering case cannot satisfy the discriminatory intent requirement simply by proving that the redistricting body intended to rely on political data or to take into account political or partisan considerations. Rather, the plaintiff must show that the redistricting body intended to apply partisan classifications "in an invidious manner or in a way

unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *id.* at 339 (Stevens, J., dissenting) (holding redistricting plan would violate Equal Protection Clause if it reflected "a naked desire to increase partisan strength"); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (defining an "invidious" classification as "a classification of persons undertaken for its own sake . . . inexplicable by anything but animus towards the class it affects"). To that end, a plaintiff satisfies the discriminatory purpose or intent requirement by introducing evidence establishing that the state redistricting body acted with an intent to "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg.*, 135 S. Ct. at 2658.

Another question bearing on the discriminatory intent requirement is what *level* of intent a plaintiff must prove to establish a partisan gerrymandering claim. Common Cause Plaintiffs assert that the degree of partisan intent motivating the drawing of the districting plan's lines determines the level of scrutiny under which a court must review the plan. Common Cause Br. 16-18. For example, if a partisan purpose "predominated" over other legitimate redistricting criteria, then the 2016 Plan warrants strict scrutiny, Common Cause Plaintiffs maintain. *Id.* at 17. If partisan advantage was only "a purpose" motivating the 2016 Plan, then, according to Common Cause Plaintiffs, the plan should be reviewed under the "sliding scale" standard of review set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Common Cause Br. 18. By contrast, League Plaintiffs assert that a plaintiff need not prove that invidious

partisanship "predominated" over other legitimate redistricting criteria, instead arguing that a partisan gerrymandering plaintiff will meet its burden under the intent prong if it proves that the redistricting body acted with the intent to "disadvantage[e] one party's (and favor[] the other party's) voters and candidates." League Br. at 5.

League Plaintiffs' position that a plaintiff asserting a partisan vote dilution claim under the Equal Protection Clause need not show that partisan considerations "predominated" over other legitimate, non-partisan redistricting criteria finds support in Supreme Court precedent. In *Bandemer*, the plurality opinion did not require that a plaintiff establish that the mapmakers were solely or primarily motivated by invidious partisanship, but instead required proof of "intentional discrimination against an identifiable political group." 478 U.S. at 127. And in describing the general intent requirement for Equal Protection claims in *Arlington Heights*, the Supreme Court held that a plaintiff generally need not prove that a legislature took a challenged action with the "sole," "dominant," or "primary" purpose of discriminating against an identifiable group. 429 U.S. at 265-66.

The Supreme Court, however, has recognized one exception to the general rule set forth in *Arlington Heights*: to establish a *Shaw*-type racial gerrymandering claim under the Fourteenth Amendment, a plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. There are compelling theoretical arguments

against extending the "predominance" requirement applicable in such racial gerrymandering actions to partisan gerrymandering claims. To begin, the Supreme Court expressly has characterized *Shaw*-type racial gerrymandering claims as "'analytically district' from a vote dilution claim." *Id.* at 911 (quoting *Shaw I*, 509 U.S. at 652). Because Plaintiffs' Equal Protection claim is grounded in a partisan vote dilution theory, there is good reason to question the applicability of precedent bearing on an "analytically distinct" form of claim.

More significantly, the constitutional violation in a *Shaw*-type racial gerrymandering case consists of "separat[ing] voters into different districts on the basis of race." *Shaw I*, 509 U.S. at 649. Accordingly, to state a prima facie case of racial gerrymandering a plaintiff *need not show* that a legislative mapdrawer segregated voters on the basis of race *to disadvantage members of one racial group relative to another*. *See Miller*, 515 U.S. at 904 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination . . . regardless of the race of those burdened or benefitted by a particular classification." (internal quotation marks omitted)); *Shaw I*, 509 U.S. at 650-51; *Covington*, 316 F.R.D. at 129 ("[A] finding that race was the predominant motive drawing a district does not . . . signify that the legislature acted . . . with discriminatory intent in its redistricting."). Notably, the Supreme Court expressly has distinguished *Shaw*-type racial gerrymandering claims from claims that a "State has enacted a particular voting scheme as a *purposeful device* 'to minimize or cancel out the voting potential of racial or ethnic minorities'"—*i.e.*

districting schemes that *invidiously* discriminate on the basis of race. *See Miller*, 515 U.S. at 911 (emphasis added) (quoting *Mobile v. Bolden*, 446 U.S. 55, 66 (1980), *superseded by statute on other grounds as recognized by Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)). In the latter type of cases, a plaintiff need not prove that the redistricting body's *invidious* purpose predominated. *See Bolden*, 446 U.S. at 66 (plurality op.).

Under the Supreme Court's definition of "partisan gerrymandering" a plaintiff must show that the legislative mapdrawer segregated voters on the basis of partisanship for an *invidious* purpose—to "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg.*, 135 S. Ct. at 2658. That a partisan gerrymandering plaintiff must meet the heightened burden of showing invidiousness weighs heavily against extending the predominance requirement for *Shaw*-type racial gerrymandering claims to partisan gerrymandering claims.

Nevertheless, in *Gill*, the Supreme Court expressly analogized partisan gerrymandering claims to *Shaw*-type racial gerrymandering claims and appealed to precedent regarding such claims in justifying its holding, 138 S. Ct. at 1930, suggesting that the Supreme Court may import into its partisan gerrymandering jurisprudence the predominance requirement it applies in *Shaw*-type racial gerrymandering cases. Accordingly, we assume that a plaintiff asserting a partisan vote dilution claim under the Equal Protection Clause faces the heightened burden of proving that a legislative mapdrawer's

predominant purpose in drawing the lines of a particular district was to "subordinate adherents of one political party and entrench a rival party in power."[23] *Ariz. State Leg.*, 135 S. Ct. at 2658.

2. Discriminatory Effects

The discriminatory effects prong is the principal reason the Supreme Court has failed to agree on a standard for proving a partisan gerrymandering claim.[24] For nearly two decades, the plurality opinion

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[23] Because we find that invidious partisanship *predominated* in the drawing of twelve the thirteen districts in the 2016 Plan, *see infra* Part III.B.2, Plaintiffs necessarily satisfy their burden under the intent prong regardless of whether the Supreme Court adopts the heightened predominance standard we assume applies.

[24] As a theoretical matter, there is good reason to question whether a partisan vote dilution plaintiff who has proven that a state districting body was predominantly motivated by invidious partisan considerations in drawing district lines should be required to demonstrate discriminatory effects. In particular, in *Shaw*-type racial gerrymandering claims—which do not require a showing of invidious intent and to which the *Gill* Court expressly appealed, *see supra* Part III.A.1—a plaintiff need not demonstrate that a districting plan's segregation of voters on basis of race yields discriminatory effects. *See Cooper*, 137 S. Ct. at 1464. Likewise, a plaintiff who has proven invidious racial gerrymandering need not show that such gerrymandering has resulted in discriminatory effects. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.").

Additionally, once a plaintiff proves that a state districting body acted with invidious discriminatory intent, a discriminatory effects requirement effectively obligates a court to determine

in *Bandemer* provided what was widely treated as the controlling test for determining whether a redistricting plan had the effect of discriminating against voters based on their partisan affiliation. *See, e.g.*, *Pope*, 809 F. Supp. at 395 ("[The *Bandemer*] plurality opinion must be considered controlling as the position which concurs in the judgment on the narrowest grounds."). In *Bandemer*, a group of Indiana Democrats sued Indiana state officials alleging that the State's decennial state legislative redistricting—which was enacted by a Republican-controlled legislature and approved by a Republican governor—violated the Equal Protection Clause by intentionally discriminating against Democrats, notwithstanding that the plan satisfied the one-person, one-vote requirement. 478 U.S. at 113-14 (plurality op.). As evidence of the districting plan's discriminatory effects, the plaintiffs alleged that the legislature drew district lines that packed Democratic voters into certain districts and fragmented Democratic votes in other districts in order to debase

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whether the body failed to achieve its intended goal. To do so, a plaintiff would seem to have to demonstrate either that the districting body was *not inept*—i.e. poorly implemented its predominant purpose in drawing the districting plan—or, alternatively, that the potential mutability of voter preferences *did not render futile* the districting body's effort to engage in invidious discrimination. We are not aware of any legal standard requiring a plaintiff to disprove that a legislative body was inept or intentionally engaged in a futile task. Notwithstanding these theoretical problems with the discriminatory effects requirement, we nevertheless assume *Bandemer* continues to control and that a partisan vote dilution plaintiff must prove that a districting plan drawn with invidious partisan intent yielded discriminatory effects.

Democratic voting strength. *Id.* at 115. Additionally, the legislature allegedly used multi-member districts to further diminish Democrats' voting strength. *Id.* In the first election following the redistricting, Democratic candidates received 51.9 percent of the vote but won 43 percent (43 of 100) of the seats in the state House. *Id.* In the Senate, Democratic candidates received 53.1 percent of the vote, and won 52 percent (13 of 25) of the seats up for election. *Id.*

Writing for a four-Justice plurality, Justice White stated that a partisan gerrymandering plaintiff must prove that it "has been unconstitutionally denied its chance to effectively influence the political process" or that the "electoral system [has been] arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132-33, 142-43. Because legislators are presumed to represent all of their constituents, "even in a safe district where the losing group loses election after election," a "mere lack of proportional representation will not be sufficient to prove unconstitutional representation." *Id.* at 132. Rather, a plaintiff must provide evidence "of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133.

Applying this test, the plurality concluded the plaintiffs failed to meet their burden. *Id.* at 134. In particular, the plurality stated that the results of a single election were insufficient to demonstrate that Indiana Democrats would be relegated to minority status throughout the decade, particularly because Indiana was a "swing [s]tate" and voters would

"sometimes prefer Democratic candidates, and sometimes Republican." *Id.* at 135. The plurality further emphasized that the district court did not find that the redistricting plan would preclude Democrats from taking control of the assembly in a subsequent election, nor did the district court ask "by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate." *Id.* And the plaintiffs provided no proof that the redistricting plan would "consign the Democrats to a minority status in the Assembly throughout the [decade]." *Id.*

The *Bandemer* plurality's discriminatory effects test proved virtually impossible for future plaintiffs to satisfy. *See, e.g.*, *Pope*, 809 F. Supp. at 397 (dismissing partisan gerrymandering action because the plaintiffs did "not allege, nor c[ould] they, that the state's redistricting plan . . . caused them to be 'shut out of the political process'" or that they had "been or w[ould] be consistently degraded in their participation in the entire political process"); *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (dismissing partisan gerrymandering claim because the plaintiffs failed to allege any "interfer[ence] with [the allegedly disfavored party's] registration, organizing, voting, fund-raising, or campaigning" or that the interests of supporters of the disfavored party were "being 'entirely ignore[d]' by their congressional representatives" (third alteration in original) (quoting *Bandemer*, 478 U.S. at 132)). As one commentator explained, "by its impossibly high proof requirements the Court in *Bandemer* essentially eliminated political gerrymandering as a meaningful cause of action, but only after it had essentially declared the practice

unconstitutional." John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 Stan. L. Rev. 607, 621 (1998); *see also* Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law of Democracy 563 (1998) ("*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress.").

In *Vieth*, all of the Justices rejected *Bandemer*'s discriminatory effects test. 541 U.S. at 283 (plurality op.) ("Because this standard was misguided when proposed [and] has not been improved in subsequent application, . . . we decline to affirm it as a constitutional requirement."); *id.* at 308 (Kennedy, J., concurring in the judgment); *id.* at 318, 339 (Stevens, J., dissenting); *id.* at 344-45 (Souter, J., dissenting); *see id.* at 360 (Breyer, J., dissenting). And the Justices appeared to agree that one of the principal problems with the *Bandemer* plurality's discriminatory effects test is that it created an evidentiary standard so high that no plaintiff could satisfy it, even in the face of strong evidence of partisan discrimination. *See id.* at 280-81 (plurality op.) (noting that under *Bandemer*'s test, "several districting plans . . . were upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results"); *id.* at 312 (Kennedy, J., concurring in the judgment) (rejecting *Bandemer*'s effects test as establishing "a single, apparently insuperable standard"); *id.* at 344-45 (Souter, J., dissenting) (rejecting *Bandemer* effects test on grounds that it "required a demonstration of such pervasive devaluation over such a period of time as to raise real doubt that a case could ever be made out").

In light of *Vieth*'s rejection of *Bandemer*'s discriminatory effects test, there is an absence of controlling authority regarding the evidentiary burden a plaintiff must meet to prove that the boundaries of a particular district have the effect of discriminating against voters who are likely to support a disfavored candidate or party. However, the Supreme Court's two most recent cases discussing partisan gerrymandering—*Gill* and *Arizona Independent Redistricting Commission*—provide some guidance regarding what a plaintiff must show to prove discriminatory effects resulting from district lines drawn on the basis of invidious partisanship. In *Gill*, the Court held that the injury in a partisan vote dilution case "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would in another, hypothetical district." 138 S. Ct. at 1931. Put differently, the "burden" giving rise to a partisan vote dilution claim "arises through a voter's placement in a 'cracked' or 'packed' district." *Id.* Likewise, in *Arizona Independent Redistricting Commission* defined partisan gerrymandering as, in part, "subordinates adherents of one political party." *Ariz. State Leg.*, 135 S. Ct. at 2658. Accordingly, the lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing.

Arizona Independent Redistricting Commission further defined partisan gerrymandering as "entrenching a rival party in power." *Ariz. State Leg.*, 135 S. Ct. at 2658. The Supreme Court's reference to

entrenchment addresses another principal constitutional concern with partisan gerrymandering—that it insulates legislators from popular will and renders them unresponsive to portions of their constituencies. *See Reynolds*, 377 U.S. at 565 ("Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsible to the popular will."). As the Supreme Court explained with regard to racial gerrymanders, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one . . . group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I*, 509 U.S. at 648. To prove entrenchment, a plaintiff need not meet *Bandemer*'s "apparently insuperable standard," *id.* at 312 (Kennedy, J., concurring in the judgment), which required a showing that supporters of a disfavored party had been entirely ignored by their representatives and for years had been frozen out of key aspects of the political process. Instead, a plaintiff must show that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.

3. Lack of Justification

The justification prong examines whether districts' discriminatory partisan effects are justified

by a legitimate state districting interest or neutral explanation. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (noting that "[a] determination that a gerrymander violates the law" must "rest . . . on a conclusion that [political] classifications . . . were applied in . . . a way unrelated to any legitimate legislative objective"); *Bandemer*, 478 U.S. at 141 ("If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings."). As a general matter, once a plaintiff establishes a prima facie case that the boundaries of a challenged district violate the Equal Protection Clause, the burden shifts to the governmental defendant to prove that a legitimate state interest or other neutral factor justified such discrimination. *See, e.g.*, *Cooper*, 137 S. Ct. at 1464 (racial gerrymandering); *Brown*, 462 U.S. at 842-43 (one-person, one-vote). Plaintiffs contend—and Legislative Defendants do not dispute—that the same burden-shifting approach applies in partisan gerrymandering cases.[25] Accordingly, once a plaintiff

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[25] The district court in *Gill* expressly declined to determine whether, at the justification inquiry, the burden shifts to the government defendant to prove that a districting plan's discriminatory partisan effects were attributable to a legitimate state interest. 218 F. Supp. 3d at 911. As explained above, the burden-shifting approach taken by the Supreme Court in analogous Equal Protection cases counsels in favor of placing the burden on Legislative Defendants. And unlike the defendants in *Whitford*, who expressly argued that the burden on the justification prong rested with the plaintiffs, *Whitford v. Nichol*, 180 F. Supp. 3d 583, 599 (W.D. Wis. 2016) (summary judgment order), Legislative Defendants have not argued that Plaintiffs have the burden to prove that 2016 Plan's discriminatory partisan effects were not justified by a legitimate state interests.

establishes a prima facie case of partisan vote dilution, the burden shifts to the defendant to prove that a district's or districts' discriminatory effects are attributable to a legitimate state interest or other neutral explanation.

B. Application

Having laid out the legal framework for a evaluating Plaintiffs' partisan vote dilution claim under the Equal Protection Clause, we now must determine whether Plaintiffs' evidence establishes that any, some, or all of the thirteen districts in the 2016 Plan constitute partisan gerrymanders. Although partisan vote dilution claims, like racial gerrymandering claims, must proceed on a district-by-district basis, *Gill*, 138 S. Ct. at 1930 (majority op.), Plaintiffs can—and do—rely on statewide evidence to prove their partisan vote dilution claims, *see Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) ("Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district."); *Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring) (stating that when district court, on remand, considers merits of partisan vote dilution claim under the Equal Protection Clause, "it can consider statewide (as well as local) evidence"). Accordingly, applying the legal framework set forth above, we first consider Plaintiffs' statewide evidence bearing on discriminatory intent, discriminatory effects, and lack of justification. Then, we evaluate

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Nevertheless, we find that even if the burden lies with Plaintiffs, Plaintiffs have propounded sufficient evidence of the 2016 Plan's lack of justification to meet such a burden.

Plaintiffs' district-specific evidence bearing on each of the three prongs of a partisan vote dilution claim.

1. Statewide Evidence

a. Intent

The record in this case reflects that a wealth of statewide evidence proves the General Assembly's predominant intent to "subordinate" the interests of non-Republican voters and "entrench" Republican domination of the state's congressional delegation. In particular, we find that the following evidence proves the General Assembly's predominant discriminatory intent: (i) the facts and circumstances surrounding the drawing and enactment of the 2016 Plan, (ii) empirical analyses of the 2016 Plan, and (iii) the discriminatory partisan intent motivating the 2011 Plan, which the General Assembly expressly sought to carry forward when it drew the 2016 Plan.

i.

Several aspects of the 2016 redistricting process establish that the General Assembly sought to advance the interests of the Republican Party at the expense of the interests of non-Republican voters. *First*, Republicans had exclusive control over the drawing and enactment of the 2016 Plan. The Committee's Republican leadership and majority denied Democratic legislators access to the principal mapdrawer, Dr. Hofeller. Ex. 1011, at 36:9-20; Ex. 1014, at 44:23-45:15; Ex. 2008. And with the exception of one small change to prevent the pairing of Democratic incumbents, Dr. Hofeller finished drawing the 2016 Plan *before* Democrats had an opportunity to participate in the legislative process. Additionally, all of the key votes—including the Committee votes

adopting the Political Data and Partisan Advantage criteria and approving the 2016 Plan, and the House and Senate votes adopting the 2016 Plan—were decided on a party-line basis. Ex. 1008, at 12:3-7, 67:10-72:8; Ex. 1011, at 110:13-22; Ex. 1016, at 81:6-16. As the *Bandemer* plurality recognized, when a single party exclusively controls the redistricting process, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality op.); *Pope*, 809 F. Supp. at 396.

Second, the legislative process "[d]epart[ed] from the normal procedural sequence." *Arlington Heights*, 429 U.S. at 267. Representative Lewis and Senator Rucho instructed Dr. Hofeller regarding the criteria he should follow in drawing the 2016 Plan *before* they had been appointed co-chairs of the Committee and *before* the Committee debated and adopted those criteria. Lewis Dep. 77:7-20. Indeed, Dr. Hofeller completed drawing the 2016 Plan *before* the Committee met and adopted the governing criteria. *Id.* And notwithstanding that the Committee held public hearings and received public input, Dr. Hofeller never received, much less considered, *any* of that input in drawing the 2016 Plan. Rucho Dep. 55:4-56:13; Hofeller Dep. 177:9-21.

Third, the plain language of the "Partisan *Advantage*" criterion reflects an express legislative intent to discriminate—to favor voters who support Republican candidates and subordinate the interests of voters who support non-Republican candidates. Ex. 1007 (emphasis added). Moreover, the Partisan Advantage criterion reflects an express intent to

entrench the Republican supermajority in North Carolina's congressional delegation by seeking to "maintain" the partisan make-up of the delegation achieved under the unconstitutional 2011 Plan. *Id.*

The official explanation of the purpose behind that criterion by Representative Lewis—who co-chaired the Committee and, in that capacity, developed the Adopted Criteria and oversaw the drawing of the 2016 Plan—demonstrates as much. Representative Lewis explained that "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage." Ex. 1005 at 54; *see also* Ex. 1016, at 29:12-13 ("We did seek a partisan advantage in drawing the map." (Statement of Rep. Lewis)). To that end, the Partisan Advantage criterion required "draw[ing] lines so that more of the whole VTDs voted for the Republican on the ballot than they did the Democrat," he explained. Ex. 1005, 57:10-16. And Representative Lewis "acknowledge[d] freely that this would be a political gerrymander," *Id.* at 48:4-5—a sentiment with which Senator Rucho "s[aw] nothing wrong," Rucho Dep. 118:20-119:10.

Fourth, the process Dr. Hofeller followed in drawing the 2016 Plan, in accordance with Representative Lewis and Senator Rucho's instructions, reflected the General Assembly's intent to discriminate against voters who were likely to support non- Republican candidates. In particular, in accordance with the Political Data criterion, Dr. Hofeller used past election results—which Dr. Hofeller, Representative Lewis, and Senator Rucho agree serve as the best predictor of whether a geographic area is likely to vote for a Republican or

Democratic candidate, Ex. 1016, at 30:23-31:3; Hofeller Dep. 25:1-17; Rucho Dep. 95:15-16—to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate, Hofeller Dep. II 262:21-24, 267:5-6. Of particular relevance to the mapdrawers' intent to draw a plan that would favor Republicans for the remainder of the decade, Dr. Hofeller testified that he believed that because "the underlying political nature of the precincts in the state does not change," his composite partisanship variable indicated whether a particular precinct would be a "strong Democratic precinct [or Republican precinct] *in every subsequent election*." Ex. 2045, at 525:14-17 (emphasis added); *see also* Hofeller Dep. II 274:9-12 (explaining partisan characteristics of particular VTD, as reflected in Dr. Hofeller's composite partisanship variable, are likely to "carry . . . through a string of elections").

Dr. Hofeller then used the partisanship variable to assign a county, VTD, or precinct "to one congressional district or another," Hofeller Dep. 106:23-107:1, 132:14-20, and "as a partial guide" in deciding whether and where to split VTDs, municipalities, or counties, *id.* 203:4-5; Hofeller Dep. II 267:10-17. For example, Dr. Hofeller split—or, in redistricting parlance, "cracked"—the Democratic city of Asheville between Republican Districts 10 and 11 and the Democratic city of Greensboro between Republican Districts 6 and 13. Ex. 4066, 4068. And Dr. Hofeller drew the Districts 4 and 12 to be "predominantly Democratic," Hofeller Dep. 192:7-12, by concentrating—or "packing"—Democratic voters in

Durham, Mecklenburg, and Wake Counties in those two districts, Ex. 4070, Ex. 4072.

After drawing a draft plan, Dr. Hofeller then would use his partisanship variable to assess the partisan performance of the plan on a district-by-district basis and as a whole. *Id.* at 247:19-23; Hofeller Dep. II 283:15-22, 284:20-285:4. Based on that review, Dr. Hofeller would convey his assessment of the partisan performance of the plan to Representative Lewis. Hofeller Dep. II 290:17-25. The evidence establishes that Representative Lewis's appraisal of the various draft plans provided by Dr. Hofeller focused on such plans' likely partisan performance. Representative Lewis admitted as much during debate on the proposed map, stating that he believed "electing Republicans is better than electing Democrats," and therefore that he "drew this map in a way to help foster" the election of Republican candidates. Ex. 1016, at 34:21-23. And Representative Lewis testified that when he assessed the draft plans, "[n]early every time" he used the results from North Carolina's 2014 Senate race between Senator Thom Tillis and former Senator Kay Hagan to evaluate the plans' partisan performance in "future elections." Lewis Dep. 63:9-64:17.

ii.

We also find that empirical evidence reveals that the 2016 Plan "bears more heavily on [supporters of candidates of one party] than another." *Washington*, 426 U.S. at 242. In particular, two empirical analyses introduced by Plaintiffs demonstrate that the pro-Republican partisan advantage achieved by the 2016 Plan cannot be explained by the General Assembly's

legitimate redistricting objectives, including legitimate redistricting objectives that take into account partisan considerations.

Dr. Jonathan Mattingly, a mathematics and statistics professor at Duke University and an expert in applied computational mathematics, drew an ensemble of 24,518 simulated districting plans from a probability distribution of *all* possible North Carolina congressional redistricting plans. Ex. 3002, at 9-10. To create the ensemble, Dr. Mattingly programmed a computer first to draw a random sample of more than 150,000 simulated plans using a Markov chain Monte Carlo algorithm—a widely employed statistical method used in a variety of settings[26]—that randomly perturbed the lines of an initial districting plan[27] to generate successive new plans. *Id.* at 13-15. The computer algorithm then eliminated from the 150,000 plan sample all "unreasonable" districting plans—plans with noncontiguous districts, plans with population deviations exceeding 0.1 percent, plans that were not reasonably compact under common

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[26] Dr. Mattingly testified that the Markov chain Monte Carlo algorithm was developed as part of the Manhattan Project and is widely used for a variety of purposes, including drug development, weather forecasting, and machine learning. Trial Tr. I, at 41:4-8.

[27] To ensure the choice of initial districting plan did not impact his results, Dr. Mattingly conducted his analysis using three different initial plans: (1) the 2011 Plan, (2) the 2016 Plan, and (3) a plan drawn by a bipartisan group of retired North Carolina judges who served as a simulated nonpartisan districting commission. Ex. 3004, at 27; Trial Tr. I, at 87:5-88:11. Dr. Mattingly found that the choice of initial plan did not impact his principal findings. Ex. 3004, at 27; Trial Tr. I, at 87:5-88:11.

statistical measures of compactness, plans that did not minimize the number of county and VTD splits, and plans that did not comply with the Voting Rights Act[28]—yielding the 24,518-plan ensemble.[29] *Id.* at 15-17. The criteria Dr. Mattingly used to eliminate "unreasonable" plans from his sample reflect traditional redistricting criteria, *see Harris*, 136 S. Ct. at 1306 (recognizing compactness, contiguity, maintaining integrity of political subdivisions, and, potentially, compliance with the Voting Rights Act, as "legitimate" considerations for deviations from population equality in state redistricting plans), and nearly all non-partisan criteria adopted by the Committee, *see* Ex. 1007.

After constructing the 24,518-plan ensemble, Dr. Mattingly analyzed the partisan performance of the 2016 Plan relative to the plans in his ensemble using precinct-level actual votes from North Carolina's 2012 and 2016 congressional elections.[30] Dr. Mattingly's

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[28] Dr. Mattingly's algorithm ensured compliance with the Voting Rights Act by requiring that any simulated plan included in the final ensemble include one district with a black voting-age population ("BVAP") of at least 40 percent and a second district with a BVAP of at least 33.5 percent. Trial Tr. I, at 41:23-25. Dr. Mattingly chose those thresholds because they were comparable to the BVAP percentages in the two highest BVAP districts in the 2016 Plan. *Id.* at 42:2-11.

[29] To test the robustness of his results to changes in his exclusion criteria, Dr. Mattingly re-ran his analyses using an ensemble of more than 119,000 simulated maps. Ex. 3040, at 31-32. The partisanship results he obtained using the larger ensemble mirrored those obtained using the smaller ensemble. *Id.*; Trial Tr. I, at 77:20-79:15.

[30] Dr. Mattingly reasonably excluded the results from the 2014 election because one of the candidates in that election ran

analysis, therefore, "assumed that the candidate does not matter, that a vote for the Democrat or Republican will not change, even after the districts are rearranged." Ex. 3002, at 23. Dr. Mattingly found that 0.36 percent (89/24,518) of the plans yielded a congressional delegation of 9 Republicans and 4 Democrats—the outcome that would have occurred under the 2016 Plan—when he evaluated the ensemble using actual 2012 votes. *Id.* at 3; Ex. 3040, at 7. The ensemble most frequently yielded plans that would have elected 7 (39.52%) or 6 (38.56%) Republicans. Ex. 3002, at 4; Ex. 3040, at 7. Using actual 2016 congressional votes, a congressional delegation of 10 Republicans and 3 Democrats—the outcome that occurred under the 2016 Plan—occurred in less than 0.7 percent of the simulated plans (162/24,518), with a delegation of 8 Republicans and 5 Democrats occurring in approximately 55 percent of the plans. Ex. 3040 at 19. Put differently, using both actual 2012 or 2016 votes, more than 99 percent of the 24,518 simulated maps produced fewer Republican seats than the 2016 Plan. Trial Tr. I, at 35:9-10.

Dr. Mattingly's analysis of the simulated plans also demonstrated that the General Assembly "cracked" and "packed" Democratic voters. Dr. Mattingly ordered the 13 congressional districts in each of the 24,518 simulated plans from lowest to highest based on the percentage of Democratic votes that would have been cast in the districts in the 2012

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unopposed, meaning that there were no votes in that district from a contested election to use in performing his analysis. Ex. 3002, at 23. Legislative Defendants took no issue with this methodological choice.

and 2016 elections. Ex. 3002, at 5-7. When analyzed using the results of both the 2012 and 2016 election, the medians of the Democratic vote share in each of the 13 districts "form a relatively straight, gradually increasing line from the most Republican district . . . to the most Democratic." *Id.* at 7; Ex. 3040, at 18, 30, 39. An identical plot of the Democratic vote percentages under a plan drawn by a bipartisan commission of former judges took on the same, gradually increasing linear form. Ex. 3040, at 18, 30, 39.

By contrast, when Dr. Mattingly conducted the same analysis using the 2016 Plan, he found that the line connecting the medians of the Democratic vote share in each of the 13 districts took on an "S-shaped" form, which Dr. Mattingly characterized as "the signature of gerrymandering," because the 2016 Plan places "significantly more Democrats in the three most Democratic districts and fairly safe Republican majorities in the first eight most Republican districts." Ex. 3002, at 8; Ex. 3040, at 18, 30, 39; Trial Tr. I, 35:19-22 ("[T]here were clearly many, many more Democrats packed into those Democratic districts [in the 2016 Plan]; and on the other hand, that allowed there to be many more Republicans in the next group of districts."). Using 2012 votes, for example, the percentage of votes cast for Democratic candidates in the three most Democratic districts (Districts 12, 4, and 1) in the 2016 Plan was significantly higher than the percentage of votes cast for Democratic candidates in the three most Democratic districts in the 24,518 plan sample, and the percentage of votes cast for Democratic candidates in the eighth through tenth most Democratic districts (Districts 9, 2, and 13) was

significantly lower than in the equivalent districts in the ensemble. Ex. 3002, at 6-7; Ex. 3040, at 29-30. And the percentage of votes cast for Democratic candidates in the sixth and seventh most Democratic district was below that of 75 percent of the plans in the ensemble. Ex. 3040, at 29-30; *see also* Trial Tr. I, at 60:6-23 (describing the sixth through thirteenth most Republican districts in 2016 Plan as "extreme outliers" relative to the simulated plans). Dr. Mattingly found the same pattern of packing Democratic voters in the three most Democratic districts when he used the votes from the 2016 election. Ex. 3002, at 6-7.

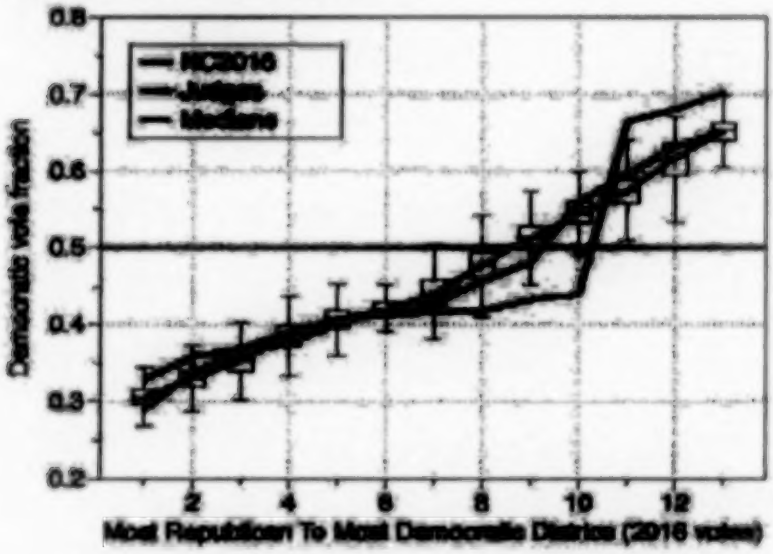

Figure 1: The "signature" of gerrymandering

To determine whether the 2016 Plan's pro-Republican bias could have resulted from chance, Dr. Mattingly analyzed how "slight[]" changes in the boundaries of the districts in the 2016 Plan impacted

the plan's partisan performance. Trial Tr. I, at 36:3-12. That analysis found that "when [he] shifted just as little as 10 percent of the boundary," the new map produced a "very, very different" partisan result that was "[m]uch, much less advantageous to Republicans." *Id.* Dr. Mattingly performed a number of additional analyses to validate his results by assessing their sensitivity to changes in his model—including seeking to reduce the number of county splits in his sample, reducing the population deviation threshold, and altering the compactness threshold—all of which confirmed the robustness of his results.[31] Ex. 3040, at 35-38; Trial Tr. I, at 83:23-84:1, 85:9-20, 85:21-86:24.

Based on his principal analyses and sensitivity and robustness tests, Dr. Mattingly concluded that the 2016 Plan is "heavily gerrymandered" and "dilute[s] the votes" of supporters of Democratic candidates. Ex. 3002, at 9. He further concluded that the General Assembly could not "have created a redistricting plan that yielded [the pro- Republican] results [of the 2016 Plan] unintentionally." Trial Tr. I, at 62:9-12; *see also id.* at 73:8-9 (stating the pro-Republican partisan results of the 2016 Plan, when analyzed using 2016 votes, "would be essentially impossible to generate randomly"); *id.* at 92:24-93:8 (opining that 2016 Plan

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[31] At trial, Common Cause Plaintiffs asked Dr. Mattingly to testify to the results of several additional sensitivity and robustness analyses he performed, all of which confirmed his principal findings. Trial Tr. I, at 139:19-141:12. Legislative Defendants objected to those analyses on grounds that they had not been disclosed prior to trial. Trial Tr. I, at 139:7-9. We sustain Legislative Defendants' objection, *see* Fed. R. Civ. P. 26(a)(2)(B), 26(e)(1)(A), and therefore do not consider that evidence.

was "specifically tuned" to achieve a pro-Republican "partisan advantage"). And Dr. Mattingly further opined "that it's extremely unlikely that one would have produced maps that had that level of packing here and that level of depletion [of Democratic votes] here unintentionally or using nonpartisan criteria." *Id.* at 71:24-72:2.

We find that Dr. Mattingly's analyses, which he confirmed through extensive sensitivity testing, provide strong evidence that the General Assembly's predominant intent in drawing the 2016 Plan was to dilute the votes of voters likely to support Democratic candidates and entrench the Republican Party in power. In particular, given that 99 percent of Dr. Mattingly's 24,518 simulated plans—which conformed to traditional redistricting criteria and the non-partisan criteria adopted by the Committee—would have led to the election of at least one additional Democratic candidate, we agree with Dr. Mattingly's conclusion that the 2016 Plan's pro-Republican bias is not attributable to a legitimate redistricting objective, but instead reflects an intentional effort to subordinate the interests of non-Republican voters. Dr. Mattingly's analysis that the packing and cracking of non-Republican voters had to have been the product of an intentional legislative effort reinforces that conclusion. And Dr. Mattingly's finding that the 2016 Plan produced "safe Republican majorities in the first eight most Republican districts," Ex. 3002, at 8, shows that the General Assembly intended for the partisan advantage to persist. That the 2016 Plan's intentional pro-Republican bias exists when Dr. Mattingly used the actual votes from *both* 2012 (a relatively good year for Democrats) and 2016 (a relatively good year for

Republicans) also speaks to the imperviousness of the 2016 Plan's partisan advantage to changes in candidates and the political environment.

Dr. Chen, a political science professor at the University of Michigan and expert in political geography and redistricting, also evaluated the 2016 Plan's partisan performance relative to simulated districting plans. Trial Tr. I, at 157:2-4. But rather than creating a representative ensemble of districting plans by randomly perturbing an initial plan, as Dr. Mattingly did, Dr. Chen created a computer algorithm to draw three random sets of 1,000 simulated districting plans that comply with specific criteria.[32] Ex. 2010, at 2. To determine "whether the distribution of partisan outcomes created by the [2016 Plan] could have plausibly emerged from a non-partisan districting process," *id.* at 4, Dr. Chen, like Dr. Mattingly, then analyzed the partisan performance of the 2016 Plan relative to the plans in his three 1,000-plan samples using precinct-level election results, *id.* at 9. Unlike Dr. Mattingly, who used results from North Carolina's 2012 and 2016 congressional elections, Dr. Chen used two equally-weighted averages of precinct-level votes cast in previous statewide elections: (1) the seven statewide elections Dr. Hofeller included in his composite partisanship variable and (2) the twenty elections included in the Committee's Political Data criterion. *Id.* at 9-10. As

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[32] To draw a random sample of simulated plans, Dr. Chen's algorithm builds each simulated plan by randomly selecting a VTD and then "building outward" from that VTD, in accordance with the governing criteria, "by adding adjacent VTDs until you construct an entire first district." Trial Tr. I, at 163:19-25.

the Fourth Circuit explained, "Dr. Chen's computer simulations are based on the logic that if a computer randomly draws [1,000] redistricting plans following traditional redistricting criteria, and the actual enacted plan[] fall[s] completely outside the range of what the computer has drawn [in terms of partisanship], one can conclude that the traditional criteria do not explain that enacted plan." *Raleigh Wake Citizens Ass'n*, 827 F.3d at 344.

Dr. Chen programmed the computer to draw the first set of districting plans to follow what he deemed to be the non-partisan criteria included in the Committee's Adopted Criteria: population equality, contiguity, minimizing county and VTD splits, and maximizing compactness. *Id.* at 6. The 1,000 simulated plans generated by the computer split the same or fewer counties and VTDs as the 2016 Plan and significantly improved the compactness of the 2016 Plan under the Reock and Popper-Polsby measures of compactness. *Id.* at 6-7. Dr. Chen found that *none* of the 1,000 plans yielded a congressional delegation of 10 Republicans and 3 Democrats—the outcome that would have occurred under the 2016 Plan—when he evaluated the sample using Dr. Hofeller's seven-election average. *Id.* at 13-14. The sample most frequently yielded plans that would have elected 6 (32.4%) or 7 (45.6%) Republicans. *Id.* at 13. Using the results of the twenty elections referenced in the Adopted Criteria, a congressional delegation of 10 Republicans and 3 Democrats—the outcome that would have occurred under the 2016 Plan—again occurred in *none* of the simulated plans, with a delegation of 6 (52.5%) Republicans occurring most frequently. *Id.* Based on these results, Dr. Chen

concluded that "the [2016 Plan] is an extreme partisan outlier when compared to valid, computer-simulated districting plans" and that the Committee's "partisan goal—the creation of 10 Republican districts—predominated over adherence to traditional districting criteria." *Id.* at 10-11.

To test whether the Committee's goal of protecting incumbents called into question the validity of his results, Dr. Chen next programmed his computer to draw maps that adhered to the requirements it used to draw the first set of simulated maps, and also to not pair in a single district any of the 13 incumbents elected under the 2011 Plan. *Id.* at 15. By comparison, the 2016 Plan paired 2 of the 13 incumbents elected under the 2011 Plan. *Id.* Like the first set of simulations, the second set of simulated plans split the same or fewer counties and VTDs as the 2016 Plan and improved the compactness of the 2016 Plan under the Reock and Popper-Polsby measures. *Id.* at 18. Dr. Chen again found that *none* of the 1,000 plans yielded a congressional delegation of 10 Republicans and 3 Democrats—the outcome that would have occurred under the 2016 Plan—when he evaluated the sample using Dr. Hofeller's seven-election average. *Id.* at 16-17. A majority of the plans included in the sample (52.9%) would have elected 7 Republicans. *Id.* at 16. Using the twenty elections in the Adopted Criteria, a congressional delegation of 10 Republicans and 3 Democrats again occurred in *none* of the simulated plans, with a delegation of 6 (50.3%) or 7 (30.6%) Republicans occurring most frequently. *Id.* Based on these results, Dr. Chen concluded that the General Assembly's desire to avoid pairing

incumbents did not explain the 2016 Plan's pro-Republican partisan advantage. *Id.* at 18-19.

To further test the validity of his results, Dr. Chen's third set of simulations sought to match the number of split counties (13) and paired incumbents (2) in the 2016 Plan, rather than minimize such criteria. *Id.* at 19-20. Adhering to these characteristics of the 2016 Plan did not meaningfully alter Dr. Chen's results. In particular, he again found that *none* of the 1,000 plans yielded a congressional delegation of 10 Republicans and 3 Democrats—the outcome that would have occurred under the 2016 Plan—when he evaluated the sample using Dr. Hofeller's seven-election average. *Id.* at 21-22. A majority of the plans included in the sample (53%) would have elected 7 Republicans. *Id.* at 21. Using the twenty elections in the Adopted Criteria, a congressional delegation of 10 Republicans and 3 Democrats again occurred in *none* of the simulated plans, with a delegation of 6 Republicans and 7 Democrats occurring most frequently (52.3%). *Id.* Based on these results, Dr. Chen concluded that the General Assembly's decision not to minimize the number of county splits or paired incumbents could not "have justified the plan's creation of a 10-3 Republican advantage." *Id.* at 20.

Analyzing the results of his three simulation sets as a whole, Dr. Chen concluded that the 2016 Plan "is an extreme statistical outlier in terms of its partisanship." Trial Tr. I, at 213:22-23. He further concluded "that the pursuit of that partisan goal . . . of creating a ten Republican map, not only *predominated* [in] the drawing of the map, but it *subordinated* the nonpartisan portions of the Adopted Criteria,"

including the goals of increasing compactness and avoiding county splits. Trial Tr. I, at 158:20-159:2 (emphasis added).

Like Dr. Mattingly's analyses, we find that Dr. Chen's analyses provide compelling evidence that the General Assembly's predominant intent in drawing and enacting the 2016 Plan was to subordinate the interests of non-Republican voters and entrench Republican congressmen in office. In particular, we find it significant that *none* of the 3,000 simulated districts plans generated by Dr. Chen's computer algorithm, which conformed to all of the traditional nonpartisan districting criteria adopted by the Committee, produced a congressional delegation containing 10 Republican and 3 Democrats—the result the General Assembly intended the 2016 Plan to create, and the result the 2016 Plan in fact created. That the 2016 Plan continued to be an "extreme statistical outlier" in terms of its pro-Republican tilt under three separate specifications of criteria for drawing the simulated plans reinforces our confidence that Dr. Chen's conclusions reflect stable and valid results.[33]

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[33] In his partial dissent, our colleague Judge Osteen states that he does not find Dr. Chen's maps "as persuasive as the majority" because "Dr. Chen drafted [the] maps without consideration to partisan interests," notwithstanding that, according to Judge Osteen, a state legislative body may permissibly pursue some degree of partisan favoritism. *Post* at 313. We do not believe the non-partisan nature of Dr. Chen's maps undermines their probative force. To begin, we first rely on Dr. Chen's (and Dr. Mattingly's maps) to establish the General Assembly's invidious partisan *intent*—that the 2016 Plan "bears more heavily on [supporters of candidates of one party] than another."

Washington, 426 U.S. at 242. By demonstrating that the 2016 Plan amounts to an "extreme statistical outlier" relative to plans that conform to the General Assembly's nonpartisan objectives, Dr. Chen's maps are "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with" favoring the Republican party at the expense of non-Republican voters and candidates. *Gomillion*, 364 U.S. at 341. To be sure, given the direct evidence of the General Assembly's invidious partisan intent, Dr. Chen's maps are less necessary to establish invidious intent *in this particular case*. Nonetheless, even in the absence of the overwhelming direct evidence of invidious discriminatory intent, Dr. Chen's maps offer a basis for establishing that the General Assembly was predominantly motivated by partisan considerations in drawing district lines.

Additionally, as Justice Kennedy explained in *Vieth*, one of the two principle obstacles to identifying a judicially manageable standard for evaluating a partisan gerrymandering claim is the absence of "any agreed upon model of fair and effective representation." 541 U.S. at 307. Put differently, assuming as we do that some degree of partisanhip is permissible, there needs to be a baseline from which to measure to what degree a districting plan drawn on the basis of partisan favoritism deviates from the universe of "fair and effective" plans. *Id.* By identifying the distribution of partisan outcomes that occur in a randomly drawn set of plans, Dr. Chen's (and Dr. Mattingly's) simulations provide a baseline measure of what constitutes "fair and effective" plans against which courts can assess how much invidious partisanship is "too much" (in the event the Supreme Court concludes that some degree of unadorned partisan discrimination in permissible). When, as here, a districting plan is standard deviations from the mean in terms of the partisan composition of the delegation it produces, that amounts to probative and reliable statewide evidence that the plan rests on "too much" partisanship. To be sure, such evidence, standing alone, does not establish invidious partisanship predominated in the drawing of the lines of a particular district. Nonetheless, when, as here, such evidence is supported by district-specific evidence of cracking and packing, then it provides reliable and compelling evidence of

Legislative Defendants raise two objections to Dr. Mattingly's and Dr. Chen's analyses, neither of which we find undermines the persuasive force of their conclusions. To begin, Legislative Defendants assert that Dr. Mattingly's and Dr. Chen's analyses rest on the "baseless assumption" that "voters vote for the party, and not for individual candidates." Leg. Defs.' Br. 10-11. Although we agree that the quality of individual candidates may impact, to a certain extent, the partisan vote share in a particular election, we do not find that this assumption undermines the probative force of the two simulation analyses, and for several reasons.

To begin, we find it significant that Dr. Mattingly and Dr. Chen used four different sets of actual votes—2012 and 2016 congressional votes in Dr. Mattingly's case and the seven- and twenty-statewide race averages in Dr. Chen's case—and reached essentially the same conclusion. As Legislative Defendants' expert in congressional elections, electoral history, and redistricting Sean Trende acknowledged,[34] Trial

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discriminatory intent, discriminatory effects, and lack of jurisdiction.

[34] Prior to trial, League Plaintiffs moved to exclude Mr. Trende's report and testimony under Federal Rule of Evidence 702 and *Daubert*. League of Women Voters Pls.' Mot. in Limine To Exclude the Testimony of Sean P. Trende at trial, June 16, 2017, ECF No. 702. This Court's Final Pretrial Order denied the motion, without prejudice to League Plaintiffs asserting a similar objection at trial. Final Pretrial Order, Oct. 4, 2017, ECF No. 90. League Plaintiffs renewed their motion to exclude Mr. Trende's testimony at trial. Trial Tr. III, at 19:20-22. This Court took League Plaintiffs' objection under advisement and allowed Mr. Trende to testify. *Id.* at 30:2-21. We conclude that Mr. Trende's training and experience render him qualified to provide expert

Tr. III, at 30:14-15, the sets of votes used by Dr. Mattingly and Dr. Chen included elections in which Republican candidates performed well and elections in which Democratic candidates performed well, Ex. 5101, at 25, 36 (describing 2008 election as a "Democratic wave" and 2010 election as a "Republican wave"). The twenty-race average used by Dr. Chen, in particular, encompassed forty race/candidate combinations occurring over four election cycles, meaning that it reflected a broad variety of candidates and electoral conditions. Given that Dr. Mattingly and Dr. Chen reached consistent results using data reflecting numerous candidates and races—and confirmed those results in numerous sensitivity analyses—we believe that the strength or weakness of individual candidates does not call into question their key findings. That Dr. Chen found that the 2016 Plan produced a 10- Republican, 3-Democrat delegation using Dr. Hofeller's seven-race average and the twenty-race average derived from the Adopted Criteria—the *same* partisan make-up as the congressional delegation elected by North Carolina voters in the 2016 race—further reinforces our confidence that Dr. Mattingly's and Dr. Chen's assumption regarding the partisan behavior of voters did not materially impact their results.

Second, Dr. Chen investigated the reasonableness of the assumption Legislative Defendants challenge by analyzing his set of simulated districting plans using VTD-specific predicted Republican and

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testimony regarding congressional elections, electoral history, and redistricting, and therefore overrule League Plaintiffs' objection.

Democratic vote shares generated by a regression model. Ex. 2010, at 26-31. The regression model controlled for incumbency and turnout, factors correlated with candidate quality and electoral conditions. *Id.* at 27. Dr. Chen found that even when controlling for incumbency and turnout on a VTD-by-VTD basis, over 67 percent of his simulated maps yielded a congressional delegation of 7 Republicans and 6 Democrats, and none of his maps produced a delegation of 10 Republicans and 3 Democrats—the outcome the 2016 Plan would have produced. *Id.* at 36. Based on that finding, Dr. Chen reaffirmed his conclusion that the 2016 Plan "could have been created only through a process in which the explicit pursuit of partisan advantage was the predominant factor." *Id.* at 30.

Third, and most significantly, Dr. Mattingly's and Dr. Chen's assumption that Legislative Defendants characterize as "baseless"—that the partisan characteristics of a particular precinct do not materially vary with different candidates or in different races—is the *same assumption* on which the Committee, Representative Lewis, Senator Rucho, and Dr. Hofeller relied in drawing the 2016 Plan. As Dr. Hofeller—who has been involved in North Carolina redistricting for more than 30 years, Ex. 2045, at 525:6-10—testified: "[T]he underlying political nature of the precincts in the state *does not change no matter what race you use to analyze it.*" Ex. 2045, at 525:9-10 (emphasis added); Hofeller Dep. 149:5-18. "So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every subsequent election. The same would be true for Republican

precincts." Ex. 2045, at 525:14-17; *see also* Hofeller Dep. II 274:9-12 ("[I]ndividual VTDs tend to carry . . . the *same characteristics through a string of elections*." (emphasis added)). Representative Lewis, Senator Rucho, and the Committee agreed with Dr. Hofeller that, at least in North Carolina, past election results serve as the best predictor of whether, and to what extent, a particular precinct will favor a Democratic or Republican candidate, Ex. 1016, at 30:23-31:2; Rucho Dep. 95:15-16, and therefore directed Dr. Hofeller to use past election results to draw a plan that would elect 10 Republicans and 3 Democrats, *see* Ex. 1007. And Dr. Hofeller, Representative Lewis, and the rest of the Committee relied on past election results—the same election results upon which Dr. Chen relied—in evaluating whether the 2016 Plan achieved its partisan objective. Ex. 1017 (spreadsheet Representative Lewis presented to the Committee, immediately before it voted to approve the 2016 Plan, showing the partisan performance of the plan using votes cast in twenty previous statewide elections).

Importantly, the past election results upon which Dr. Hofeller, Representative Lewis, and the Committee relied to assess the 2016 Plan involved different candidates—a composite of seven statewide races in Dr. Hofeller's case and the results of the 2014 Tillis-Hagan Senate race in Representative Lewis' case—than those who ran in the 2016 congressional elections. Legislative Defendants and the expert mapdrawer they employed, therefore, believed that Dr. Mattingly's and Dr. Chen's allegedly "baseless" assumption was sufficiently reasonable, at least in the case of North Carolina, to rely on it to draw the 2016

Plan. Likewise, Legislative Defendants' expert in American politics and policy, southern politics, quantitative political analysis, and election administration, Dr. M.V. Hood, III, conceded that he relied on the *same assumption* in assessing the likely partisan performance of the districts created by the 2016 Plan. Trial Tr. IV, at 11:8-12, 71:1-15 (acknowledging that by averaging partisan results of past elections with different candidates, as Dr. Hofeller and Dr. Chen did, "candidate effects are going to average out so we'll get a pretty good fix on what the partisan composition of an area is"). In such circumstances, we cannot say that that assumption calls into question the significant probative force of Dr. Mattingly's and Dr. Chen's analyses, particularly given how extreme a partisan outlier the 2016 Plan was in each of the two analyses.

Legislative Defendants next contend that both sets of simulated maps fail to account for a number of criteria *implicitly* relied upon by the General Assembly, including: that more populous, rather than less populous counties should be divided; that the "core" of the 2011 Plan districts should be retained; that a district line should not traverse a county line more than once; and that, to ensure compliance with the Voting Rights Act, one district should have a black voting age population ("BVAP") of at least 42 percent and another should have a BVAP of at least 35 percent. Leg. Defs.' FOF 78-86.

None of these alleged criteria were among the seven criteria adopted by the Committee, Ex. 1007, nor are *any* of these criteria mentioned in the legislative record. Additionally, both the Adopted

Criteria and the legislative record expressly contradict the purported BVAP threshold criterion, as the Adopted Criteria state that "[d]ata identifying the race of individuals or voters *shall not be used* in the construction or consideration of districts," Ex. 1007 (emphasis added), and Representative Lewis and Dr. Hofeller repeatedly disclaimed any reliance on race or effort to preserve BVAP percentages in the 2016 Plan, *see, e.g.*, Ex. 1016 at 62:9-20; Hofeller Dep. 145:9-12, 146:4-146:8, 183:22-184:8. And even if the General Assembly had implicitly adopted a BVAP threshold criterion—which the record proves it did not—Dr. Mattingly's analysis accounted for that criterion by requiring that any simulated plan included in his final ensemble include one district with a BVAP of at least 40 percent and a second district with a BVAP of at least 33.5 percent. Trial Tr. I, at 41:23-25

The *only* two of the alleged implicit criteria that find *any* support in the record of this case—the alleged criteria requiring preservation of the "cores" of the districts in the 2011 Plan and the division of populous counties—are criteria that would serve to advance the General Assembly's invidious partisan objective. By preserving the "cores" of the districts in the 2011 Plan, the General Assembly perpetuated the partisan effects of a districting plan expressly drawn "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." Hofeller Dep. 127:19-22. And the alleged criterion requiring division of populous counties—which is referenced in a single line of an affidavit provided by Dr. Hofeller after the trial, *see* Ex. 5116, at 5—effectively required "cracking" areas of Democratic strength because more populous counties

tend to be Democratic whereas less populous counties tend to be Republican. This is precisely what the 2016 Plan did by dividing populous Democratic counties like Buncombe and Guilford. Exs. 4066, 4068. Given that most of these alleged implicit criteria have no support in the record and the remaining purported criteria work hand-in-hand with the General Assembly's partisan objective, the omission of these purported criteria from Dr. Mattingly's and Dr. Chen's analyses does not in any way call into question the persuasive force of their results.

iii.

Finally, although we find the facts and analyses specifically relating to the 2016 Plan sufficient, by themselves, to establish the General Assembly's discriminatory intent, we further note that evidence regarding the drawing and adoption of the *2011 Plan* also speaks to the General Assembly's discriminatory intent in drawing and enacting the *2016 Plan*. Typically, it would be improper for a court to rely on evidence regarding a different districting plan in finding that a redistricting body enacted a challenged plan with discriminatory intent. The "Partisan Advantage" criterion proposed by the Chairs and adopted by the Committee, however, expressly sought to carry forward the partisan advantage obtained by Republicans under the unconstitutional 2011 Plan. Ex. 1007 ("The Committee shall make reasonable efforts to construct districts in the 2016 . . . Plan to maintain the current partisan makeup of North Carolina's congressional delegation."). Accordingly, to the extent invidious partisanship was a motivating purpose behind the 2011 Plan, the Committee

expressly sought to carry forward—and thereby entrench—the effects of that partisanship.

As with the 2016 Plan, Republicans exclusively controlled the drawing and adoption of the 2011 Plan. The 2011 redistricting effort coincided with the RSLC's REDMAP, in which Dr. Hofeller participated and which sought to "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives *for the next decade*." Ex. 2015, at ¶ 10; Ex. 2026, at 1 (emphasis added). As chairs of the committees responsible for drawing the 2011 Plan, Representative Lewis and Senator Rucho's "primary goal" was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." Hofeller Dep. 123:1-7. Defendants conceded as much in the *Harris* litigation, in which Dr. Hofeller stated in an expert report that "[p]olitics was the primary policy determinant in the drafting of the . . . [2011] Plan." Ex. 2035, at ¶ 23.

To effectuate the General Assembly's partisan intent, Dr. Hofeller drew the 2011 Plan "to *minimize* the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." Hofeller Dep. 127:19-22 (emphasis added). In particular, Dr. Hofeller "concentrat[ed]" Democratic voters in three districts, Ex. 2043, at 33-34, and thereby "increase[d] Republican voting strength" in five new districts, Hofeller Dep. 116:19-117:25. Notably, the three districts in the 2011 Plan that elected Democratic candidates were the same three districts in the 2016 Plan that elected Democratic candidates, and the ten districts in the 2011 Plan that

elected Republican candidates were the same ten districts in the 2016 Plan that elected Republican candidates. Exs. 1018-19. Additionally, when compared to his 24,518-plan ensemble, Dr. Mattingly found that the 2011 Plan also was "heavily engineered" to favor Republican candidates, Ex. 3002, at 2, exhibiting "S-shaped curve" that is "the signature of [partisan] gerrymandering" as the 2016 Plan, Trial Tr. I, at 76:18-77:5; Ex. 3040, at 17-18. Accordingly, the 2016 Plan carried forward the invidious partisan intent motivating the 2011 Plan.

iv.

Legislative Defendants nonetheless argue that the General Assembly failed to act with the requisite discriminatory intent for two reasons: (1) the General Assembly did not seek to "maximize partisan advantage" and (2) the General Assembly adhered to a number of "traditional redistricting criteria," such as compactness, contiguity, and equal population. Neither argument, however, calls into question our finding that Plaintiffs satisfied their burden as to the discriminatory intent requirement.

Legislative Defendants' reliance on the General Assembly's purported lack of intent to "maximize partisan advantage" fails as a matter of both law and fact. As a matter of law, Legislative Defendants cite no authority, controlling or otherwise, stating that a governmental body must seek to "maximize" partisan advantage in order to violate the Equal Protection Clause. To be sure, the Supreme Court has indicated that evidence that a legislative body sought to maximize partisan advantage would prove that the legislature acted with discriminatory intent. *See*

Gaffney, 412 U.S. at 751 ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to 'minimize or cancel out the voting strength of racial or political elements of the voting population.'" (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.").

That does not mean, however, that to establish a constitutional violation a plaintiff *must* prove that a districting body sought to maximize partisan advantage. The Supreme Court does not require that a redistricting plan maximally malapportion districts for it to violate the one-person, one-vote requirement. Nor does the Supreme Court require that a redistricting plan maximally disadvantage voters of a particular race to constitute an unconstitutional racial gerrymander. And in the context of partisan gerrymandering, in particular, Justice Kennedy has rejected a "maximization" requirement, explaining that a legislature is "culpable" regardless of whether it engages in an "egregious" and "blatant" effort to "capture[] every congressional seat" or "proceeds by a more subtle effort, capturing less than all seats." *Vieth*, 541 U.S. at 316.

Another basis for not imposing a maximization requirement is that, in the context of a partisan

gerrymander, what constitutes "maximum partisan advantage" is elusive, and turns on political strategy decisions. A party may not seek to maximize the number of seats a redistricting plan could allow it to win in a particular election because, by spreading out its supporters across a number of districts to achieve such a goal, its candidates would face a greater risk of losing either initially or in subsequent elections. *See* Bernard Grofman & Thomas Brunnell, *The Art of the Dummymander, in* Redistricting in the New Millennium 192-93 (Peter F. Galderisi ed., 2005) (finding, for example, that North Carolina's 1991 decennial redistricting plan, which was drawn by a Democrat-controlled General Assembly, created districts with sufficiently narrow margins in favor of expected Democratic voters that Republicans were able capture seats later in the decade). Accordingly, different partisan redistricting bodies may have different perspectives on what constitutes maximum partisan advantage.

As a matter of fact, Plaintiffs presented compelling evidence that the General Assembly *did* seek to maximally burden voters who were likely to support non-Republican candidates. Most significantly, in explaining the proposed Partisan Advantage criterion to the Committee, Representative Lewis said that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because *[he] d[id] not believe it[would be] possible to draw a map with 11 Republicans and 2 Democrats.*" Ex. 1005, at 50:7-10 (emphasis added). Legislative Defendants assert that this statement establishes that Representative Lewis *did not* draw the map to maximize partisan advantage

because he did not believe that it would be possible to draw a plan that could elect 11 Republicans without violating other criteria, "such as keeping . . . counties whole and splitting fewer precincts." Leg. Defs.' Br. 5. Put differently, Legislative Defendants maintain that the 2016 Plan's adherence to other traditional redistricting criteria establishes that the General Assembly did not pursue maximum partisan advantage. *Id.*

But Representative Lewis acknowledged during his deposition that had the 2016 Plan split a large number of precincts and counties, as the 2011 Plan did, there was a significant risk that the *Harris* court would "throw it out" on grounds that it failed to remedy the racial gerrymander. Lewis Dep. 166:13-168:8. Accordingly, Representative Lewis's testimony indicates that he believed the 2016 Plan offered the maximum lawful partisan advantage—the maximum partisan advantage that could be obtained without risking that the *Harris* court would "throw" the plan out as perpetuating the constitutional violation.

Dr. Mattingly's and Dr. Chen's analyses further evidence that the 2016 Plan reflected an effort to maximize partisan advantage. In particular, when Dr. Mattingly evaluated his 24,518-plan ensemble using the votes cast in North Carolina's 2012 congressional election, *none* of the plans produced an 11-2 pro-Republican partisan advantage. Ex. 3040, at 7. And Dr. Mattingly found the same result when he used votes from the 2016 election—*none* of the simulated plans produced an 11-2 partisan advantage. *Id.* at 19. Likewise, regardless of whether Dr. Chen applied the seven-race formula used by Dr. Hofeller or the twenty-

race formula adopted by the Committee, none of his 3,000 simulated plans produced a 10-3 pro-Republican partisan advantage, let alone an 11-2 partisan advantage. Ex. 2010, at 12, 16, 21, 36-37.

Finally, the facts and circumstances surrounding the drawing and enactment of the 2011 Plan—the partisan effects of which the Committee expressly sought to carry forward in the 2016 Plan, Ex. 1007—further establish that the General Assembly drew the 2016 Plan to maximize partisan advantage. In particular, Representative Lewis and Senator Rucho's "primar[y] goal" in drawing the 2011 Plan was "to create *as many districts as possible* in which GOP candidates would be able to successfully compete for office." Hofeller Dep. 123:1-7 (emphasis added). And, in accordance with that goal, Dr. Hofeller testified that he drew the plan "to *minimize* the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 127:19-22 (emphasis added).

Nor does the General Assembly's reliance on a number of traditional redistricting criteria undermine our finding that invidious partisan intent motivated the 2016 Plan. As a matter of law, the Supreme Court long has held that a state redistricting body can engage in unconstitutional partisan gerrymandering even if it complies with the traditional redistricting criterion of population equality. *Gaffney*, 412 U.S. at 751. More recently, the Supreme Court rejected an identical argument in a racial gerrymandering case, holding that "inconsistency between the [challenged] plan and traditional redistricting criteria *is not a threshold requirement*" to establish such a claim.

Bethune- Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 799 (2017) (emphasis added). The rationale supporting the *Bethune-Hill* Court's refusal to allow compliance with traditional redistricting criteria to immunize a plan from scrutiny under the Equal Protection Clause is equally compelling in the partisan gerrymandering context. As the *Whitford* Court explained in holding that compliance with traditional redistricting criteria is not a "safe harbor" from a partisan gerrymandering claim, "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria." 218 F. Supp. 3d at 889. "A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." *Id.*

As a matter of fact, the 2016 Plan does not conform to all traditional redistricting principles. Although the plan is equipopulous, contiguous, improves on the compactness of the 2011 Plan, and reduces the number of county and precinct splits relative to the 2011 Plan, a number of districts in the 2016 Plan take on "bizarre" and "irregular" shapes explicable only by the partisan make-up of the precincts the mapdrawers elected to place within and without the districts. *See infra* Part III.B.2. The 2016 Plan also fails to adhere to the traditional redistricting principle of "maintaining the integrity of political subdivisions." *Harris*, 136 S. Ct. at 1306. In particular, Legislative Defendants' expert Dr. Hood conceded that the 2016 Plan divided numerous political subdivisions, *see, e.g.*, Trial Tr. IV, at 41:2-18, 42:6-43:4, including the City of Asheville, Buncombe

County, Cumberland County, the City of Fayetteville, the City of Greensboro, Guilford County, Johnston County, the City of Charlotte, Mecklenburg County, the City of Raleigh, and Wake County, Exs. 4066-72. Notably, the Committee voted, on a party-line basis, against adopting a proposed criterion that would have directed the mapdrawers to make reasonable efforts to respect the lines of political subdivisions and preserve communities of interest. *See* Ex. 1006, at 27-28. The division of political subdivisions allowed the General Assembly to achieve its partisan objectives, by packing non-Republican voters in certain districts and submerging non-Republican voters in majority-Republican districts. Trial Tr. IV, at 41:2-18, 42:6-43:4.

* * * * *

In sum, we find that Plaintiffs' statewide evidence establishes that the General Assembly's pursuit of partisan advantage predominated over its non-partisan redistricting objectives. And given that Dr. Chen found that the General Assembly's desire to protect incumbents and express refusal to try to avoid dividing political subdivisions failed to explain the 2016 Plan's partisan bias, we find that Plaintiffs' evidence distinguishes between permissible redistricting objectives that rely on political data or consider partisanship, and what instead here occurred: invidious partisan discrimination.

b. Effects

Having concluded that statewide evidence establishes that the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican

candidates and entrench Republican candidates in office, we now turn to Plaintiffs' statewide evidence of the 2016 Plan's discriminatory effects. We find that Plaintiffs' statewide evidence proves that the 2016 Plan dilutes the votes of non- Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office. In reaching this conclusion we rely on the following categories of evidence: (i) the results of North Carolina's 2016 congressional election conducted using the 2016 Plan; (ii) expert analyses of those results revealing that the 2016 Plan exhibits "extreme" partisan asymmetry; (iii) Dr. Mattingly's and Dr. Chen's simulation analyses; and (iv) the results of North Carolina's 2012 and 2014 elections using the 2011 Plan—the partisan effects of which the General Assembly expressly sought to carry forward when it drew the 2016 Plan—and empirical analyses of those results.

i.

We begin with the results of North Carolina's 2016 congressional election conducted under the 2016 Plan. The General Assembly achieved its unambiguously stated goal: North Carolina voters elected a congressional delegation of 10 Republicans and 3 Democrats. Exs. 1018, 3022. That the 2016 Plan resulted in the outcome Representative Lewis, Senator Rucho, Dr. Hofeller, and the General Assembly intended proves both that the precinct-level election data used by the mapdrawers served as a reliable predictor of the 2016 Plan's partisan performance and that the mapdrawers effectively

used that data to draw a districting plan that perfectly achieved the General Assembly's partisan objectives.

Following the 2016 election, Republicans hold 76.9 percent of the seats in the state's thirteen-seat congressional delegation, whereas North Carolina voters cast 53.22 percent of their votes for Republican congressional candidates. Ex. 3022. Notably, the district court in *Gill* found that less significant disparities between the favored party's seat-share and vote-share (60.7% v. 48.6% and 63.6% v. 52%) provided evidence of a challenged districting plan's discriminatory effects. 218 F. Supp. 3d at 901. As the court explained, "[i]f it is true that a redistricting 'plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination,' . . . then a plan that deviates this strongly from the distribution of statewide power suggests the opposite." *Id.* at 902 (quoting *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.)).

The results of the 2016 election also reveal that the 2016 Plan "packed" and "cracked" voters who supported Republican candidates. In particular, in the three districts in which Democratic candidates prevailed, the Democratic candidates received an average of 67.95 percent of the vote, whereas Republican candidates received an average of 31.24 percent of the vote. *See* Ex. 3022. By contrast, in the ten districts in which Republican candidates prevailed, the Republican candidates received an average of 60.27 percent of the vote, and Democratic candidates received an average of 39.73 percent of the vote. *See id.* Democratic candidates, therefore, consistently won by larger margins than Republican

candidates. Additionally, the Democratic candidate's margin in the *least* Democratic district in which a Democratic candidate prevailed (34.04%) was nearly *triple* that of the Republican candidate's margin in the *least* Republican district in which a Republican candidate prevailed (12.20%), *see id.*, reflecting the "S-shaped curve" that Dr. Mattingly described as "the signature of [partisan] gerrymandering," Trial Tr. I, at 76:18-77:5.

And the results of the 2016 congressional election establish that the 2016 Plan's discriminatory effects—attributable to cracking and packing—likely will persist through multiple election cycles. To begin, the Republican candidate's vote share (56.10%) and margin of victory (12.20%) in the *least* Republican district electing a Republican candidate, District 13, exceed the thresholds at which political science experts, including Legislative Defendants' expert Dr. Hood, consider a seat to be "safe"—*i.e.*, highly unlikely to change parties in subsequent elections. *See* Ex. 5058, at 25, Trial Tr. IV, at 29:16-22, 86:21-88:5; *LULAC*, 548 U.S. at 470-71 (Stevens, J., dissenting in part) (characterizing 10 percent advantage as a threshold for a "safe" seat and explaining that "[m]embers of Congress elected from such safe districts need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities in their district"). Indeed, all of the districts—including all ten Republican-held districts—in the 2016 Plan are "safe" under that standard. Ex. 3022.

Additionally, Dr. Simon Jackman—a professor of political science at the University of Sydney and

expert in statistical methods in political science, elections and election forecasting, and American political institutions, Trial Tr. II, at 32:5-9—performed a "uniform swing analysis," which is used by both researchers and courts to assesses the sensitivity of a districting plan to changing electoral conditions, Ex. 4002, at 15-16, 54-59; *Whitford*, 218 F. Supp. 3d at 899-903. To conduct his uniform swing analysis, Dr. Jackman took the two-parties' statewide vote share in the 2016 election, and then shifted those shares by one-percent increments ranging from 10 percent more Republican to 10 percent more Democratic. Ex. 4002, at 54. The analysis assumed that votes shift in all districts by the same amount. *Id.* Dr. Jackman found that "[i]f Democrats obtained a statewide, uniform swing of even six points—taking Democratic share of the two-party vote to 52.7%—*no seats would change hands relative to the actual 2016 results.*" *Id.* at 59 (emphasis added). Accordingly, even if Democratic candidates obtained a 52.7 percent of the statewide vote, they would comprise only 23.1 percent of the state's congressional delegation. And if Democratic candidates captured the *same percentage* of the vote (53.22%) that elected Republican candidates in ten districts in 2016, Democratic candidates would prevail in only four districts. Ex. 3022.

ii.

We also find that other analyses performed by Dr. Jackman assessing the 2016 Plan's "partisan asymmetry"—whether supporters of each of the two parties are able to translate their votes into representation with equal ease—provide additional

evidence of the 2016 Plan's statewide discriminatory effects. Trial Tr. II, at 34:20-22 (explaining that a redistricting plan exhibits partisan asymmetry if there is "a gap between the parties with respect to the way their votes are translated into seats"). The concept of partisan symmetry, at least in its modern form, dates to the 1970s, but scholars did not begin to widely view it as a measure of partisan gerrymandering until the last 20 years. *Id.* at 33:24-34:11. Dr. Jackman analyzed three standard measures of partisan symmetry: the "efficiency gap," "partisan bias," and "the mean-median difference." *Id.* at 34:13-17.

The *efficiency gap*, which was the focus of Dr. Jackman's report and is the newest measure of partisan asymmetry, evaluates whether a districting plan leads supporters of one party to "waste" more votes than supporters of the other. Ex. 4002, at 5. The concept of "wasted" votes derives directly from two of the principal mechanisms mapdrawers use to diminish the electoral power of a disfavored party or group: packing and cracking. Trial Tr. II, at 45:19-46:11. "Wasted" votes are votes cast for a candidate in excess of what the candidate needed to win a given district, which increase as more voters supporting the candidate are "packed" into the district, *or* votes cast for a losing candidate in a given district, which increase, on an aggregate basis, when a party's supporters are "cracked."[35] *Id.* at 35:9-23, 45:19-46:11.

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[35] "Wasted" votes is a term of art used by political scientists, and is not intended to convey that any vote is in fact "wasted" as that term is used colloquially.

Dr. Jackman calculated the efficiency gap by subtracting the sum of one party's wasted votes in each district in a particular election from the sum of the other party's wasted votes in each district in that election and then dividing that figure by the total number of votes cast for all parties in all districts in the election. Ex. 4002, at 18; Ex. 4078. Efficiency gaps close to zero, which occur when the two parties waste approximately the same number of votes, reflect a districting plan that does not favor, invidiously or otherwise, one party or the other.

Using the results of the 2016 congressional elections conducted under the 2016 Plan, Dr. Jackman calculated an efficiency gap favoring Republican candidates of 19.4 percent.[36] Ex. 4002, at 7-8. That constituted the third largest efficiency gap (pro-Republican or pro-Democratic) in North Carolina since 1972, surpassed only by the efficiency gaps exhibited in the 2012 and 2014 elections using the 2011 Plan. Trial Tr. II, at 54:21-24.

To put the 19.4 percent figure further in perspective, Dr. Jackman estimated the efficiency gaps for 512 congressional elections occurring in 25

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[36] The efficiency gap measure takes on a different sign depending on whether it favors one party or the other. Rather than denoting the sign of each calculated efficiency gap, this opinion reports the absolute value, or magnitude, of the efficiency gap.

states[37] between 1972 and 2016.[38] He determined that the distribution of those efficiency gaps was normal with its mean and median centered on zero, meaning that, on average, the districting plans in his sample

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[37] Dr. Jackman's database included results from only 25 states because he excluded elections both in states with six or fewer representatives at the time of the election and in Louisiana due to its unique run-off election system. Ex. 4002, at 18-19 According to Dr. Jackman, when a state has six or fewer representatives the efficiency gap varies substantially with the shift of a single seat, thus making it a less useful metric in those states. *Id.* Legislative Defendants do not take issue with this methodological choice.

[38] Approximately 14 percent of the districts included in Dr. Jackman's 512- election database had elections that did not include candidates from both parties. Ex. 4002, at 20-26. Rather than excluding districts with uncontested elections from his database, Dr. Jackman "imputed" (or predicted) Democratic and Republican vote shares in those elections in two ways: (1) using presidential vote shares in the districts and incumbency status and (2) using results from previous and subsequent contested elections in the district and incumbency status. *Id.* at 24-26. Because calculating an efficiency gap requires predicting both vote shares *and* turnout, Dr. Jackman also predicted turnout using turnout data from contested congressional elections, usually contested elections under the same districting plan. *Id.* Importantly, Dr. Jackman reported measures of statistical significance reflecting error rates associated with the imputed vote shares and turnout, and his conclusions regarding the partisan performance of the 2016 Plan accounted for those measures of statistical significance. *See, e.g., id.* at 41-48. Although Legislative Defendants assert that the imputation requirement complicates the efficiency gap analysis, they do not challenge Dr. Jackman's methodology for imputing the vote shares and turnout in the uncontested elections, nor do they take issue with his results. Leg. Defs.' FOF 64. Accordingly, we find that Dr. Jackman's imputation of vote shares and turnout in uncontested elections does not impact the validity and probative force of his results.

did not tend to favor either party. Ex. 4002, at 26-28. Dr. Jackman found that North Carolina's 2016 congressional election under the 2016 Plan yielded the 13th most pro-Republican efficiency gap of the 512 elections in the database, and that 95 percent of the plans in the database had efficiency gaps that were smaller in magnitude (in favor of either Republicans or Democrats). *Id.* at 7, 65. Dr. Jackman also calculated the average efficiency gap for the 136 unique districting plans included in his 512-election database, and found that the 2016 Plan produced the fourth-largest average efficiency gap of the 136 plans. *Id.* at 10; Trial Tr. II, at 60:15-17. And Dr. Jackman compared North Carolina's efficiency gap in 2016 with that of 24 other states for which his database contained 2016 data, finding that the 2016 Plan produced the largest efficiency gap of any of those plans. Ex. 4002, at 9.

To further put the 19.4 percent figure in context, Dr. Jackman used his database of elections to analyze what magnitude of efficiency gap would likely lead to at least one congressional seat changing hands—a "politically meaningful" burden on a disfavored party's supporters. Ex. 4002, at 37; Trial Tr. II, at 64:6-12. Dr. Jackman found that in states with congressional delegations with 7 to 15 representatives, like North Carolina, an 8 percent efficiency gap is associated with at least one seat likely changing hands.[39] Ex. 4002, at 39-41. Under that threshold, North Carolina's 2016 efficiency gap of 19.4 percent indicates that the 2016

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[39] Dr. Jackman observed a lower threshold of 5 percent for states with congressional delegations with 15 members or more. Ex. 4002, at 39-41.

Plan allowed Republicans to prevail in at least one more district than they would have in an unbiased plan. Based on these results, Dr. Jackman concluded that the 2016 Plan creates "a systematic advantage for Republican candidates," *id.* at 62, and that that advantage "is generating tangible consequences in terms of seats being won," Trial Tr. II, at 82:13-16.

Dr. Jackman also sought to test whether, given the magnitude of North Carolina's 2016 efficiency gap, the pro-Republican bias of the 2016 Plan is likely to persist in future elections. To do so, he performed regressions using his multi-state dataset to analyze the relationship between the first efficiency gap observed in the first election conducted under a particular districting plan and the average efficiency gap over the remaining elections in which that plan was used. Ex. 4002, at 47-54. Using data from the 108 plans in his dataset that were used in at least three elections, Dr. Jackman estimated that a plan with an initial efficiency gap of 19.4 percent in favor of a particular party, like the 2016 Plan, likely would have an 8 percent average efficiency gap in favor of the same party in the remaining elections conducted under the plan, with the plan resulting in an average efficiency gap in that same party's favor over 90 percent of the time. *Id.* at 47. When Dr. Jackman restricted his data set to the 44 plans that have been used at least three times since 2000, he found that an efficiency gap of 19.4 percent in favor of one party would likely have a 12 percent efficiency gap in that party's favor over the remainder of the plan's use. *Id.* Based on these analyses, Dr. Jackman concluded that the evidence "strongly suggests" that the 2016 Plan "will continue to produce large, [pro-Republican]

efficiency gaps (if left undisturbed), generating seat tallies for Democrats well below those that would be generated from a neutral districting plan." *Id.* at 66.

Additionally, Dr. Jackman evaluated the likely persistence of the 2016 Plan's pro- Republican bias by conducting a uniform swing analysis and determining the size of pro- Democratic swing necessary to eliminate the 2016 Plan's pro-Republican efficiency gap. *Id.* at 54-60. Dr. Jackman found that it would require a uniform swing of approximately 9 percentage points in Democrats' favor—on the order of the 1974 post-Watergate swing in favor of Democrats, the largest pro-Democratic swing that has occurred in North Carolina since 1972—for the efficiency gap to return to zero, and therefore for the 2016 Plan to lose its pro-Republican bias. *Id.* at 55-59. Based on these analyses, Dr. Jackman concluded that the 2016 Plan's pro-Republican efficiency gap "is durable," and that it would require a swing of votes in Democratic candidates' favor of "historic magnitude" to strip the 2016 Plan of its pro-Republican bias. Trial Tr. II, at 54:24-55:9; *see also* Ex. 4002, at 66 (concluding that the 2016 Plan's large, pro-Republican efficiency gap is "likely to endure over the course of the plan").

Legislative Defendants raise several objections to Dr. Jackman's efficiency gap analysis: (1) the efficiency gap cannot be applied in all states; (2) the efficiency gap is a measure of "proportional representation," and therefore is foreclosed by controlling Supreme Court precedent; (3) there are several problems with Dr. Jackman's efficiency gap thresholds for identifying when a particular plan is biased towards one party and when that bias is likely

to persist; (4) the efficiency gap does not account for a variety of idiosyncratic factors that play a significant role in determining election outcomes; (5) the efficiency gap fails to flag as unconstitutional certain districting plans that bear certain hallmarks of a partisan gerrymander; (6) the efficiency gap cannot be administered prospectively, making it impossible for a legislature to predict whether a districting plan will violate the Constitution; and (7) the efficiency gap does not encourage mapmakers to draw more competitive districts. Leg. Defs.' FOF 62-66. Although we do not entirely discount all of these objections, we find that they do not individually, or as a group, materially undermine the persuasive force of Dr. Jackman's efficiency gap analysis regarding the 2016 Plan.

Dr. Jackman concedes that the sensitivity of the efficiency gap in jurisdictions with only a few districts—in the case of congressional districts, states with six or fewer districts—renders it difficult, if not impossible, to apply. *See* Ex. 4002, at 19. According to Legislative Defendants, this limitation requires this Court to categorically reject the efficiency gap as a measure of partisan gerrymandering because "[i]t would be untenable for a court to impose a constitutional standard on one state that literally cannot be imposed or applied in all other states." Leg. Defs.' Br. 10. But League Plaintiffs do not propose that this Court constitutionalize the efficiency gap—nor does this Court do so. Rather, League Plaintiffs argue—and this Court finds—that Dr. Jackman's efficiency gap analysis provides *evidence* that Defendants violated the governing constitutional standard: that a redistricting body must not adopt a

districting plan that intentionally subordinates the interests of supporters of a disfavored party and entrenches a favored party in power. *See supra* Parts III.A. That constitutional standard does not vary with the size of a state's congressional delegation. In states entitled to a small number of representatives, a partisan gerrymandering plaintiff simply will have to rely on different types of *evidence* to prove that the redistricting body violated that constitutional standard. Importantly, in addition to the efficiency gap, this Court relies on a variety of other types of evidence probative of the 2016 Plan's discriminatory effects, much of which could be relied on in states with a smaller number of congressional districts. *See infra* Part III.B.

Legislative Defendants also are correct that the Constitution does not entitle supporters of a particular party to representation in a state's congressional delegation in proportion to their statewide vote share. *See LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) ("To be sure, there is no constitutional requirement of proportional representation . . . ."). But the efficiency gap, like other measures of partisan asymmetry, does not dictate strict proportional representation. Trial Tr. II, at 48:21-50:7; Trial Tr. III, at 70:5-7. In particular, the efficiency gap permits a redistricting body to choose to draw a districting plan that awards the party that obtains a bare majority of the statewide vote a larger proportion of the seats in the state's congressional delegation (referred to as a "winner's bonus"). The efficiency gap, therefore, is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner's bonus should be approximately the same for both parties.

Trial Tr. II, at 49:8-17 (Dr. Jackman explaining that partisan symmetry is a "weaker property" than proportional representation because "[a]ll it insists on is that the mapping from votes into seats is the same for both sides of politics"). Even if the efficiency gap did amount to a measure of proportional representation, "[t]o say that the Constitution does not require proportional representation is not to say that highly *dis*proportionate representation may not be evidence of a discriminatory effect." *Whitford*, 218 F. Supp. 3d at 906-07. On the contrary, a number of Justices have concluded that disproportionate representation constitutes evidence, although not conclusive evidence, of a redistricting plan's discriminatory effects—the same way in which we treat Dr. Jackman's efficiency gap evidence. *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."); *Bandemer*, 478 U.S. at 132 (plurality op.) ("[A] failure of proportional representation *alone* does not constitute impermissible discrimination under the Equal Protection Clause." (emphasis added)).

As to Dr. Jackman's proposed thresholds, Legislative Defendants are correct that in *Gill* Dr. Jackman used a different method for calculating an efficiency gap[40] and found "that an efficiency gap

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[40] In *Gill*, Dr. Jackman used the "simplified method" for calculating the efficiency gap, which assumes equal voter turnout at the district level and that for each "1% of the vote a party obtains above 50%, the party would be expected to earn 2% more

above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." 218 F. Supp. 3d at 905. By contrast, here Dr. Jackman concluded that, in states like North Carolina with 7 to 14 representatives, a 12 percent first-year efficiency gap indicates that the districting plan's partisan bias will persist in subsequent elections. Ex. 4002, at 51-54. Even under the more conservative threshold Dr. Jackman proposes in this case, approximately one-third of the post-2000 districting plans in such states that would trip Dr. Jackman's threshold did not have an average remainder-of-the-plan efficiency gap of sufficient magnitude to establish that the districting plan deprived the disfavored party of at least one seat. *Id.* at 53. We agree with Legislative Defendants that this error rate, which pertains only to the durability of a gerrymander, weighs against relying on Dr. Jackman's proposed thresholds as the sole basis for holding unconstitutional a districting plan. But Dr. Jackman's efficiency gap analysis—and his threshold analysis, in particular—is not the sole, or even primary, form of evidence we rely on in finding that nearly all of the

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of the seats." 218 F. Supp. 3d at 855 n.88, 904. Although it accepted Dr. Jackman's analysis, the district court expressed a preference for the "full method" of calculating the efficiency gap because that method does not rely on assumptions about voter turnout and the votes-to-seats ratio. *Id.* at 907-08. Dr. Jackman calculated the 2016 Plan's efficiency gap, as well as the efficiency gaps observed in his 512-election database, using the "full method," and therefore his analysis does not rest on the assumptions about which the district court expressed concern. We decline to criticize Dr. Jackman for changing his analysis to the methodology the district court found most reliable and informative.

districts in the 2016 Plan violate the Equal Protection Clause. And given (1) that the magnitude of the 2016 Plan's efficiency gap in the 2016 congressional election (19.4 percent) significantly exceeded either threshold, (2) that most plans in Dr. Jackman's database that exceeded his proposed threshold continued to exhibit a meaningful bias throughout their life, and (3) that numerous other pieces of evidence provide proof of the 2016 Plan's discriminatory effects, we do not believe this concern strips Dr. Jackman's analyses of their persuasive force in this case. *See Whitford*, 218 F. Supp. 3d at 907-08 (acknowledging different methods of calculating the efficiency could prove problematic in other cases but nonetheless relying on efficiency gap evidence because challenged legislative districting plan was not "at the statistical margins" and "both methods yield[ed] an historically large, pro-Republican [efficiency gap]").

Legislative Defendants next assert that the efficiency gap, as a "mathematical formula," does not take into account a number of idiosyncratic considerations that effect the outcome of particular elections, such as "the quality of . . . candidates, the amount of money raised, the impact of traditional districting principles on election results, whether Democratic voters are more concentrated than Republican voters, and the impact of wave elections." Leg. Defs.' FOF 65. We agree that each of these considerations may impact the outcome of a particular election. But we reject Legislative Defendants' assertion that Dr. Jackman's conclusion that the 2016 Plan is an extreme partisan outlier does not account for these contest-specific factors. On the contrary, Dr. Jackman reached his conclusion by comparing the

2016 Plan's efficiency gap with efficiency gaps observed in the other 512 elections in his database. That database comprises results from 512 elections occurring in 25 states over a 44-year period. As Dr. Jackman explained, "all of those [election-specific] factors appeared in those 512 elections," including the Watergate and 1994 wave elections, candidates facing political scandals, candidates who were well-funded or poorly funded, states with political geography favoring one party or the other, and unique candidates at the top of the ballot like President Obama and President Trump. Trial Tr. II, at 69:5-18. Accordingly, comparing the 2016 Plan's efficiency gap to those observed in hundreds of other elections allowed Dr. Jackman to conclude that the election-specific factors that Legislative Defendants highlight do not explain the large magnitude of the 2016 Plan's pro-Republican efficiency gap.

Relatedly, Legislative Defendants contend that Dr. Jackman's proposed efficiency thresholds flag several bipartisan districting plans or districting plans drawn by courts or nonpartisan commissions and fail to flag as partisan gerrymanders a number of districting plans that bear other hallmarks of gerrymandering such as irregular shapes and widespread division of political subdivisions and voting precincts. *See* Ex. 5101, at 29-62. But if a districting plan is drawn on a bipartisan basis or by a nonpartisan body, a plaintiff will be unable to establish that it was drawn with discriminatory intent, and therefore the plan will pass constitutional muster. *See Whitford*, 21 F. Supp. 3d at 908. Likewise, just as compliance with traditional redistricting criteria does not immunize a districting plan from

constitutional scrutiny, *see supra* Part III.B.1.a.iv, failure to comply with redistricting criteria does not necessarily prove the inverse—that a districting plan amounts to an actionable partisan gerrymander. And to the extent Dr. Jackman's threshold fails to flag certain unconstitutional plans, a plaintiff can rely on other types of evidence to prove a plan's discriminatory effects. Additionally, each of these concerns are not present in this case—the Republican-controlled General Assembly intended to dilute the votes of non-Republican voters and the 2016 Plan exhibited an extremely large efficiency gap in the 2016 election—meaning that those concerns, although potentially legitimate in other cases, do not significantly undermine the probative force of Dr. Jackman's efficiency gap conclusions as to the 2016 Plan. *Accord Whitford*, 218 F. Supp. 3d at 908.

We also reject Legislative Defendants' assertion that a state redistricting body cannot apply the efficiency gap prospectively. In particular, Dr. Chen used the results from the seven races on which Dr. Hofeller relied and the twenty races included in the Committee's Political Data criterion to predict the efficiency gap for both the 2016 Plan and the 3,000 simulated plans he generated. Ex. 2010, at 32-34. Like Dr. Jackman's *post hoc* analysis, Dr. Chen's analysis revealed that the 2016 Plan's predicted efficiency gap was an extreme outlier relative to the simulated plans in his sample and significantly higher than the thresholds suggested by Dr. Jackman. *Id.* at 25. Accordingly, just as the General Assembly used the data relied on by Dr. Hofeller and prescribed by the Committee to predict (correctly) that the 2016 Plan would elect ten Republicans and three Democrats, so

too could it have used that same data to predict the 2016 Plan's efficiency gap—and that the magnitude of that gap would provide strong evidence of the 2016 Plan's pro-Republican bias.[41]

Finally, we agree with Legislative Defendants that the efficiency gap does not provide redistricting bodies with an incentive to draw districting plans with more competitive districts. But the 2016 Plan, which Legislative Defendants seek to keep in place, also creates uniformly "safe" districts. *See* Ex. 3022. And the Supreme Court has never held that the Constitution entitles voters to competitive districts. Accordingly, regardless of whether the efficiency gap's failure to encourage redistricting bodies to draw districting plans with competitive districts is desirable from a policy perspective, that failure does not render the efficiency gap legally infirm.

Partisan bias—the second measure of partisan asymmetry calculated by Dr. Jackman—measures a districting plan's asymmetry by taking the two parties' statewide vote share in a particular election, and then imposing a uniform swing of the magnitude necessary to make the parties split the statewide vote equally. Trial Tr. II, at 47:7-21; *LULAC*, 548 U.S. at 420 (explaining that partisan bias is measured by

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[41] At trial, League Plaintiffs sought to adduce additional evidence of legislators' ability to use the efficiency gap prospectively by asking Dr. Jackman about a report purportedly prepared by a North Carolina state legislator calculating the efficiency gap for a proposed state legislative districting plan. Trial Tr. II, at 136:24-137:7. Legislative Defendants objected to the question on hearsay grounds. *Id.* at 137:10-13. Having taken the objection under advisement at trial, we now sustain that objection.

"comparing how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote" (internal quotation marks and alteration omitted)). After performing the uniform swing, the analyst then calculates the number of seats each party would win. Trial Tr. II, at 47:7-21. A districting plan "is biased in favor of the party that would win more than 50 percent of the seats, if it won 50 percent of the vote and is biased against the . . . party that would win less than 50 percent of the seats if it were able to win 50 percent of the vote," Dr. Jackman explained. *Id.* at 46:15-47:4. When partisan bias is close to zero, a districting plan does not favor, invidiously or otherwise, one party or the other. Ex. 4002, at 13-17; Trial Tr. II, at 48:21-50:7. In *LULAC*, a majority of the Court agreed that partisan bias, at a minimum, has "utility in redistricting planning and litigation," even if, by itself, it is "not a reliable measure of unconstitutional partisanship." 548 U.S. at 420 (opinion of Kennedy, J.); *id.* at 483-84 (Souter, J. dissenting in part) (joined by Ginsburg, J., noting that "[i]nterest in exploring [partisan bias and other measures of partisan symmetry] is evident" and citing separate opinions of Kennedy, J., Stevens, J., and Breyer, J.).

Dr. Jackman found that the 2016 Plan exhibited a pro-Republican partisan bias of 27 percent. Ex. 4003, at 3-4. He again sought to put that figure in perspective by comparing it to previous North Carolina congressional elections and congressional elections across the country. Dr. Jackman found that the 2016 Plan's partisan bias in the 2016 election was the largest observed in North Carolina since 1972, the first year for which he had data. *Id.* And the 2016

Plan's partisan bias was the *second largest* observed among the 283 state congressional elections[42] in his database, and "roughly three standard deviations from the historical mean." *Id.* at 4. Based on these findings, Dr. Jackman characterized the partisan bias exhibited by the 2016 Plan as "extreme"—"of quite literally historic magnitude, not just relative to North Carolina's history, but in the United States of America." Trial Tr. II, at 80:15, 80:24-81:1.

Finally, Dr. Jackman estimated the 2016 Plan's *mean-median difference* in North Carolina's 2016 congressional election. As its name suggests, the mean-median difference is the difference between a party's mean vote share in a particular election and median vote share in that election across all of the districts included in the subject districting plan. Ex. 4003, at 7. In his report, Dr. Jackman explained that the intuition behind the mean-median difference measure "is that when the mean and the median diverge significantly, the distribution of district-level

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[42] In comparing the 2016 Plan's partisan bias with that exhibited in elections in other states, Dr. Jackman excluded what he characterized as "uncompetitive elections"—elections in which the two parties' statewide vote shares were not closer than the range of 55 percent to 45 percent. Ex. 4003, at 4-5. Accordingly, Dr. Jackman had fewer comparators for his partisan bias estimate than for his efficiency gap estimate. Dr. Jackman explained that he excluded uncompetitive elections because partisan bias is a less reliable measure of partisan asymmetry in such elections. *Id.* at 5. Legislative Defendants take no issue with that methodological decision. North Carolina's 2016 statewide congressional vote was within the 55%-to-45% range, and therefore, under Dr. Jackman's unrebutted opinion, partisan bias provides reliable evidence of the 2016 Plan's partisan asymmetry in 2016.

vote shares is skewed in favor of one party and against its opponent—consistent with the classic gerrymandering techniques of 'packing' partisans into a relatively small number of districts and/or 'cracking' partisans among a larger number of districts." *Id.* As with the efficiency gap and partisan bias, the closer the mean-median difference is to zero, the less a plan is biased (invidiously or otherwise) towards one party or another.

Dr. Jackman found that the 2016 Plan exhibited a pro-Republican mean-median difference of 5.1 percent in North Carolina's 2016 congressional election. He explained that the mean-median difference arose from the packing of Democratic voters in the three districts in which Democratic candidates prevailed, and the dispersal of Democratic voters across the remaining districts. Trial Tr. II, at 81:17-21 ("[T]he skew here arises from the fact that there are three districts where Democratic vote share is in the 60s, and then there are ten where it's below 50 percent, where the Democrat lost."). Again seeking to put the 2016 Plan's 5.1 percent figure in historical perspective, Dr. Jackman found that "North Carolina's average mean-median difference from 1972 to 2016 was just 1.0%," Ex. 4003, at 8, and for the other state elections included in his database the average mean-median difference was "roughly . . . zero." Trial Tr. II, at 81:22.

We find Dr. Jackman's partisan asymmetry analyses—each of which measures the 2016 Plan's packing and cracking of non-Republican voters—establish, on a statewide basis, that the 2016 Plan dilutes the votes of supporters of Democratic

candidates and serves to entrench the Republican Party's control of the state's congressional delegation. In particular, we find it significant that three different measures of partisan asymmetry all point to the same result—that the 2016 Plan poses a significant impediment to supporters of non-Republican candidates translating their votes into seats, and that the magnitude of that impediment is an extreme outlier relative to other congressional districting plans. We also find it significant that Dr. Jackman's analyses demonstrate the durability of the 2016 Plan's pro-Republican bias, both by comparing the 2016 Plan to other plans that were used in multiple elections and by demonstrating that 2016 Plan is likely to retain its pro-Republican bias "under any *likely* electoral scenario." *Whitford*, 218 F. Supp. 3d at 899, 903. Given that durability, we find that the 2016 Plan has the effect of entrenching Republican candidates in power, even in the face of significant shifts in voter support in favor of non-Republican candidates, and thereby likely making Republican elected representatives less responsive to the interests of non-Republican members of their constituency.

iii.

Next, we find that Dr. Mattingly's and Dr. Chen's simulation analyses not only evidence the General Assembly's discriminatory intent, but also provide strong evidence of the 2016 Plan's statewide discriminatory effects. As explained above, Dr. Mattingly created an ensemble of 24,518 simulated districting plans that conform to traditional redistricting criteria, and then assessed the electoral outcomes of those plans relative to the 2016 Plan using

actual votes cast in North Carolina's 2012 and 2016 congressional elections. *See supra* Part III.B.1.a.ii. When he evaluated the ensemble using actual 2012 votes, Dr. Mattingly found that nearly 80 percent of the simulated plans would have yielded two-to-three fewer seats for Republicans than the 2016 Plan, and more than 99 percent of the plans resulted in at least one less seat for Republicans. Ex. 3040, at 7-10. And using actual 2016 congressional votes, Dr. Mattingly found that more than 70 percent of the simulated plans produced two-to-three fewer seats for Republicans than the 2016 Plan, and more than 99 percent of the plans resulted in at least one less seat for Republicans. *Id.* at 19-22. Dr. Mattingly's ensemble also revealed evidence that the 2016 Plan diluted the votes of supporters of Democratic candidates: Democratic candidates in the three most Democratic districts in the 2016 Plan—Districts 1, 4, and 12—received a significantly *higher* share of the two-party vote than the three most Democratic districts in Dr. Mattingly's 24,518-plan ensemble. Ex. 3040, at 28-29. And in the eighth-through-tenth most Democratic districts in the 2016 Plan—in which Democratic candidates lost—the Democratic candidate received a significantly *lower* share of the votes than in the equivalent districts in the 24,518-plan ensemble. *Id.* Accordingly, Dr. Mattingly's analyses indicate that the 2016 Plan had a measurable, tangible adverse impact on supporters of non-Republican candidates.

Dr. Chen's simulation analyses likewise indicate that the 2016 Plan had a measurable tangible statewide adverse effect on supporters of non-Republican candidates. Analyzing his first set of 1,000

simulated plans—which sought to conform to the Committee's non-partisan criteria—using elections results reflected in Dr. Hofeller's seven-race formula, Dr. Chen found that 78 percent of the simulated plans would have elected three-to-four fewer Republican candidates, with *all* of the plans electing at least one less Republican candidate. *See* Ex. 2010, at 12-13. And using the Committee's twenty-race criterion, Dr. Chen found that 94.5 percent of the simulated plans would have elected two-to-four fewer Republican candidates, with *all* of the plans electing at least one fewer Republican candidate. *Id.* at 13. Dr. Chen found similar results when he used the 2,000 simulated plans in his simulated sets that sought to avoid pairing incumbents and match the county splits and incumbent protection of the 2016 Plan. *Id.* at 16, 21. Based on these results, Dr. Chen concluded that the 2016 Plan "creates 3 to 4 more Republican seats than what is generally achievable under a map-drawing process respecting non-partisan, traditional districting criteria." *Id.* at 2-3.

To assess the 2016 Plan's partisan effects, Dr. Chen also compared the 2016 Plan's efficiency gap with those of his simulated plans. For each of his three sets of 1,000 simulated districting plans, Dr. Chen found that the 2016 Plan yielded a significantly higher pro-Republican efficiency gap than *all* of the simulated plans, regardless of whether he used the results from the seven elections relied on by Dr. Hofeller or the twenty elections prescribed by the Committee. *Id.* at 32-34. Because the 2016 Plan yielded "improbabl[y]" high pro-Republican efficiency gaps, Dr. Chen concluded "with overwhelmingly high statistical certainty that neutral, non-partisan

districting criteria, combined with North Carolina's natural political geography, could not have produced a districting plan as electorally skewed as the [2016 Plan]." *Id.* at 25.

Taken together, Dr. Mattingly's and Dr. Chen's analyses—which use multiple methods for generating districting plans and multiple sets of votes—provide further strong evidence that the 2016 Plan had the effect of diluting the votes of non-Republican voters, and entrenching Republican congressmen in office. As detailed above, none of Legislative Defendants' objections to Dr. Mattingly's and Dr. Chen's analyses call into question their persuasive force. *See supra* Part III.B.1.a.ii.

iv.

Finally, although not essential to our finding that the 2016 Plan had the effect of discriminating against supporters of non-Republican candidates, the results of the two congressional elections conducted under the *2011 Plan*—and empirical analyses of those results—provide further evidence of the *2016 Plan*'s discriminatory effects. As explained previously, *see supra* Part II.B.1.a.iii, because the Adopted Criteria expressly sought to carry forward the 2011 Plan's partisan effects, Ex. 1007, any discriminatory partisan effects attributable to the 2011 Plan are probative of the 2016 Plan's discriminatory effects. That is particularly true given that, according to an analysis by Legislative Defendants' expert Dr. Hood, most of the districts created by 2016 Plan retained the "core" of their constituency under the 2011 Plan, Ex. 5058, at 23, including, for example, Districts 1, 4, and 12 in which Dr. Hofeller expressly sought to

"concentrat[e]" likely Democratic voters, Ex. 2043, at 33-34.

In North Carolina's 2012 election conducted under the 2011 Plan, North Carolina voters statewide cast 50.9 percent of the votes for Democratic congressional candidates, yet Democratic candidates won only 30.8 percent of the state's congressional seats (4 of 13). Ex. 4002, at 62. The 2011 Plan exhibited a 21.4 percent pro-Republican efficiency gap in the 2012 election. *Id.* In 2014, Democratic candidates won 46.2 percent of the statewide vote, and won 23.1 percent of the seats in the state's congressional delegation, producing a pro-Republican efficiency gap of 21.1 percent. *Id.* North Carolina's 2012 and 2014 efficiency gaps produced under the 2011 Plan were twelfth- and fourteenth-largest by magnitude in Dr. Jackman's 512-election sample. *Id.* at 65. Therefore, as the durability analyses conducted by Dr. Jackman described above would indicate, the magnitude of the 2012 efficiency gap pointed to the large efficiency gap realized in 2014. *See supra* Part III.B.2.b.ii.

Noting that the magnitude of North Carolina's efficiency gaps under the 2011 Plan were significantly higher than those exhibited by the 2001 Plan, Dr. Jackman concluded that the 2011 Plan "is the driver of the change, systematically degrading the efficiency with which Democratic votes translate into Democratic seats in North Carolina." Ex. 4002, at 66. Accordingly, because (1) the General Assembly drew the 2016 Plan to perpetuate the partisan effects of the 2011 Plan and (2) evidence reveals that the 2011 Plan was systematically biased to durably dilute the votes

of supporters of non- Republican candidates, we find that the pro-Republican bias of the 2011 Plan provides further evidence of the 2016 Plan's statewide discriminatory effects.

* * * * *

When viewed in totality, we find Plaintiffs' statewide evidence establishes that the 2016 Plan has diluted the votes of voters who support non-Republican candidates, and will continue to do so in the future. In making this determination, we find it significant that Plaintiffs' evidence proves the 2016 Plan's discriminatory effects in a variety of different ways. Plaintiffs' direct evidence based on the actual results of an election conducted under the 2016 Plan confirmed that the discriminatory effects intended by the 2016 Plan's architects and predicted by Dr. Mattingly's analyses—the election of 10 Republicans by margins that suggest they will retain their seats throughout the life of the plan—in fact occurred. That five different types of statistical analyses performed by three different experts all reached the same conclusion gives us further confidence that 2016 Plan produces discernible discriminatory effects. And although some of those analyses considered "unfair results that would occur in a hypothetical state of affairs," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), others like the efficiency gap and the mean-median difference did not. Given that all of this evidence "point[s] in the same direction"—and Legislative Defendants failed to provide any evidence to the contrary—Plaintiffs have provided "strong proof" of the 2016 Plan's discriminatory effects. *Sylvester*, 453 F.3d at 903.

c. Lack of Justification

We now consider whether the 2016 Plan's dilutionary effects are justified by a legitimate state districting interest or neutral explanation. Legislative Defendants offer two statewide explanations[43] for the 2016 Plan's discriminatory effects: (i) North Carolina's political geography, which reflects the "natural packing" of Democratic voters, and (ii) the General Assembly's interest in protecting incumbents, and the electoral benefits of incumbency. We reject both proposed justifications.

i.

Legislative Defendants first argue that Democratic voters tend to congregate in North Carolina's urban centers, and therefore that the 2016 Plan's pro-Republican partisan bias is attributable to such natural packing, rather than invidious partisan discrimination. *See* Ex. 5058, at 10-13; *Vieth*, 541 U.S. at 289-90 (plurality op.) (describing "'natural' packing"). To support their natural packing argument, Legislative Defendants rely on a shaded map prepared by Dr. Hood reflecting the partisan makeup of North Carolina's VTDs. Ex. 5058, at 9-10. According to Dr. Hood, that map "visual[ly]" demonstrates that "Democrats appear to be located in urban areas (e.g.

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[43] Notwithstanding (1) that Common Cause Plaintiffs, in particular, have pressed a district-by-district Equal Protection challenge to the 2016 Plan throughout the course of this litigation, *see supra* Part II.A.1.a, and (2) Legislative Defendants have consistently argued that partisan vote dilution claims under the Equal Protection Clause must proceed district-by-district, Legislative Defendants never have advanced any district-specific justifications for the 2016 Plan's discriminatory effects.

Charlotte, Asheville, Winston-Salem, Greensboro, Durham, and Raleigh) and within the *blackbelt*[44] area of the state that runs through the coastal plain subregion," whereas "Republican partisans are much more geographically dispersed, producing a larger footprint within the state." *Id.* at 9-10 (footnote text altered). We agree with Legislative Defendants that supporters of Democratic candidates often cluster in North Carolina's urban areas, but we find that this clustering does not explain the 2016 Plan's pro-Republican discriminatory effects, for several reasons.

First, Dr. Hood conceded on cross-examination that, in drawing the 2016 Plan, the General Assembly repeatedly divided Democratic clusters. For example, Dr. Hood conceded that the 2016 Plan "cracked" the naturally occurring Democratic cluster in the City of Asheville and Buncombe County into two districts that he classified as "safe" Republican districts. Trial Tr. IV, at 40:1-43:4. Dr. Hood further conceded that had the General Assembly kept that naturally occurring Democratic cluster whole, it would have been more likely that voters in the cluster would have elected a Democratic candidate. *Id.* at 42:23-43:4. Dr.

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[44] According to Dr. Hood, the term "blackbelt" refers to North Carolina's "Coastal Plain" region, which encompasses a large population of African-American voters. *See* Ex. 5058, at 10, n.16. Dr. Hood's characterization of the "blackbelt" as a distinct political subregion derives from a 1949 academic analysis of North Carolina's political subregions. V.O. Key, Jr., Southern Politics in State and Nation (Alfred A. Knopf 1949). Dr. Hood did not directly testify as to whether that analysis, which is nearly seventy years old and predates the civil rights movement, continues to accurately reflect North Carolina's political geography.

Hood similarly conceded that the 2016 Plan "cracked" several other naturally occurring Democratic clusters and, by "submerg[ing]" likely Democratic voters in pro-Republican districts, made it easier for Republican candidates to prevail in more districts. *Id.* at 43:5-50:25; *see infra* Part III.B.2. Accordingly, testimony by *Legislative Defendants' expert* belies any argument that natural packing explains the 2016 Plan's discriminatory partisan effect.

Second, Dr. Mattingly's and Dr. Chen's simulation analyses, both of which account for the state's political geography, found that "natural packing" of Democratic voters did not explain the 2016 Plan's partisan effects. In particular, based on his ensemble of 24,518 simulated congressional districting plans—all of which conformed to traditional redistricting criteria such as population equality, contiguity, keeping political subdivisions and precincts whole, compactness, and complying with the Voting Rights Act—Dr. Mattingly concluded that "the background structure in the geopolitical makeup of North Carolina, . . . its geography, where its people live, where its voters in each party are distributed, and whether the African-American population is, and what that necessitates relative to the Voting Rights Act" did not explain the 2016 Plan's partisan bias. Trial Tr. I, at 91:20-92:19. Dr. Chen's analysis of his simulated districting plans—which conformed to the nonpartisan criteria adopted by the Committee—reached the same conclusion: the "political geography of North Carolina voters" does not explain the 2016 Plan's pro-Republican bias. *Id.* at 212:14-214:2.

Legislative Defendants have not provided *any* persuasive basis for calling into question Dr. Mattingly's and Dr. Chen's methods, findings, and conclusions. *See supra* Part III.B.1.a.ii. And other than Dr. Hood's "visual" analysis, Legislative Defendants have not provided any contrary empirical analysis showing that the state's political geography does, in fact, explain the 2016 Plan's discriminatory effects. *See Whitford*, 218 F. Supp. 3d at 914-15 (concluding that Wisconsin's political geography did not explain legislative districting plan's partisan bias when the defendant's natural packing argument was "based largely on . . . shaded maps rather than quantitative analysis"). Accordingly, we find that North Carolina's political geography does not explain the 2016 Plan's discriminatory effects on supporters of non-Republican candidates.

ii.

Next, Legislative Defendants suggest that the 2016 Plan's discriminatory effects are attributable to the General Assembly's legitimate interest in protecting incumbents elected under the 2011 Plan and the electoral benefits attributable to incumbency. Legislative Defendants are correct that state redistricting bodies have a legitimate interest, at least outside the remedial context,[45] in drawing districts so

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[45] Although the Supreme Court has recognized that a redistricting body generally has a legitimate interest in avoiding the pairing of incumbents, the Supreme Court has not addressed whether, and by what means, a state redistricting body directed to draw remedial districts may protect incumbents elected in unconstitutional districts. *Easley v. Cromartie*, 532 U.S. 234, 262 n.3 (U.S. 2001) (Thomas, J., dissenting) (noting that that question was not presented to the Supreme Court or district court

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and, therefore, that the Court had not addressed it). Four Justices, however, have stated that whether "the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district . . . is a questionable proposition." *Id.* The Justices' skepticism regarding the use of incumbency in the remedial context accords with the Supreme Court's admonition that remedial plans should not "validate the very maneuvers that were a major cause of the unconstitutional districting." *Abrams v. Johnson*, 521 U.S. 74, 86 (1997). Lower courts likewise have expressed concern about the use of incumbency in the remedial context. *See Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (expressing skepticism about efforts to protect incumbents in maps drawn to remedy impermissible race-based districting because "many devices employed to preserve incumbencies are necessarily racially discriminatory"); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199-1200 (E.D. Ark. 1990) (rejecting remedial districts that violated Voting Rights Act, notwithstanding that the districts were designed to protect incumbents, because "[t]he desire to protect incumbents, either from running against each other or from a difficult race against a black challenger, cannot prevail if the result is to perpetuate violations of the equal-opportunity principle contained in the Voting Rights Act"). The district court in *Covington* held that any interest a legislative body tasked with drawing a remedial districting plan has in protecting incumbents must give way to its obligation to remedy the constitutional violation, and therefore that the General Assembly's interest in protecting incumbents elected in racially gerrymandered districts and districts adjacent to such districts did not justify an enacted remedial plan's failure to fully remedy the segregation of voters on the basis of race. 283 F. Supp. 3d at 429-42. The Supreme Court affirmed that judgment. 138 S. Ct. at 2552-54

The General Assembly drew the 2016 Plan after the 2011 Plan was found to be an unconstitutional racial gerrymander. *See supra* Part I.B. Accordingly, whether the General Assembly had a legitimate interest in protecting incumbents elected under the 2011 Plan remains uncertain, particularly with regard to those

as to avoid pairing incumbents in a single district. *See Karcher*, 462 U.S. at 740. But we find that the General Assembly's efforts to protect incumbents do not explain the 2016 Plan's discriminatory partisan effects.

In particular, Dr. Chen's simulation analyses demonstrate that the General Assembly could achieve its interest in avoiding the pairing of incumbents without drawing a plan exhibiting the discriminatory effects of the 2016 Plan. Ex. 2010, at 15-19. Indeed, Dr. Chen's simulated plans advanced the Committee's goal of avoiding pairing incumbents *more effectively* than the 2016 Plan: unlike the 2016 Plan, which paired two of the state's thirteen incumbents, Dr. Chen drew 1,000 plans that did not pair *any* incumbents. *Id.* at 3, 15-19 ("These simulation results clearly reject any notion that an effort to protect incumbents might have warranted the extreme partisan bias observed in the [2016 Plan].").

Additionally, to ensure that the election data upon which he relied—the *same* data relied upon by Dr. Hofeller and prescribed by the Committee's Political Data criterion—adequately accounted for the benefits of incumbency, Dr. Chen performed a sensitivity analysis that accounted for the electoral advantages associated with incumbency. *Id.* at 26-31. Although that sensitivity analysis revealed, as expected, that incumbents enjoy electoral advantages, *id.* at 27 (finding that North Carolina congressional incumbents receive, on average, approximately 3

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incumbents elected in the unconstitutional districts and districts adjoining the unconstitutional districts.

percent greater electoral support than nonincumbents), Dr. Chen found that the revealed electoral advantage associated with incumbency did not explain the 2016 Plan's pro-Republican bias, *id.* at 28-30, 32-37.

Dr. Chen's finding that incumbency does not explain the 2016 Plan's partisan bias is unsurprising given that the 2016 Plan sought to protect the incumbents elected under the 2011 Plan. As explained above, the General Assembly expressly drew the 2011 Plan "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." Hofeller Dep. 127:19-22; *see also supra* Part III.A.2-3. And the 2011 Plan had the effect of diluting the votes of supporters of Democratic candidates and entrenching Republican control of the state's congressional delegation. Accordingly, the General Assembly's effort to protect incumbents elected under the 2011 Plan when it drew the 2016 Plan served to perpetuate the discriminatory partisan effects of the 2011 Plan.

Legislative Defendants nevertheless argue that Republican candidates' success in the 2016 election under the 2016 Plan was attributable to advantages associated with incumbency, including that the Republican incumbents attracted less experienced opponents and raised significantly more money than their opponents. Ex. 5058, at 6-7; Trial Tr. IV, at 51:1-53:12. But Legislative Defendants' political science expert, Dr. Hood, conceded on cross-examination that the likelihood an incumbent will prevail in a redrawn district impacts the incumbent's ability to raise money and whether he draws a strong opponent. Trial Tr. IV,

at 54:23-55:12. To that end, Dr. Hood further conceded that the Republican incumbents may have attracted weak opponents and raised substantially more money because the General Assembly drew the Republican incumbents districts in which they were likely to prevail—a possibility that Dr. Hood did not consider, much less evaluate. *Id.* at 54:9-59:18.

Given that Legislative Defendants' own expert acknowledged that the 2016 Plan's discriminatory lines may have caused Republican incumbents' observed advantages, and that Legislative defendants failed to offer any analyses rebutting Dr. Chen's rigorous quantitative analysis showing that the General Assembly's goal of protecting incumbents did not explain the 2016 Plan's pro-Republican bias, we find the General Assembly's interest in protecting incumbents and the electoral advantages associated with incumbency do not explain the 2016 Plan's discriminatory partisan effect.

* * * * *

In sum, we find that Plaintiffs' statewide evidence establishes that the General Assembly drew and enacted the 2016 Plan with a predominant intent to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation. We further find that numerous forms of statewide evidence prove that the 2016 Plan achieved the General Assembly's discriminatory partisan objective. And we find that neither North Carolina's political geography nor the General Assembly's interest in protecting incumbents explains the 2016 Plan's discriminatory effects.

2. District-Specific Evidence

Having concluded that Plaintiffs have introduced compelling statewide evidence bearing on discriminatory intent, discriminatory effects, and lack of justification, we turn to Plaintiffs' district-specific evidence. Because *Gill* expressly analogized to partisan vote dilution claims to racial gerrymandering claims, 138 S. Ct. at 1930, and because racial gerrymandering claims also proceed on a district-by-district basis, in evaluating each of the districts in the 2016 Plan we will draw on racial gerrymandering precedent. Recall that in a *Shaw*-type racial gerrymandering challenge a plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. In such cases, the Supreme Court has considered several forms of evidence, none of which is necessary or decisive alone, as probative that an impermissible consideration predominated.

First, the Supreme Court has said that a lack of "respect for political subdivisions" may indicate an improper motive predominated. *Shaw I*, 509 U.S. at 647. For example, the division of counties, municipalities, or precincts can be probative that an improper motive predominated. *Miller*, 515 U.S. at 908, 918. Additionally, if the legislature has split "communities of interest" or grouped areas with "fractured political, social, and economic interests" that too may indicate an improper motive predominated. *Id.* at 919.

Second, the shape or appearance of a district also may speak to whether an improper motive

predominated. Although a district need not be oddly shaped in order to violate the Equal Protection Clause, "bizarreness . . . may be persuasive circumstantial evidence that [partisanship] for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 912-13; *see also Shaw II*, 517 U.S. at 905-06 (considering a district's bizarre shape and noncompactness to affirm a finding of racial predominance). That is particularly true when demographic evidence reveals that a district's bizarre lines coincide with the historical voting patterns of the precincts included in, or excluded from, the district. *See Miller*, 515 U.S. at 912-13. One way to assess whether a particular district takes on a bizarre shape is through use of mathematical measures of compactness, *Karcher*, 462 U.S. at 755 (Stevens, J., concurring); *Covington*, 316 F.R.D. at 140, such as the Reock and Polsby- Popper measures previously relied on by the General Assembly in defending the 2016 Plan, Exs. 1007; 5001 app'x. Additionally, although visually assessing districts necessarily involves some subjective judgment, the Supreme Court has repeatedly relied upon such assessments (the "eyeball approach" or "interocular test") to determine if a district is "bizarre" or "irreguiar." *See, e.g., Vera*, 517 U.S. at 965-66; *Shaw II*, 517 U.S. at 905-06; *Shaw I*, 509 U.S. at 646-47.

Third, demographic data may help explain the location and idiosyncrasies of a district boundary, and thereby support a finding of predominance. *Miller*, 515 U.S. at 917 (noting that even if a district is not "bizarre on its face," the predominance of race may become clearer "when its shape is considered in conjunction

with its racial and population densities"); *see also Vera*, 517 U.S. at 961-62. Thus, maps shaded to indicate the percentage of the population in each VTD or precinct that historically voted for candidates of a particular party may provide evidence that partisan considerations predominated in the drawing of a particular district's lines. *See, e.g.*, *Covington*, 316 F.R.D. at 141-65 (relying, in part, on "racial density maps" to determine whether race predominated in drawing district lines). Because Dr. Hofeller, Representative Lewis, and Senator Rucho testified that they relied on such data in drawing and evaluating the challenged districts, such maps provide particularly useful insights into whether district boundaries reflect partisan differences in the population. *See supra* Part I.B.

Finally, although not a precondition to establishing a claim that an improper districting consideration predominated, a plaintiff can introduce an alternative districting plan or plans that conform to traditional districting principles—as or more effectively than the challenged plan—and in which the plaintiff's vote is not diluted on the basis of an impermissible consideration. *See, e.g.*, *Cooper*, 137 S. Ct. at 1478-82; *Easley v. Cromartie*, 532 U.S. 234, 258 (2001). Notably, *Gill* expressly embraced the use of alternative plans to demonstrate that the boundaries of a particular district diluted a particular plaintiff's vote on the basis of invidious partisanship. *See* 138 S. Ct. at 1931 (explaining that the injury in a partisan vote dilution case "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry *in another*,

hypothetical district" (emphasis added)); *id.* at 1936 (Kagan, J., concurring) ("Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight.").

Here, Plaintiffs rely on numerous alternative districting plans to prove their partisan vote dilution claims. First, Plaintiffs rely on two alternative plans drawn by Dr. Hofeller as part of the 2016 remedial districting process. Exs. 4016-24. Both plans are comparable to the 2016 Plan with regard to compliance with traditional districting criteria such as county splits and compactness and include a number of districts more favorable to non-Republican voters than their counterparts in the 2016 Plan, as measured by Dr. Hofeller's partisanship variable. *Id.* Second, Plaintiffs rely on a group of maps drawn by a bipartisan group of retired North Carolina judges convened to act as a simulated nonpartisan districting commission and directed to comply with a set of traditional, nonpartisan districting criteria. Ex. 3002, at 10. Finally, Plaintiffs rely on the thousands of computer-generated districting plans created by Dr. Chen and Dr. Mattingly to conform to—and often more effectively advance—the General Assembly's non-partisan districting objectives. *See, e.g.*, Exs. 4025-4033, 5025-34. Those computer-generated plans include Plan 2-297, which Dr. Chen generated to maximize, subject to certain constraints, the General Assembly's non-partisan districting criteria; in doing so, Plan 2- 297 protects more incumbents, splits fewer counties, has more compact districts than the 2016

Plan, and exhibits significantly less dilution of Democratic voters' votes, based on Dr. Hofeller's partisanship variable. Second Chen. Decl. 1-5.

As further explained below, relying on these and other forms of district-specific evidence—as well as the overwhelming statewide evidence set forth above—we conclude that partisan considerations predominated in the drawing of all but one of the thirteen districts in the 2016 Plan, and therefore that those twelve districts violate the Equal Protection Clause.

a. District 1

District 1 spans all or part of fourteen counties in northeastern North Carolina, most of which run along the eastern portion of North Carolina's border with Virginia. Ex. 1001. Dr. Hofeller testified that he "concentrate[d]" Democratic voters in the 2011 version of the district—which the Supreme Court held constituted a racial gerrymander, *Cooper*, 137 S. Ct. at 1468-72—in order to "weaken Democratic strength in Districts 7, 8, and 11," Ex. 2043, at 33-34, and "to increase Republican voting strength in New Districts 2, 3, 6, 7, and 13," Hofeller Dep. 116:19-117:25. Although the version of the district in the 2016 Plan eliminates a number of appendages in the 2011 version drawn to make the district majority-black, Ex. 2001, the 2016 Plan version retains approximately 70 percent of the population included in its 2011 version, Ex. 5001, tbl.1, carrying forward the invidious partisanship motivating the 2011 version of the district's lines. Dr. Hofeller testified that District 1 was one of three districts in the 2016 Plan he and the Chairs drew, using past election results, to be

"predominantly Democratic." Hofeller Dep. 192:7-16, ECF No. 110-1.

As Dr. Hofeller and the Chairs intended and expected, District 1 packs supporters of Democratic candidates: the district's Democratic candidate received approximately 70 percent of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Democratic candidate was likely to receive 68.8% of the two-party vote share), *with* Ex. 1018, at 2 (Democratic candidate, Rep. G.K. Butterfield, received 68.62% of the vote in 2016 election). Additionally, in the 2016 election, the Democratic candidate in District 1 received a higher share of the vote in his district than each of the Republican candidates received in the 10 districts Dr. Hofeller drew to be predominantly Republican. Ex. 1018. Consistent with these results, Legislative Defendants' expert Dr. Hood characterized District 1 as "Safe Democratic." Ex. 5058, at 25.

To achieve the goal of concentrating Democratic voters in District 1, the 2016 Plan divides municipalities and communities of interest along partisan lines. For example, the southwestern edge of District 1 splits Wilson County by packing the county's large cluster of historically Democratic precincts into District 1, while placing the county's historically Republican precincts into District 2. Ex. 4015. Similarly, the southern edge of District 1 splits Pitt County by placing that county's disproportionately Democratic precincts into District 1 while placing the disproportionately Republican precincts into District 3. Ex. 4013.

Figure 2: The partisan division of Wilson County between Districts 1 and 2[46]

Dr. Hofeller created several alternative maps that *did not* split either Wilson or Pitt County. Ex. 2004, at 17-18. Not a *single* map drawn by the bipartisan group of retired judges split either Wilson or Pitt County. Ex. 5095. And Plan 2-297 does not divide Wilson County at all and does not divide Pitt County along partisan lines. *Compare* Third Chen Decl. 1-3, *with* Ex. 4013. Unsurprisingly, therefore, District 1's counterpart in Plan 2-297, District 12, packs fewer Democratic

[46] In Figures 2 through 8, which derive from Exhibits 3013 to 3020, precincts are shaded in accordance with Dr. Hofeller's partisanship variable. Precincts in blue historically favor Democratic candidates; precincts shaded with darker hues of blue historically favored Democratic candidates more than precincts with lighter hues of blue. Precincts in red historically favor Republican candidates; precincts shaded with darker hues of red historically favored Republican candidates more than precincts with lighter hues of red. Green lines denote county lines and dotted lines denote district lines.

voters, with the Democratic candidate expected to obtain approximately 59 percent of the two-party vote, Second Chen Decl. at 5, as opposed to 68 percent of vote garnered by the Democratic candidate in District 1 in the 2016 election, Ex. 1018, at 2.

Plaintiffs' statistical evidence further proves that District 1's unique partisan configuration was not mere happenstance. Instead, the data demonstrate that Democratic voters in District 1 were, in fact, packed together in order to dilute such voters' voting strength. In particular, Dr. Mattingly's analysis of more than 24,000 simulated maps—which conform to all of the General Assembly's non-partisan districting objectives—reveals that the 2016 version of District 1 is an extreme statistical outlier with regard to its concentration of Democratic voters. Ex. 3040, at 30. In particular, only 0.61 percent of the 24,000 simulated maps had *any district* with a higher concentration of likely Democratic voters. Trial Tr. I, at 72:10-13; Ex. 3040, at 29. This demonstrates that the effect of the 2016 version of Congressional District 1 is to pack Democratic voters into the district in an amount greater than would otherwise naturally occur more than 99 percent of the time under neutral districting criteria. *See* Trial Tr. I, at 55:2-6, 70:1-4, 76:22-77:1.

When viewed in conjunction with the overwhelming statewide evidence, this district-specific evidence confirms that (1) the mapdrawers predominantly intended to, and did in fact, pack Democratic voters in District 1; (2) the packing of Democratic voters in District 1 had the effect of diluting such voters' votes; and (3) the packing of Democratic voters in District 1 was not a product of

the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, we conclude that District 1 violates the Equal Protection Clause.

b. District 2

District 2 spans all or part of six counties in central North Carolina, and splits three counties with Districts 1, 4, and 7. Ex. 1001. Dr. Hofeller testified that, in drawing the 2011 Plan, he removed Democratic voters in the prior version of the district and placed them "in either Districts 1 [or] 4" because it was the "only [way to] accomplish" the Republican leadership's goal "to increase Republican voting strength in New District[] . . . 13," which was renumbered to be District 2 in the 2016 Plan. Hofeller Dep. 116:19-117:25. District 2 retains approximately 57 percent of the population of its predecessor in the 2011 Plan, Ex. 5001, tbl.1, thereby carrying forward the mapdrawers' express partisan intent in drawing the 2011 version of District 2.

The results of the 2016 election confirm the mapdrawers successfully cracked Democratic voters: as Dr. Hofeller intended and expected, the district's Republican candidate received approximately 56 percent of the votes cast in the 2016 election, meaning that mapdrawers effectively ensured Democratic voters would be highly unlikely to elect their candidate of choice. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, candidate was likely to receive 55.6% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. George Holding, received 56.7% of the vote in 2016 election). Notably, the Republican candidate

received a significantly *lower* share of the vote in District 2 than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018.

To achieve the goal of diluting Democratic voting strength in District 2, the district takes on a highly irregular shape and divides municipalities and communities of interest along partisan lines. For example, District 2 includes a horseshoe-shaped section of Wake County—a horseshoe-shaped section that the General Assembly retained from the 2011 version of the district, which also was expressly drawn to favor Republican candidates, Ex. 5001, map 4—that encompasses the predominantly Republican suburbs of Raleigh, but excludes the predominantly Democratic core of Raleigh, which the General Assembly placed in "predominantly Democratic" District 4. Ex. 3019. In the 2008 North Carolina gubernatorial election, for example, 41.5 percent of the Wake County voters assigned to District 2 voted Democratic, whereas 57.1 percent of the Wake County voters assigned to District 4 voted Democratic. *Compare* VTD 2008 Election Results - 2 - District 2: 2016 Contingent Congressional Plan Corrected ("NCGA District 2 Data") 3 (Data Printed Feb. 25, 2016), *with* VTD 2008 Election Results - 2 - District 4: 2016 Contingent Congressional Plan Corrected ("NCGA District 4 Data") 3 (Data Printed Feb. 25, 2016).[47] Precinct-level results from other races follow

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[47] The General Assembly compiles and makes publicly available on its website for the 2016 Plan precinct-level election results on a county-by-county and district-by-district basis for

the same pattern: the Wake County precincts assigned to District 2 tended to strongly favor Republican candidates, while the precincts assigned to District 4 favored Democratic candidates. *Compare* NCGA District 2 Data 3, *with* NCGA District 4 Data 3; *Compare* VTD 2010 Election Results - District 2: 2016 Congressional Plan Corrected 4 (Data Printed Feb. 25, 2016), *with* VTD 2010 Election Results - District 4: 2016 Congressional Plan Corrected 5 (Data Printed Feb. 25, 2016). Additionally, the eastern edge of District 2 splits Wilson County by cracking off the county's large cluster of historically Democratic precincts into District 1, while placing the county's historically Republican precincts into District 2. Ex. 4015.

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each district in the 2016 Plan. *See* N.C. General Assembly, 2016 Congressional Plan - Corrected, https://www.ncleg.net/Representation/Content/Plans/PlanPage_DB_2016.asp?Plan=2016_Contingent_Congressional_Plan_-_Corrected&Body=Congress (last visited Aug. 8, 2018). We take judicial notice of this legislatively-maintained data under Federal Rule of Evidence 201(b)(2), which provides for judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined by sources whose accuracy cannot reasonably be questioned."

Figure 3: The partisan division of Wake County between Districts 2 and 4

Notably, Dr. Hofeller created alternative maps that *did not* split Wilson County. Ex. 2004, at 17-18. And although any map must split Wake County to satisfy the oneperson, one-vote requirement, none of the maps drawn by the panel of former judges split Wake County along partisan lines, like the 2016 Plan. *Compare* Ex. 5095, *with* Ex. 3019. Likewise, numerous alternative maps generated by Plaintiffs' experts, including Plan 2- 297, demonstrate that the General Assembly could have drawn District 2 without cracking the Democratic cluster in Wilson County, and without dividing Wake County along partisan lines. *Compare, e.g.*, Second Chen Decl. 3; Exs. 5025, 5027, 5029, *with* Ex. 3019. The district in Plan 2-297 that includes eastern Wake County, District 10, has a substantially lower Republican vote share as

measured by Dr. Hofeller's variable than District 2. *Compare* Second Chen Decl. at 5 (expected Republican vote share of 47.40%), *with* Ex. 1018, at 2 (Republican candidate received 56.71% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 2's unique partisan make-up did not result from the State's political geography or other legitimate districting consideration. Instead, the data demonstrate that Democratic voters in District 2 were, in fact, cracked off into Districts 1 and 4 in order to dilute the voting strength of the remaining Democratic voters in District 2. In particular, Dr. Mattingly's analysis of more than 24,000 simulated maps shows that the 2016 version of District 2 is an extreme statistical outlier with regard to its concentration of Democratic voters. In the 2016 election the Democratic candidate in District 2 received *43 percent* of the vote, the second highest Democratic vote share in any of the ten districts in which a Republican candidate prevailed and the fifth highest Democratic vote share overall. Ex. 3040, at 29-30. Yet, in Dr. Mattingly's ensemble of more than 24,000 plans, the median Democratic vote share of the fifth most Democratic district was *51 percent*, with only .53 percent of such districts having a Democratic vote share at or below the level recorded in District 2 the 2016 election. *Id.* Put differently, in more than 99 percent of the 24,000 simulated maps, the district with the fifth highest share of Democratic votes—like District 2 recorded in the 2016 election—had a higher concentration of voters who supported Democratic congressional candidates that District 2. Ex. 3040, at 29-30; *see* Trial Tr. I, at 55:2-6, 70:1-9, 72:10-13, 76:22-

77:5. Accordingly, the strategic drawing of District 2—including the cracking of Wilson and Wake Counties along partisan lines—diluted the votes of Democratic voters in District 2, and was not the result of the State's political geography or other legitimate redistricting considerations.

When viewed alongside the overwhelming statewide evidence set forth above, this district-specific evidence proves (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in drawing District 2; (2) that the cracking of Democratic voters in and adjacent to District 2 had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in and adjacent to District 2 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Therefore, we conclude that District 2 violates the Equal Protection Clause.

c. District 3

District 3 spans all or part of seventeen counties in eastern North Carolina, most of which run along North Carolina's coast. Ex. 1001. Dr. Hofeller testified that, in drawing the 2011 Plan, he removed Democratic voters from the prior version of District 3 and placed them "in . . . District[] 1" because it was the "only [way to] accomplish" the General Assembly's goal "to increase Republican voting strength in New District . . . 3." Hofeller Dep. 116:19-117:25. Although the version of District 3 in the 2016 Plan eliminates a number of appendages from the 2011 version, Ex. 2001, the 2016 Plan version retains approximately 81 percent of the population included in the 2011 version,

Ex. 5001, tbl.1, which the General Assembly expressly drew to increase Republican voting strength.

The results of the 2016 election demonstrate that the mapdrawers' successfully cracked Democratic voters in and around District 3: as Dr. Hofeller intended and expected, the district's Republican candidate received a safe majority of the votes cast in the 2016 election, and is therefore likely to retain his seat in future elections. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, candidate was likely to receive 55% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. Walter B. Jones, received 67.2% of the vote in 2016 election). The Republican candidate also received *a lower* share of the vote in District 3 than two of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018.

To achieve the goal of diluting Democratic voting strength in District 3, the district divides municipalities and communities of interest along partisan lines. In particular, the upper western edge of District 3 splits Pitt County by cracking off that county's disproportionately Democratic precincts into District 1, while placing its disproportionately Republican precincts into District 3. Ex. 4013. Notably, Dr. Hofeller created several alternative maps that *did not* split Pitt County. Ex. 2004, at 17-18. And all but one map drawn by the retired judges placed Pitt County entirely in one district. Ex. 5095. Additionally, Plaintiffs' experts generated a number of other alternative maps that likewise did not split Pitt County. *E.g.*, Exs. 5025, 5027. And although Plan 2-

297 splits Pitt County, it does not do so along partisan lines. *Compare* Second Chen Decl. 3, *with* Ex. 4013. District 3's counterpart in Plan 2-297, District 13, has a substantially lower Republican vote share as measured by Dr. Hofeller's variable than District 3. *Compare* Second Chen Decl. at 5 (expected Republican vote share of 54.43%), *with* Ex. 1018, at 2 (Republican candidate received 67.2% of the vote in 2016 election).

When considered in conjunction with Plaintiffs' strong statewide evidence, this constitutes district-specific proof (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in drawing District 3; (2) that the cracking of Democratic voters in and adjacent to District 3 had the effect of diluting the strength of the Democratic voters' votes in District 3; and (3) that the cracking of Democratic voters in and adjacent to District 3 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, District 3 violates the Equal Protection Clause

d. District 4

District 4 sits in the upper middle of North Carolina and spans all of Orange County, then snakes eastward and captures segments of Durham County and Wake County. Ex. 1001. Dr. Hofeller testified that he purposely drew the lines of the 2011 version of District 4 to encompass "all the strong Democratic VTDs" in the area because the goal of the General Assembly's Republican leadership "to increase Republican voting strength in New Districts 2, 3, 6, 7, and 13 . . . could only be accomplished" in that way. Hofeller Dep. 116:19-117:25. Although the version of

the district in the 2016 Plan is significantly more compact than the 2011 version, Ex. 2001, the 2016 Plan version retains approximately 62 percent of the population included in the 2011 version drawn to pack Democratic voters. Ex. 5001, tbl.1. To that end, Dr. Hofeller testified that District 4 was one of three districts in the 2016 Plan he and the Chairs drew, using past election results, to be "predominantly Democratic." Hofeller Dep. 192:7-16.

The results of the 2016 election demonstrate that the mapdrawers achieved their goal of packing Democratic voters in District 4: as Dr. Hofeller intended and expected, the district's Democratic candidate received an overwhelming majority of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Democratic candidate was likely to receive 63% of the two-party vote share), *with* Ex. 1018, at 2 (Democratic candidate, Rep. David Price, received 68% of the vote in 2016 election). Consistent with these results, Dr. Hood characterized District 4 as "Safe Democratic." Ex. 5058, at 25. Additionally, in the 2016 election the Democratic candidate in District 4 received a higher share of the vote in his district than each of the Republican candidates received in the 10 districts Dr. Hofeller drew so as to ensure Republican candidates would prevail. Ex. 1018, at 2-4.

To achieve the goal of concentrating Democratic voters in District 4, the district divides municipalities and communities of interest along partisan lines. In particular, the eastern edge of District 4 reaches through Durham County and into the heart of Wake County, packing Wake County' s large cluster of

historically Democratic precincts into District 4, while placing the county's historically Republican precincts into a horseshoe-shaped section of District 2. Ex. 4014. As noted above, precinct-level elections results reveal that the Wake County precincts assigned to District 2 tended to strongly favor Republican candidates, while the precincts assigned to District 4 favored Democratic candidates. *See supra* Part III.B.2.b.

Notably, although any map must divide Wake County to comply with the one-person, one-vote rule, each of the maps drawn by the panel of former judges did so by creating *single district* solely within Wake County and not dividing the county on partisan lines. *Compare* Ex. 5095, *with* Ex. 3019. And none of the judges' maps divided Wake County on partisan lines, as the 2016 Plan does. *Compare* Ex. 5095, *with* Ex. 3019. Likewise, numerous alternative maps generated by Plaintiffs' experts, including Plan 2-297, demonstrate that the General Assembly could have drawn District 4 without dividing Wake County on partisan lines so as to pack Democratic voters in District 4. *Compare, e.g.*, Second Chen Decl. 3; Exs. 5026-27, *with* Ex. 4014. The district most closely overlapping with District 4 in Plan 2-297, District 11, has a substantially lower Democratic vote share as measured by Dr. Hofeller's partisanship variable than District 4. *Compare* Second Chen Decl. at 5 (expected Democratic vote share of 63.22%), *with* Ex. 1018, at 2 (Democratic candidate received 68% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 4's unique partisan configuration was not

attributable to the state's political geography or other legitimate districting considerations. Instead, the data demonstrate that Democratic voters in District 4 were, in fact, packed together in order to dilute the voting strength of those Democratic voters. In the 2016 election the Democratic candidate in District 4 received *68 percent* of the vote, the second highest Democratic vote share overall. Ex. 3040, at 29-30. By contrast, in Dr. Mattingly's ensemble of more than 24,000 plans, the median Democratic vote share of the second most Democratic district, based on votes cast in the 2016 election, was *62 percent*, with none of such districts having as high a percentage as the level recorded in District 4 the 2016 election. *Id.*; Trial Tr. I, at 72:10-15. This demonstrates that the effect of the 2016 version of Congressional District 4 is to pack Democratic voters into the district in an amount greater than would otherwise *ever* naturally occur under neutral districting criteria. *See* Trial Tr. I, at 55:2-6, 70:1-4, 76:22-77:1; Ex. 3040.

When considered alongside Plaintiffs' compelling statewide evidence, this district-specific evidence proves (1) that the mapdrawers predominantly intended to, and did in fact, pack Democratic voters in District 4; (2) that the packing of Democratic voters in District 4 had the effect of diluting such voters' votes; and (3) that the packing of Democratic voters in District 4 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, District 4 violates the Equal Protection Clause.

e. District 5

District 5 spans all or part of eleven counties in northwestern North Carolina, most of which run along the western portion of North Carolina's border with Virginia. Ex. 1001. In addition to the overwhelming statewide evidence of partisan gerrymandering, Plaintiffs introduced some district-specific evidence supporting their claim that District 5 dilutes the votes of Democratic voters assigned to the district. In particular, as Dr. Hofeller intended and expected, the district's Republican candidate received a safe majority of the votes cast in the 2016 election, and is therefore likely to retain his seat in future elections. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 55.7% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. Virginia Fox, received 58.2% of the vote in 2016 election). The Republican candidate also received a significantly *lower* share of the vote in District 5 than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be overwhelmingly Democratic. Ex. 1018, at 2-4. And Dr. Hood characterized District 5 as "Safe Republican." Ex. 5058, at 25.

Unlike with other districts, however, Plaintiffs produced no direct evidence that the mapdrawers expressly sought to increase Republican voting strength in drawing either the 2011 version of District 5 or the 2016 version of the district. Likewise, Plaintiffs produced no evidence indicating that District 5 splits municipalities or communities of interest along partisan lines. Ex. 4007. To the

contrary, District 5 is principally composed of predominantly Republican precincts and does not divide either of the two clusters of Democratic precincts within it. *Id.* Indeed, based on historical voting patterns, it is difficult to imagine how one would draw a compact district in the northwest corner of North Carolina that was not predominantly Republican. *Id.* District 5 also is, on average, more compact than most of the other districts in the 2016 Plan and more compact, on average, than its counterpart in the 2011 Plan. Ex. 5001, app. And notably, District 5's counterpart in Plan 2-297, District 5, includes many of the same counties as the version of the district in the 2016 Plan and has a *higher* predicted Republican vote share than the version of the district in the 2016 Plan. *Compare* Second Chen Decl. 3, 5 (expected Republican vote share of 63.86%), *with* Ex. 1018, at 2 (Republican candidate received 58.4% of the vote in 2016 election).

In sum, notwithstanding the compelling statewide evidence of cracking and packing, Plaintiffs have failed to demonstrate that District 5, in particular, cracks or packs Democratic voters, or that such voters' votes would carry more weight under an alternative plan. Accordingly, District 5 does not violate the Equal Protection Clause.

f. District 6

District 6, which resembles a sideways "H," spans all or part of eight counties in northern and central North Carolina. Ex. 1001. Dr. Hofeller testified that in drawing the 2011 version of the district he "plac[ed]" into Districts 1 and 4 "all the strong Democratic VTDs" in order "to increase Republican voting strength in

New District[] . . . 6." Hofeller Dep. 116:19-117:25. The version of District 6 in the 2016 Plan retains slightly more than half its population from the 2011 version, and, of particular relevance here, the version of District 6 in the 2016 Plan follows the 2011 version in cracking Guilford County and the City of Greensboro—the most populous part of the district—both of which traditionally support Democratic candidates. Exs. 1001; 2001. Accordingly, the 2016 Plan version of District 6 carries forward the invidious partisan intent and effects motivating the lines of the 2011 version of the district. To that end, Representative Lewis testified that when creating the 2016 Plan, he and Dr. Hofeller "move[d] individual VTDs from District 6 to District 13 in Guilford County, or vice versa, for political impact." Lewis Dep. 156:19-157:1.

The results of the 2016 election demonstrate that Dr. Hofeller achieved the goal of cracking Democratic voters in Guilford County, and submerging such voters in a "safe" Republican district: as Dr. Hofeller intended and expected, the district's Republican candidate prevailed in the district by a "safe" margin in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 54.41% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. B. Mark Walker, received 59.2% of the vote in 2016 election). Dr. Hood characterized District 6 as "Safe Republican." Ex. 5058, at 25. And notably, the Republican candidate received a significantly *lower* share of the vote in District 6 than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be

predominantly and overwhelmingly Democratic. Ex. 1018.

To achieve the goal of diluting Democratic voting strength in District 6, the district divides municipalities and communities of interest along partisan lines. As noted above, the western edge of District 6 splits Guilford County and the City of Greensboro, placing approximately half of the city's large cluster of historically Democratic precincts into District 6 and placing the other half into District 13. Ex. 4010. Significantly, *Legislative Defendants' expert*, Dr. Hood, testified that line drawn through Guilford County separating Districts 6 and 13 constituted "legislative cracking of a Democratic partisan cluster in the redistricting process." Trial Tr. IV, at 45:2-8. Dr. Hood further testified that had the mapdrawers not cracked Guilford County, one of the two districts "would have been more Democratic." *Id.* at 45:24-46:5.

Figure 4: The cracking of Guilford County between Districts 6 and 13

Dr. Hofeller created at least one alternative map that ***did not*** split the Guilford County Democratic cluster. Ex. 2004, at 18. Not a ***single*** map submitted by the retired judges splits Guilford County ***at all***, let alone through the middle of the Greensboro Democratic cluster. Ex. 5095. Several other alternative maps generated by Plaintiffs' experts did not split Guilford County, or split it less significantly. *E.g.*, Exs. 5025-26, 5028, 5031. And although Dr. Chen's Plan 2-297 divides Guilford County, it does so because Dr. Chen was constrained to follow the General Assembly's objective of avoiding the pairing of two incumbents who reside in Guilford County and were elected under the 2011 Plan, Second Chen Decl. 3, which split Guilford County and was expressly

drawn to increase Republican voting strength, Hofeller Dep. 116:19-117:25. Notably, the two districts in Plan 2-297 that contain parts of Guilford County are significantly more compact, on average, than their counterparts in the 2016 Plan under the compactness measures preferred by the General Assembly. *Compare* Second Chen Decl. 5 (reporting Reock and Polsby-Popper scores of .522 and .320, respectively, for District 6, and scores of .481 and .248 for District 7 in Plan 2-297), *with* Ex. 5001 app'x (reporting Reock and Polsby-Popper scores of .50 and .32, respectively, for District 6, and scores of .36 and .23 for District 13 in the 2016 Plan). And District 6's counterpart in Plan 2-297, District 7, has a substantially lower Republican vote share as measured by Dr. Hofeller's variable than that observed in District 6 in the 2016 election. *Compare* Second Chen Decl. at 5 (expected Republican vote share of 51.49%), *with* Ex. 1018, at 2 (Republican candidate received 59.2% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 6's partisan make-up is attributable to the intentional cracking of Democratic voters, rather than political geography or other legitimate non-partisan redistricting considerations. In particular, Dr. Mattingly found that District 13, with which District 6 split the historically Democratic precincts in Greensboro and Guilford County, represents an extreme statistical outlier. Ex. 3040, at 30. In the 2016 election the Democratic candidate in District 13 received *44 percent* of the vote, the highest Democratic vote share in any of the ten districts in which a Republican candidate prevailed and the fourth highest Democratic vote share overall. *Id.* at 29-30. Yet, in Dr. Mattingly's ensemble of more than 24,000

plans, the median Democratic vote share of the fourth most Democratic district was *54 percent*, with only .19 percent of such districts having a Democratic vote share at or below the level recorded in District 13 the 2016 election. *Id.* Accordingly, the splitting of Guilford County, not North Carolina's political geography, diluted the votes of Democratic voters in District 6.

Viewed in conjunction with Plaintiffs' statewide evidence, Plaintiffs district-specific evidence demonstrates (1) that the mapdrawers predominantly intended to, and did in fact, dilute the votes of Democratic voters in District 6; (2) that the cracking of Democratic voters in District 6 and adjacent districts had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in District 6 and adjacent districts was not a product of the State's political geography or other legitimate, nonpartisan districting considerations. Accordingly, we conclude that District 6 violates the Equal Protection Clause.

g. District 7

District 7 spans all or part of nine counties in southeastern North Carolina. Ex. 1001. Dr. Hofeller testified that he redrew a number of districts in the 2011 Plan "to weaken Democratic strength in District[] 7," Ex. 2043, at 33-34, and "to increase Republican voting strength in New District[] 7," Hofeller Dep. 116:19-117:25. Although the version of District 7 in the 2016 Plan eliminates a number of appendages in the 2011 version, *see* Ex. 2001, the 2016 Plan version includes nearly all of the counties in the 2011 version of the district and retains approximately 72 percent of the population included in its 2011

version. Ex. 5001, tbl.1. Therefore, 2016 Plan version of District 7 carries forward the express partisan intent motivating the lines of the 2011 version of the district, and the attendant discriminatory effects.

The results of the 2016 election demonstrate that the mapdrawers successfully diluted Democratic voters' votes in drawing District 7: the Republican candidate received approximately 61 percent of the votes cast in the 2016 election, a much higher percentage than Dr. Hofeller estimated. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 53.7% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. David Rouzer, received 60.9% of the vote in 2016 election). Yet, notwithstanding this higher-than-anticipated Republican vote share, the Republican candidate in District 7 still received a *lower* share of the vote in his district than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018.

To achieve the goal of diluting Democratic voter strength in District 7, the district divides municipalities and communities of interest along partisan lines. For example, the northwestern edge of District 7 splits Johnston County in two—cracking the county's large cluster of historically Democratic precincts into near-equal halves between Districts 7 and 2. Ex. 4011. Similarly, the southwestern edge of District 7 splits Bladen County by meandering around more than half of the county's disproportionately Democratic precincts to draw those districts into

District 7, while retaining the remaining precincts in District 9. Ex. 4007.

Figure 5: The cracking of Johnston County between Districts 2 and 7

Notably, Dr. Hofeller created several alternative maps that *did not* split Johnston and Bladen Counties. Ex. 2004, at 17-23. Not a *single* map drawn by the panel of retired judges split those counties. Ex. 5095. And a number of other alternative maps generated by Plaintiffs' experts kept Johnston and Bladen Counties whole. *E.g.*, Exs. 5025-27. Additionally, Plan 2-297 does not divide Bladen County, nor does it divide Johnston County as clearly along partisan lines. Second Chen Decl. 3. Furthermore, District 7's counterpart in Plan 2-297, District 9, has a substantially lower Republican vote share as

measured by Dr. Hofeller's variable than that observed in District 6 in the 2016 election. *Compare* Second Chen Decl. at 5 (expected Republican vote share of 52.18%), *with* Ex. 1018, at 2 (Republican candidate received 60.9% of the vote in 2016 election).

Against the backdrop of Plaintiffs' overwhelming statewide evidence, this district-specific evidence proves (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in drawing District 7; (2) that the cracking of Democratic voters in District 7 and adjacent districts had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in District 7 and adjacent districts was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Therefore, we conclude that District 7 violates the Equal Protection Clause.

h. District 8

District 8 takes on a serpentine shape, running more than 100 miles from the outskirts of Charlotte in Cabarrus County to part of the City of Fayetteville in Cumberland County. Ex. 1001. According to Legislative Defendants' expert Dr. Hood, Cabarrus County lies in a different political "subregion" of the State than Fayetteville and Cumberland County, as those subregions have traditionally been defined by political scientists. Ex. 5058, at 8-9.

Dr. Hofeller testified that, in drawing the 2011 Plan, he intended to—and did, in fact—"weaken Democratic strength" in District 8. Ex. 2043, at 33-34. Dr. Hofeller substantially changed the shape of District 8 in the 2016 Plan, retaining only 42 percent of the population in the 2011 version of the district.

Ex. 5001, tbl.1. However, the voting strength of Democratic voters in the district remains intentionally "weak[]." Ex. 2043, at 33-34. As Dr. Hofeller intended and expected, the district's Republican candidate received a safe majority of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 54.9% of the two-party vote share), *with* Ex. 1018, at 3 (Republican candidate, Rep. Richard Hudson, received 58.8% of the vote in 2016 election). And in the 2016 election, the Republican candidate in District 8 received a significantly lower share of the vote in his district than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018.

Although the 2016 Plan substantially altered the boundaries of the version in the 2011 Plan, the 2016 version of District 8 continues to strongly favor Republican candidates because, like the earlier version of the district, it divides counties and communities of interest along partisan lines, and joins sections of the state that have little in common. In particular, the southeastern edge of District 8 cracks the City of Fayetteville and a large cluster of historically Democratic precincts in Cumberland, Hoke, and Robeson Counties between Districts 8 and 9. Ex. 4009. Legislative Defendants' expert Dr. Hood conceded as much, testifying that the three-county area constituted a "cluster of Democratic VTDs" that the 2016 Plan "split between those two districts." Trial Tr. IV, at 47:10, 48:24-49:18. Dr. Hood further testified that if the 2016 Plan had not cracked the Cumberland-

Hoke-Robeson County Democratic cluster, either District 8 or District 9 would not have been a safe Republican district, as is the case under the 2016 Plan. *Id.* at 49:12-25.

Figure 6: The cracking of Cumberland County between Districts 8 and 9

Dr. Hofeller created at least one alternative map that left Cumberland County whole. *See, e.g.*, Ex. 2004, at 14. Several other maps generated by Plaintiffs' experts—including Plan 2-297—did not divide Cumberland County, *e.g.*, Second Chen Decl. 3; Ex. 5029, or crack the Cumberland-Hoke-Robeson County cluster, *e.g.*, Exs. 5026, 5033. Also unlike the 2016 Plan, numerous maps generated by Plaintiffs' experts—including Plan 2-297—do not place Cabarrus County and the Cumberland-Hoke-Robeson County grouping, which lie in different political subregions of the State, in the same district. *E.g.*, Second Chen Decl. 3; Exs. 5025-27. Additionally, although none of the districts in Plan 2-297 take on District 8's serpentine-

shape, the district in Plan 2-297 that includes most of the Cumberland-Hoke-Robeson County cluster, District 8, has a substantially lower Republican vote share as measured by Dr. Hofeller's variable than District 8 in the 2016 Plan. *Compare* Second Chen Decl. 5 (expected Republican vote share of 46.43%), *with* Ex. 1018, at 3 (Republican candidate received 58.8% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 8's partisan make-up did not result from the State's political geography, but rather from the mapdrawers' successful effort to dilute Democratic voters' votes. In particular, in the 2016 election the Democratic candidate in District 9—the district with which District 8 split the Democratic voters in the Cumberland-Hoke-Robeson County cluster—received *42 percent* of the vote, the third highest Democratic vote share in any of the 10 districts in which a Republican candidate prevailed and the sixth highest Democratic vote share among all 13 districts. Ex. 3040, at 29-30. Yet, in Dr. Mattingly's ensemble of more than 24,000 plans—all of which conformed to traditional redistricting criteria—the median Democratic vote share of the sixth most Democratic district was *48 percent*, with only *.02 percent* of such districts having a Democratic vote share at or below the level recorded in District 9 in the 2016 election. *Id.* Accordingly, the splitting of Democratic voters in the Cumberland-Hoke-Robeson County cluster between District 8 and District 9 had the effect of diluting the votes of Democratic voters in District 8.

When considered in conjunction with Plaintiffs' statewide evidence, we find that Plaintiffs have

proven (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in and adjacent to District 8; (2) that the cracking of Democratic voters in an adjacent to District 8 had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in an adjacent to District 8 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, District 8 violates the Equal Protection Clause

i. District 9

District 9 spans all or part of eight counties running along the southeastern portion of North Carolina's border with South Carolina, tracking the serpentine southern border of District 8. Ex. 1001. The District encompasses a number of predominantly Republican precincts in southern Charlotte and its Mecklenburg and Union County suburbs—the areas from which District 9 draws the most population—and then extends nearly 150 miles east, through a number of predominantly Democratic precincts, to rural Bladen County. *Id.*; Ex. 3040, at 2. Legislative Defendants' expert Dr. Hood opined that Charlotte and its Mecklenburg and Union County suburbs and Bladen County lie in different political "subregions" of North Carolina, as the State's political regions have been defined by political scientists. Ex. 5058, at 8-9.

The mapdrawers successfully diluted the votes of Democratic voters by submerging such voters in a predominantly Republican district: as Dr. Hofeller intended and expected, the district's Republican candidate received over 55 percent of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller

averring that, using his seven-race formula, Republican candidate was likely to receive 55.7% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Robert Pittenger, received 58.2% of the vote in 2016 election). And despite this safe margin of victory, the victorious Republican candidate in District 9 received a lower share of the vote in his district than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018, at 2-4.

To achieve the goal of diluting Democratic voter strength in District 9, the district divides several municipalities and communities of interest along partisan lines, and joins sections of the state that have little in common. For example, the northwestern edge of District 9 splits Mecklenburg County by drawing district lines so that almost all of the traditionally Republican precincts found in a small slice of southern Mecklenburg County fall within District 9, while the rest of the county's historically Democratic precincts are packed into District 12. Ex. 4012. In particular, in the 2008 gubernatorial election, approximately 25 percent of the Mecklenburg County voters assigned by the mapdrawers to District 9 in the 2016 Plan voted for the Democratic candidate, whereas more than 56 percent of the Mecklenburg County voters assigned to District 12 voted for the Democratic candidate. VTD 2008 Election Results - 2 - District 9: 2016 Contingent Congressional Plan Corrected ("NCGA District 9 Data") 2 (Data Printed Feb. 25, 2016), *with* VTD 2008 Election Results - 2 - District 4: 2016 Contingent Congressional Plan Corrected ("NCGA District 12 Data") 12 (Data Printed Feb. 25, 2016). Precinct-level

results from other elections follow the same pattern: the Mecklenburg County precincts assigned to District 9 tended to strongly favor Republican candidates, while the precincts assigned to District 12 favored Democratic candidates. *Compare* NCGA District 9 Data 2, *with* NCGA District 12 Data 3; *Compare* VTD 2010 Election Results - District 9: 2016 Congressional Plan Corrected 3 (Data Printed Feb. 25, 2016), *with* VTD 2010 Election Results - District 12: 2016 Congressional Plan Corrected 3 (Data Printed Feb. 25, 2016).

Additionally, as Legislative Defendants' expert Dr. Hood acknowledged, the northeastern edge of District 9 cracks Cumberland County's historically Democratic precincts between districts 8 and 9. Ex. 4012; Trial Tr. IV, at 47:10, 48:24-49:18. Further, the southeastern edge of District 9 cracks Bladen County's historically Democratic precincts between Districts 7 and 9. Ex. 4012. And several Plaintiffs testified that the predominantly Republican Mecklenburg County section of District 9 has little in common with the predominantly rural eastern portion of the district that historically has favored Democratic candidates. McNeill Dep. 26:9-27:18; Klenz Dep. 65:23-66:12.

Notably, Dr. Hofeller created several alternative maps that *did not* split Mecklenburg, Cumberland, and Bladen Counties in the same districting plan. Ex. 2004, at 13, 14, 15, 17-23. And not a *single* map drawn by the retired judges split all three counties. Ex. 5095. Nor did any of the judges' maps place any portion of Mecklenburg County in the same district as parts of Cumberland County or Bladen County. *Id.* Nor did

any of their maps divide Mecklenburg County along partisan lines, as the 2016 Plan does. *Id.* Likewise, numerous alternative maps generated by Plaintiffs' experts, including Dr. Chen's Plan 2-297, demonstrate that the General Assembly could have drawn District 9 without dividing Mecklenburg County along partisan lines or placing portions of Mecklenburg County in the same district as portions of Bladen and Cumberland Counties, which lie in a different political subregion of the state. *E.g.* Second Chen Decl. 3; Exs. 5025-27. Additionally, although none of the districts in Plan 2-297 place Mecklenburg County in the same district as Robeson and Bladen County, the district in Plan 2-297 that, like District 9, includes southeastern Mecklenburg and Union Counties, District 4, has a slightly lower Republican vote share as measured by Dr. Hofeller's variable than District 9 in the 2016 Plan. *Compare* Second Chen Decl. 5 (expected Republican vote share of 57.77%), *with* Ex. 1018, at 2 (Republican candidate received 58.2% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 9's unique partisan configuration did not result from the State's political geography, but rather from the mapdrawers' successful effort to dilute Democratic voters' votes by combining Mecklenburg County's populous Republican precincts with Democratic precincts in rural southeast North Carolina. In particular, in the 2016 election the Democratic candidate in District 9 received *42 percent* of the vote, the third highest Democratic vote share in any of the 10 districts in which a Republican candidate prevailed and the sixth highest Democratic vote share among all 13 districts. Ex. 3040, at 29-30. By contrast,

in Dr. Mattingly's ensemble of more than 24,000 plans the median Democratic vote share of the sixth most Democratic district was *48 percent*, with only *.02 percent* of such districts having a Democratic vote share at or below the level recorded in District 9 in the 2016 election. *Id.*

This strong district-specific evidence—when coupled with the overwhelming statewide evidence—establishes (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in and adjacent to District 9; (2) that the cracking of Democratic voters in and adjacent to District 9 had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in and adjacent to District 9 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, we conclude District 9 violates the Equal Protection Clause.

j. District 10

District 10 spans all or part of eight counties in southwestern North Carolina, running from the western suburbs of Charlotte to a bizarre, bulbous protrusion into Buncombe County and the City of Asheville in the Appalachian Mountains. Ex. 1001. Like the 2011 Plan, the 2016 Plan divides Buncombe County and Asheville, which are composed of precincts that historically favor Democrats, between Districts 10 and 11. Exs. 2001, 4008. The 2016 version of District 10 closely tracks the version of the district in 2011 Plan, retaining over 95 percent of the 2011 version's population. Ex. 5001, tbl. 1. The congressional districting plan in place prior to the 2011 election did not divide Buncombe County or

Asheville, and the district in that plan that included all of Buncombe County and Asheville elected the Democratic candidate in the 2010 election, Ex. 1021; Quinn Dep. 26:17-23, 38:20-25, notwithstanding that Republican candidates performed strongly in the 2010 election, both in North Carolina and nationwide, Exs. 1021; 5101, at 25, 36. Although the General Assembly received "push back" regarding the splitting of Buncombe County and Asheville in the 2011 Plan, Dr. Hofeller and Representative Lewis determined that it simply "wasn't worth the effort" to remove the split for the 2016 version, especially since the split was present "in every scenario" that achieved their partisan objectives. Lewis Dep. 62:4-19.

The 2016 Plan successfully cracked Democratic voters in and adjacent to District 10: as Dr. Hofeller intended and expected, the district's Republican candidate received an overwhelming majority of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 58% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. Patrick McHenry, received 63.1% of the vote in 2016 election). Consistent with these results, Legislative Defendants' expert Dr. Hood characterized District 10 as "Safe Republican." Ex. 5058, at 25. And despite this safe margin of victory, in the 2016 election the victorious Republican candidate in District 10 received a significantly lower share of the vote in his district than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018, at 2-4.

To achieve the goal of diluting Democratic voting strength in District 10, the district divides municipalities and communities of interest along partisan lines. In particular, the northeastern edge of District 10 splits Buncombe County and Asheville with District 11. Ex. 4008. Notably, Legislative Defendants' expert Dr. Hood testified that the district line drawn through Buncombe County and Asheville constituted "legislative cracking of a Democratic partisan cluster in the redistricting process." Trial Tr. IV, at 41:12-18. Dr. Hood further conceded that had Buncombe County and Asheville not been divided between two districts—*i.e.* had the "naturally packed" Buncombe County and Asheville Democratic "cluster" been kept whole—the district containing Buncombe County and Asheville would have been more favorable to Democratic candidates. *Id.* at 40:1-43:4.

Figure 7: The cracking of Buncombe County between Districts 10 and 11

Significantly, Dr. Hofeller created several alternative maps that *did not* split the Buncombe County Democratic cluster. Ex. 2004, at 11, 13, 18. And not a *single* map drawn by the retired judges splits Buncombe County *at all*, let alone through the middle of the Democratic cluster. Ex. 5095; *cf.* Lewis Dep. 64:25-65:1 (testifying he "couldn't ever figure out a way" to "keep Buncombe county whole"). Likewise, numerous alternative maps generated by Plaintiffs' experts, including Plan 2-297, demonstrate that the General Assembly could have drawn District 10 without cracking the Democratic cluster in Buncombe County. *E.g.*, Second Chen Decl. 3, Exs. 5025-27. Notably, Districts 1 and 2 in Plan 2-297, which contain most of the area encompassed by Districts 10 and 11 in the 2016 Plan, are, on average, significantly more

compact than District 10 and 11 of the 2016 Plan, as measured by the General Assembly's preferred Reock and Polsby-Popper metrics. *Compare* Second Chen Decl. 3-5 (reporting Reock and Polsby-Popper scores of .320 and .324, respectively, for District 1, and scores of .553 and .325 for District 2 in Plan 2-297), *with* Ex. 5001 (reporting Reock and Polsby-Popper scores of .35 and .26, respectively, for District 10, and scores of .26 and .21 for District 11 in the 2016 Plan).

When viewed in conjunction with Plaintiffs' overwhelming statewide evidence, this district-specific evidence proves (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in and adjacent to District 10; (2) that the cracking of Democratic voters in and adjacent to District 10 had the effect of diluting such voters' votes; and (3) that the cracking off of Democratic voters in and adjacent to District 10 was not a product of the State's political geography or other legitimate, nonpartisan districting considerations. District 10, therefore, violates the Equal Protection Clause.

k. District 11

District 11 spans all or part of sixteen counties in western North Carolina, including sections of Buncombe County and Asheville. Ex. 1001. District 11 closely tracks the shape and population of the version of the district in the 2011 Plan, retaining over 96 percent of the 2011 version's population. Exs. 2001; 5001, tbl. 1. Dr. Hofeller averred that a part of the "strategy" of the General Assembly's Republican leadership in drawing the 2011 Plan "was to weaken Democratic strength in District[] 11." Ex. 2034, at 2.

As explained above, *see supra* Part III.B.2.j, notwithstanding that the General Assembly received "push back" as a result of the division of Buncombe County and Asheville between Districts 10 and 11, Dr. Hofeller and Representative Lewis determined that it simply "wasn't worth the effort" to remove the split for the 2016 version, especially since the split was present "in every scenario" that achieved their partisan objectives. Lewis Dep. 62:4-19. Accordingly, the version of District 11 in the 2016 Plan expressly carried forward the express partisan intent and effects attributable to the version of the district included in the 2011 Plan.

District 11 cracks Democratic voters and thereby dilutes their votes: as the mapdrawers intended and expected, the district's Republican candidate received a safe majority of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 57.1% of the two-party vote share), *with* Ex. 1018, at 2 (Republican candidate, Rep. Mark Meadows, received 64.1% of the vote in 2016 election). Consistent with these results, Dr. Hood characterized District 11 as "Safe Republican." Ex. 5058, at 25. Although District 11 is safely Republican, the victorious Republican candidate in District 11 received a significantly lower share of the vote in his district in the 2016 election than each of the Democratic candidates received in the three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018, at 2-4.

To achieve the goal of diluting Democratic voting strength in District 11, the district divides

municipalities and communities of interest along partisan lines. As explained above, the eastern edge of District 11 splits Buncombe County and the City of Asheville with District 10. *See supra* Part III.B.2.j; *see also* Exs. 3013; 4008. Notably, Legislative Defendants' expert Dr. Hood testified that the Buncombe County boundary between Districts 10 and 11 constituted "legislative cracking of a Democratic partisan cluster in the redistricting process." Trial Tr. IV, at 41:12-18. And Dr. Hood further conceded that had Buncombe County and Asheville been kept whole, the district containing Buncombe County and Asheville would have been more favorable to Democratic candidates. *Id.* at 40:1-43:4.

Dr. Hofeller created several alternative maps that *did not* split the Buncombe County Democratic cluster. Ex. 2004, at 11, 13, 18. And not a *single* map submitted by the retired judges splits Buncombe County *at all*, let alone along the Democratic cluster. Ex. 5095. Likewise, numerous alternative maps generated by Plaintiffs' experts, including Plan 2-297, demonstrate that the General Assembly could have drawn District 11 without cracking the Democratic cluster in Buncombe County. *E.g.*, Second Chen Decl. 3, Exs. 5025-27. And significantly, Districts 1 and 2 in Plan 2-297, which contain most of the area encompassed by Districts 10 and 11 in the 2016 Plan, are, on average, significantly more compact than District 10 and 11 of the 2016 Plan, as measured by the Reock and Polsby-Popper metrics. *Compare* Second Chen Decl. 3-5 (reporting Reock and Polsby-Popper scores of .320 and .324, respectively, for District 1, and scores of .553 and .325 for District 2 in Plan 2-297), *with* Ex. 5001 (reporting Reock and

Polsby-Popper scores of .35 and .26, respectively, for District 10, and scores of .26 and .21 for District 11 in the 2016 Plan). Additionally, District 11's counterpart in Plan 2-297, District 1, has a substantially lower Republican vote share as measured by Dr. Hofeller's partisanship variable than that observed in District 11 in the 2016 election. *Compare* Second Chen Decl. 5 (expected Republican vote share of 52.62%), *with* Ex. 1018, at 2 (Republican candidate received 64.1% of the vote in 2016 election).

When viewed in conjunction with Plaintiffs' overwhelming statewide evidence, this district-specific evidence demonstrates (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in and adjacent to District 11; (2) that the cracking of Democratic voters in and adjacent to District 11 had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in and adjacent to District 11 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, District 11 violates the Equal Protection Clause.

l. District 12

District 12 is wholly contained within Mecklenburg County. Ex. 1001. Dr. Hofeller testified that District 12 was one of three districts in the 2016 Plan he and the Chairs drew, using past election results, to be "predominantly Democratic." Hofeller Dep. 192:7-16. As Dr. Hofeller intended and expected, the district's Democratic candidate received well over 60 percent of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that,

using his seven-race formula, Democratic candidate was likely to receive 63.8% of the two-party vote share), *with* Ex. 1018, at 4 (Democratic candidate, Rep. Alma Adams, received 67% of the vote in 2016 election). Consistent with these results, Dr. Hood characterized District 12 as "Safe Democratic." Ex. 5058, at 25. In the 2016 election, the Democratic candidate in District 12 received a higher share of the vote in her district than all but one of the Republican candidates received in the 10 districts Dr. Hofeller drew to be predominantly Republican. Ex. 1018, 2-4.

To achieve the goal of concentrating Democratic voters in District 12, the district divides Mecklenburg County and Charlotte along partisan lines. In particular, the southern edge of District 12 splits Mecklenburg County by packing the county's large cluster of historically Democratic precincts into District 12, while placing the county's historically Republican precincts into District 9. Ex. 4012. To that end, precinct-level election results reveal the Mecklenburg County precincts assigned to District 9 tended to strongly favor Republican candidates, while the precincts assigned to District 12 favored Democratic candidates. *See supra* Part III.B.2.i.

Figure 8: The partisan division of Mecklenburg County between Districts 9 and 12

Although any map drawn to comply with the one-person, one-vote requirement must divide Mecklenburg County, numerous alternative maps drawn by the panel of retired judges and generated Plaintiffs' experts, including Plan 2-297, demonstrate that the General Assembly could have drawn District 12 without hewing exactly to the line formed between the Democratic and Republican precincts in Mecklenburg County, as the 2016 Plan does. *Compare, e.g.*, Second Chen Decl. 3; Exs. 5025-27, 5095, *with* Ex. 4012. Notably, the district, like District 12, wholly contained in Mecklenburg County in Plan 2-297, District 3, has a significantly lower predicted Democratic vote share, as measured by Dr. Hofeller's partisanship variable, than that observed in District

12. *Compare* Second Chen Decl. 5 (expected Democratic vote share of 54.18%), *with* Ex. 1018, at 2 (Democratic candidate received 67% of the vote in 2016 election).

Plaintiffs' statistical evidence further demonstrates that District 12's partisan make-up resulted from the mapdrawers' successful efforts to pack Democratic voters, rather than the State's political geography or other legitimate redistricting consideration. In particular, among Dr. Mattingly's more than 24,000 simulated maps—all of which conform to traditional districting criteria—District 12 in the 2016 Plan is an extreme statistical outlier with regard to its concentration of Democratic voters. Ex. 3040, at 30. In the 2016 election the Democratic candidate in District 12 received *67 percent* of the vote, the third highest Democratic vote share recorded in all 13 districts. *Id.* at 29-30. Yet, in Dr. Mattingly's ensemble of more than 24,000 plans, the median Democratic vote share of the third most Democratic district was *57 percent*—approximately 10 percentage points fewer—with only *.07 percent* of such districts having a Democratic vote share at or above the level recorded in District 12 in the 2016 election. *Id.* This demonstrates that the effect of the 2016 version of District 12 is to pack Democratic voters into the district in an amount greater than would otherwise naturally occur more than 99.9 percent of the time under neutral districting criteria. *See* Trial Tr. I, at 55:2-6, 70:1-4, 76:22-77:5.

Considered alongside Plaintiffs' strong statewide evidence, this district-specific evidence proves (1) that the mapdrawers predominantly intended to, and did

in fact, pack Democratic voters in District 12; (2) that the packing of Democratic voters in District 12 had the effect of diluting such voters' votes; and (3) that the packing of Democratic voters in District 12 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Accordingly, we conclude that District 12 violates the Equal Protection Clause.

m. District 13

District 13 spans all or part of five counties in mid-western North Carolina, running from Charlotte's northern suburbs to the center of Guilford County and the City of Greensboro. Ex. 1001. Representative Lewis and Dr. Hofeller drew the version of District 13 in the 2016 Plan by "mov[ing] individual VTDs from District 6 to District 13 . . . , or vice versa, for political impact." Lewis Dep. 156:19-157:1.

The results of the 2016 election reveal that the mapdrawers effectively diluted the votes of Democratic voters in and adjacent to District 13 in drawing the district: as Dr. Hofeller intended and expected, the district's Republican candidate received over 53 percent of the votes cast in the 2016 election. *Compare* Ex. 5116, at 9 (Dr. Hofeller averring that, using his seven-race formula, Republican candidate was likely to receive 53.5% of the two-party vote share), *with* Ex. 1018, at 4 (Republican candidate, Rep. Ted Bud, received 56.1% of the vote in 2016 election). And in the 2016 election the victorious Republican candidate in District 13 received a significantly lower share of the vote in his district than each of the Democratic candidates received in the

three districts Dr. Hofeller drew to be predominantly and overwhelmingly Democratic. Ex. 1018, at 2-4.

To achieve the goal of diluting Democratic voting strength in District 13, the district divides municipalities and communities of interest along partisan lines. As explained above, the northeastern edge of District 13 splits Guilford County and Greensboro in half, cracking off approximately half of the county's large cluster of historically Democratic precincts into District 6. *See supra* Part III.B.2.f; *see also* Ex. 4010. Significantly, Legislative Defendants' expert, Dr. Hood testified that the boundary between Districts 6 and 13 constitutes "legislative cracking of a Democratic partisan cluster in the redistricting process." Trial Tr. IV, at 45:2-8. And Dr. Hood further testified that had the mapdrawers not cracked Guilford County, either District 6 or District 13 "would have been more Democratic." *Id.* at 45:24-46:5.

Dr. Hofeller created at least one alternative map that *did not* split Guilford County Democratic cluster. Ex. 2004, at 18. And not a *single* map drawn by the retired judges splits Guilford County *at all*, let alone along the Democratic cluster. Ex. 5095. A number of other maps generated by Plaintiffs' experts did not split Guilford County, or split it far less significantly. *E.g.*, Exs. 5025-26, 5028, 5031. And although Dr. Chen's Plan 2-297 divides Guilford County, it does so because Dr. Chen was constrained to follow the General Assembly's objective of avoiding the pairing of incumbents elected under the 2011 Plan, Second Chen Decl. 3, which split Guilford County and was expressly drawn to increase Republican voting strength, Hofeller Dep. 116:19-117:25. As noted above,

the two districts in Plan 2-297 that contain parts of Guilford County are significantly more compact, on average, than their counterparts in the 2016 Plan under the compactness measures preferred by the General Assembly. *Compare* Second Chen Decl. 5 (reporting Reock and Polsby-Popper scores of .522 and .320, respectively, for District 6, and scores of .481 and .248 for District 7 in Plan 2-297), *with* Ex. 5001 (reporting Reock and Polsby-Popper scores of .50 and .32, respectively, for District 6, and scores of .36 and .23 for District 13 in the 2016 Plan). Additionally, although no district in Plan 2-297 closely resembles District 13, the district in Plan 2-297 that includes eastern Greensboro and Guilford County, District 6, has a substantially lower Republican vote share as measured by Dr. Hofeller's partisanship variable than that observed in District 13 in the 2016 election. *Compare* Second Chen Decl. 5 (expected Republican vote share of 49.30%), *with* Ex. 1018, at 2 (Republican candidate, Rep. Ted Budd, received 56.1% of the vote in 2016 election).

Plaintiffs' statistical evidence further proves that District 13's partisan make-up is attributable to the intentional cracking of Democratic voters, rather than political geography or other legitimate non-partisan redistricting considerations. In particular, Dr. Mattingly found that District 13 represents an extreme statistical outlier in terms of its partisan composition. Ex. 3040, at 30. In the 2016 election the Democratic candidate in District 13 received *44 percent* of the vote, the highest Democratic vote share in any of the ten districts in which a Republican candidate prevailed and the fourth highest Democratic vote share overall. Ex. 3040, at 29-30. By

contrast, in Dr. Mattingly's ensemble of more than 24,000 plans, the median Democratic vote share of the fourth most Democratic district was *54 percent*, with *significantly less than one percent*—just .19 percent—of such districts having a Democratic vote share at or below the level recorded in District 13 the 2016 election. *Id.* Accordingly, the splitting of Guilford County, not North Carolina's political geography, had the effect of diluting the votes of Democratic voters in and adjacent to District 13.

This district-specific evidence—when coupled with Plaintiffs' overwhelming statewide evidence—proves (1) that the mapdrawers predominantly intended to, and did in fact, crack Democratic voters in and around District 13; (2) that the cracking of Democratic voters in and around District 13 had the effect of diluting such voters' votes; and (3) that the cracking of Democratic voters in and around District 13 was not a product of the State's political geography or other legitimate, non-partisan districting considerations. Therefore, District 13 violates the Equal Protection Clause.

* * * * *

All told, Plaintiffs' statewide and district-specific evidence proves that (1) in drawing Districts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, and 13, the General Assembly's predominant intent was to subordinate the interests of non-Republican voters and entrench Republicans in power; (2) the General Assembly cracked or packed Democratic voters in each of those districts and thereby diluted such voters' votes; and (3) the dilution of such voters' votes is not attributable to the State's political geography or other legitimate redistricting

considerations. Accordingly, we conclude that each of those twelve districts constitutes an invidious partisan gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. First Amendment

Next, we consider Plaintiffs' claims under the First Amendment. The First Amendment, through the Due Process Clause of the Fourteenth Amendment, prohibits states from making any law "abridging the freedom of speech." U.S. Const. amend. I. Partisan gerrymandering—again, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Leg.*, 135 S. Ct. at 2658—implicates First Amendment rights because "political belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 356 (1976), and because "[t]he First Amendment operates as a vital guarantee of democratic self-government," *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). Accordingly, the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 558 U.S. at 339-40 (internal quotation marks omitted). To that end, the First Amendment protects "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively." *Williams*, 393 U.S. at 30-31 (emphasis added).

A. Background Law

Several lines of precedent bear on the application of the First Amendment to partisan gerrymanders. To begin, by favoring one set of political beliefs over another, partisan gerrymanders implicate the First Amendment prohibition on "viewpoint discrimination." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment *by reason of their views*." (emphasis added)). The First Amendment prohibits the government from favoring or disfavoring particular viewpoints, and, therefore, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment). Viewpoint discrimination is "presumptively unconstitutional," *Rosenberger*, 515 U.S. at 830 (internal quotation marks omitted), and therefore subject to "strict scrutiny," *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (explaining that a governmental action amounting to viewpoint discrimination survives strict scrutiny only if the action is "the least restrictive means of achieving a compelling state interest").

Relatedly, by seeking to dilute the electoral speech of supporters of disfavored parties or candidates, partisan gerrymandering runs afoul of the First Amendment's prohibition on laws that disfavor a particular group or class of speakers. *Citizens United*, 558 U.S. at 340 (explaining that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content"). The First Amendment prohibits such laws because "[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340-41; *see also Becerra*, 138 S. Ct. at 2378 ("Speaker-based laws run the risk that the State has left unburdened those speakers whose messages are in accord with its own views." (internal quotation marks omitted)). In the context of political speech, in particular, the Supreme Court repeatedly has applied the First Amendment's prohibition on "restrictions on certain disfavored speakers" to strike down electoral laws that disfavor a particular group of speakers. *Id.* at 341; *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978). And when, as is the case with a partisan gerrymander, a restriction on one group of speakers "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Belotti*, 435 U.S. at 785-86 (footnote omitted). Like viewpoint discrimination, governmental actions that discriminate against a particular group or class of speakers are subject to "strict scrutiny." *See Citizens United*, 558 U.S. at 340.

Third, by disfavoring a group of voters based on their prior votes and political association, partisan gerrymandering implicates the First Amendment's prohibition on burdening or penalizing individuals for engaging in protected speech. *Vieth*, 541 U.S. at 314 (2004) (Kennedy, J., concurring in the judgment) (explaining partisan gerrymandering violates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"). The Supreme Court has explained that the government cannot "penalize[]" a person for engaging in "constitutionally protected speech or associations" because such indirect regulation of speech would "allow the government to produce a result which it could not command directly." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (internal quotation marks and alterations omitted). The Supreme Court's First Amendment retaliation jurisprudence represents a specific application of the general principle that even when the law affords the government the authority to make discretionary decisions—like firing or promoting an employee or allowing public use of a governmental facility—the government may not exercise such discretion "in a narrowly partisan or political manner." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) (plurality op.). For example, although the government retains discretion to curate public school libraries, "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional

rights of the students denied access to those books." *Id.*; *see also id.* at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede all of this.").

Courts have distilled a three-prong test from the Supreme Court's First Amendment retaliation jurisprudence, examining whether (1) the plaintiff's "speech was protected;" (2) "the defendant's . . . retaliatory action adversely affected the plaintiff's constitutionally protected speech;" and (3) "a causal relationship exists between [the plaintiff's] speech and the defendant's retaliatory action." *See, e.g.*, *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000). Examining these considerations, the Supreme Court repeatedly has struck down as violative of the First Amendment government actions that burden or penalize an individual or group for engaging in political speech or association. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (concluding that First Amendment prohibits government employers from making "promotion, transfer, recall, and hiring decisions involving low-level public employees . . . based on party affiliation and support"); *Elrod*, 427 U.S. at 373 (holding that First Amendment prohibits government officials from discharging or threatening to discharge lower-level public employees based on their political affiliation).

Finally, partisan gerrymandering implicates First Amendment precedent dealing with electoral regulations that have the potential to burden political speech or association. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The First Amendment demands judicial

scrutiny of state election regulations because regulations that "govern[] the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Because states' "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *id.*, the Supreme Court applies "sliding-scale" scrutiny to state election regulations, *see Burdick*, 504 U.S. at 433-34. In particular, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986)). Under this test, "[e]lection regulations that impose a severe burden on associational rights are subject to strict scrutiny." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). By contrast, "[i]f a statute imposes only modest burdens . . . then 'the State's important regulatory interests are generally sufficient to justify reasonable, *nondiscriminatory* restrictions.'" *Id.* at 452 (emphasis added) (quoting *Anderson*, 460 U.S. at 788).

Applying that test, the Court has "repeatedly upheld reasonable, *politically neutral* regulations that

have the effect of channeling expressive activity at the polls." *Id.* at 438 (emphasis added). By contrast, the Supreme Court has repeatedly struck down as violative of the First Amendment even facially neutral electoral regulations that had the effect of burdening particular parties, candidates, or groups of voters. *See, e.g.*, *Tashjian*, 479 U.S. at 225 (concluding that state's enforcement of statute requiring closed primaries, against the will of the Republican party, violated First Amendment); *Anderson*, 460 U.S. at 806 (striking down state candidate filing deadline because it posed unjustified burden on third-party candidates and voters who supported such candidates, with the "interests of the voters who chose to associate together" for political ends constituting the Court's "primary concern"). These cases reflect the governing principle that "in exercising their powers over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections," including enacting "election laws [that] so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

Against these many, multifaceted lines of precedent, the First Amendment's applicability to partisan gerrymandering is manifest. How can the First Amendment prohibit the government from disfavoring certain viewpoints, yet allow a legislature to enact a districting plan that disfavors supporters of a particular set of political beliefs? How can the First Amendment bar the government from disfavoring a class of speakers, but allow a districting plan to disfavor a class of voters and candidates? How can the First Amendment protect government employees'

political speech rights, but stand idle when the government infringes on voters' political speech rights? And how can the First Amendment ensure that candidates ascribing to all manner of political beliefs have a reasonable opportunity to appear on the ballot, and yet allow a state electoral system to favor one set of political beliefs over others? As at least five Justices already have determined, we conclude that the First Amendment does not draw such fine lines. *See Gill*, 138 S. Ct. at 1937-40 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring).

The 2016 Plan, in particular, implicates all four of these lines of precedent. The 2016 Plan discriminates against a particular viewpoint: voters who oppose the Republican platform and Republican candidates. The 2016 Plan also discriminates against a particular group of speakers: non-Republican candidates and voters who support non-Republican candidates. The General Assembly's use of Political Data—individuals' votes in previous elections—to draw district lines to dilute the votes of individuals likely to support non-Republican candidates imposes burdens on such individuals based on their past political speech and association. And the 2016 Plan's express partisan favoritism excludes it from the class of "reasonable, politically neutral" electoral regulations that pass First Amendment muster. *Burdick*, 504 U.S. at 438. Indeed, if legislative mapdrawers can "rig" an election through the manipulation of district lines so as to ensure a favored group of candidates widely prevails—as we find the North Carolina General Assembly did here—then there would be no reason for legislators to resort to second-best approaches to attempt to dictate electoral outcomes and distort the marketplace of

political ideas, such as those struck down in *Anderson*, *Citizens United*, and *McCutcheon*.

B. Legal Standard and Application

Notwithstanding the evident applicability of the First Amendment to partisan gerrymandering, and the 2016 Plan in particular, neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment. League Plaintiffs, in accordance with the approach taken by the district court in *Gill*, assert that the three-prong framework governing partisan gerrymandering claims under the Equal Protection Clause also applies to partisan gerrymandering claims under the First Amendment. This requires a plaintiff to demonstrate (1) discriminatory intent, (2) discriminatory effects, and (3) a lack of justification for the discriminatory effects. League Br. 3; *Whitford*, 218 F. Supp. 3d at 884. That inquiry mirrors the considerations the Supreme Court evaluates in First Amendment retaliation cases and First Amendment challenges to election regulations, *see supra* Part IV.A; *infra* Part IV.C, albeit using somewhat different nomenclature. Legislative Defendants agree that to the extent partisan gerrymandering is actionable under the First Amendment—and we conclude that it is, *see supra* Parts II.B, IV.A[48]—the governing legal framework is no "different from any test which might apply under

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[48] *See also Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (noting that a First Amendment claim of impermissible partisan gerrymandering articulates "a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases").

the Fourteenth Amendment." Leg. Defs.' FOF 105-06 ("'[T]he [F]irst amendment, like the [T]hirteenth, offers no protection of voting rights beyond that afforded by the [F]ourteenth and [F]ifteenth Amendments.'" (quoting *Washington v. Finley*, 664 F.2d 913, 927-28 (4th Cir. 1981))).

Common Cause Plaintiffs, by contrast, assert that once a plaintiff proves that a redistricting body intended for a districting plan to discriminate against voters likely to support a disfavored candidate or party—and thereby intended to engage in discrimination against a particular viewpoint and group of speakers—a court must subject the plan to strict scrutiny, upholding the plan "'only if [Defendants] prove[] that [it is] narrowly tailored to serve compelling state interests.'" Common Cause Br. 7-8 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)). Accordingly, unlike League Plaintiffs, Common Cause Plaintiffs take the position that once a plaintiff demonstrates that a districting plan is motivated by invidious partisan intent, the First Amendment does not require a plaintiff to demonstrate that a plan has concrete discriminatory effects.

We agree with Common Cause Plaintiffs that the Supreme Court's demonstrated dim view of viewpoint discrimination, laws that discriminate against a class of speakers, and laws that impose severe burdens on associational rights provides strong theoretical support for their position that invidious partisan discrimination, even absent a showing of concrete discriminatory effects, "is itself an injury to the First Amendment rights of the intended targets or victims."

Common Cause Br. 9. To that end, the Supreme Court repeatedly has struck down election laws and regulations that discriminate against a particular viewpoint or group of speakers, even in the absence of evidence that the law or regulation had, or would have, a concrete effect on the outcome of an election. *See, e.g.*, *Citizens United*, 558 U.S. at 365-66 (striking down statute placing certain restrictions on political advocacy by corporations); *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (opinion of Roberts, C.J.) (same); *id.* at 504 (Scalia, J., concurring in the judgment) (same). It defies reason that the First Amendment—which "has its fullest and most urgent application" to political speech—would subject election regulations that discriminate against associations of individuals organized principally for economic gain to the most exacting level of constitutional scrutiny, *see Citizens United*, 558 U.S. at 339-43, 365, but subject election regulations that expressly discriminate against associations of individuals principally organized to advance political beliefs, like Plaintiffs North Carolina Democratic Party, League of Women Voters, and Common Cause, to less searching scrutiny. And we see no reason why the First Amendment would provide greater protection to associations of individuals principally organized to advance a single political belief, *see Becerra*, 138 S. Ct. at 2372-76 (applying strict scrutiny to content-based regulation of speech as-applied to state-licensed medical clinics "devoted to opposing" abortion), than it does to associations of individuals, like political parties and religious institutions, organized to support or advance a collection of moral or political beliefs.

Likewise, courts reviewing election regulations under the *Anderson/Burdick* framework apply strict scrutiny to election regulations that are not "even-handed" or "politically neutral." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011); *see also Clingman v. Beaver*, 544 U.S. 581, 603-04 (2005) (O'Connor, J. concurring in part) (concluding that burden imposed by electoral regulation was not "severe," and thus not subject to strict scrutiny, because it imposed "only a modest and politically neutral burden on associational rights"). We can conceive of no reason why a redistricting plan that is expressly not "even handed" or "politically neutral"—like the 2016 Plan—would not be subject to the same searching First Amendment scrutiny as other election regulations enacted pursuant to a state legislature's Article I authority to regulate elections.

Nevertheless, Supreme Court precedent appears to bar a plaintiff from successfully challenging a partisan gerrymander solely based on evidence that a redistricting body enacted a districting plan with discriminatory partisan intent. *See LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights. For this reason, a majority of the Court rejected a test proposed in *Vieth* that is markedly similar to the one appellants present today."); *id.* at 511-12 (Scalia, J., concurring in part and dissenting in part). To that end, the one lower court to put forward a unique framework for adjudicating partisan gerrymandering claims under

the First Amendment since the Supreme Court decided *LULAC* required that a partisan gerrymandering plaintiff prove that he experienced a "demonstrable and concrete adverse effect" on his First Amendment rights. *Shapiro*, 203 F. Supp. 3d at 598.

In light of this precedent, we assume that the Supreme Court would review First Amendment partisan gerrymandering claims in accordance with the intermediate scrutiny standard applied in retaliation cases and challenges to election regulations that do not impose a "severe" burden on voting rights.[49] Drawing on that precedent, we derive a three-prong test requiring Plaintiffs to prove: (1) that the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party, (2) that the districting plan in fact burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan.

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[49] We need not definitively resolve this question because we find (1) that the General Assembly intended for the 2016 Plan to subordinate the interests of non- Republican voters and entrench Republican congressmen in office, (2) that the 2016 Plan had that effect, and (3) that no legitimate state interest or neutral explanation justified the 2016 Plan's discriminatory effect. *See supra* Part III; *infra* Part IV.B. Accordingly, under either League Plaintiffs and Legislative Defendants' three-prong framework or Common Cause Plaintiffs' strict-scrutiny approach, Plaintiffs prevail on their First Amendment claims.

1. Intent To Burden Speech and Associational Rights

The intent prong principally derives from the causation component in First Amendment retaliation cases. In such cases, a "plaintiff must show a causal connection between a defendant's *retaliatory animus* and subsequent injury in any sort of retaliation action." *Hartman v. Moore*, 547 U.S. 250, 259 (2006) (emphasis added). Put differently, a plaintiff must show that her protected First Amendment activities were a "motivating factor" behind the challenged retaliatory action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The motivating-factor requirement in First Amendment retaliation claims parallels the intent requirement in Equal Protection Claims. *Id.* at 287 n.2 (citing *Arlington Heights*, 429 U.S. at 270-71). Relying on this precedent, lower courts have concluded that the motivating-factor requirement renders proof of a governmental actor's intent to burden speech or associational rights an essential element of First Amendment retaliation claims. *See, e.g., Greenwich Citizens Comm., Inc. v. Ctys. Of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 32 (2d Cir. 1996) ("[R]etaliatory intent is required for a retaliatory First Amendment claim."); *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 14 F.3d 457, 464 (9th Cir. 1994) ("The defendant's intent is an element of the [retaliation] claim." (emphasis removed)); *Shapiro*, 203 F. Supp. 3d at 597.

Applying the guidelines for assessing discriminatory intent in *Arlington Heights*, we previously found that Plaintiffs adduced more-than-

sufficient evidence to prove that, in enacting the 2016 Plan, the General Assembly predominantly intended to "subordinate" the interests of entities and voters who supported, or were likely to support, non-Republican candidates. *See supra* Part III.B. Given that the *Arlington Heights* intent inquiry parallels the intent inquiry in First Amendment retaliation claims, *see Mt. Healthy*, 429 U.S. at 287 n.2, we likewise find that Plaintiffs satisfied their burden to demonstrate that the General Assembly intended to burden the speech and associational rights of such entities and voters.

2. Burden on Speech and Associational Rights

Next, we must determine whether the 2016 Plan in fact burdened First Amendment rights. The requirement that a plaintiff demonstrate that a partisan gerrymander burdens political speech or associational rights derives from both retaliation and election regulation cases. In the context of retaliation claims, even when, as here, a challenged governmental action does not flatly prohibit protected speech or association, the action nonetheless burdens First Amendment rights if it "has a chilling effect or an adverse impact" on speech or associational rights. *The Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2005). To constitute an actionable First Amendment burden, the chilling effect or adverse impact must be more than *de minimis*. *See, e.g.*, *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006); *ACLU of Md., Inc. v. Wicomico Cty.*, 999 F.2d 780, 786 n.6 (4th Cir. 1993). Likewise, the *Anderson/Burdick* framework applied in election regulation cases requires a plaintiff

to establish that a challenged regulation imposed a "burden" on political speech or associational rights. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (opinion of Stevens, J.). The Court has refused to impose "any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters," instead requiring that "[h]owever slight [a] burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Id.* at 191 (internal quotation marks omitted).

Legislative Defendants argue that partisan gerrymandering does not "burden" First Amendment rights because it does not "prohibit" supporters of a disfavored party or candidate from speaking nor does it "chill" speech or "deter" such supporters "from engaging in political speech or association." Leg. Defs.' FOF 139. Put differently, the 2016 Plan does not "chill" First Amendment activities because "Plaintiffs are every bit as free under [the 2016 Plan] to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." *Kidd v. Cox*, No. 1:06-CV-0997, 2006 WL 1341302, at *12 (N.D. Ga. 2006).

A governmental action "chills" speech if it is "likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights." *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted). "Any chilling effect must be objectively reasonable. Nevertheless, a claimant need not show

[he] ceased those activities altogether to demonstrate an injury in fact." *Id.* (alterations and internal citation omitted).

Under that standard, the record reveals that the 2016 Plan has had a constitutionally cognizable chilling effect on reasonable North Carolinians' First Amendment activities. Multiple Plaintiffs testified that in "the most recent election, a lot of people did not come out to vote"—despite Plaintiffs' concerted get-out-the-vote efforts—"[b]ecause they felt their vote didn't count." Evans Dep. 16:4-9; *accord, e.g.*, Peck Dep. 27:20-24 ("I can't tell you how many people told me this election, Republicans as well as Democrats, 'This system is rigged. My vote doesn't count.' It was really hard to try to galvanize people to participate."). Likewise, in the 2016 election under the 2016 Plan, many organizations' "biggest struggle was to get people to vote." Peck Dep. 40:5-6. Voters and advocacy organizations elected not to participate in congressional races because they believed they could not "have a democratic—small 'D'—democratic impact. It doesn't really matter for those races because of the gerrymandering because they're not competitive." Peck Dep. 30:20-24.

Additionally, the League had difficulty fulfilling its mission of "inform[ing] . . . [and] engag[ing] voters in the process of voting and civic participation in their government." Klenz Dep. 59:16-17; *see id.* 44:15-25 (explaining that the League of Women Voters engages in "voter registration" and "Get Out The Vote" efforts). For example, the League testified that it had difficulty finding ways for their members to interact with "candidate[s] that [were] expected to win and

projected to win," because those candidates were often not "motivated" to participate "in voter forums, debates, [or] voter guides, because the outcome is so skewed in favor or in disfavor of one or the other." *Id.* at 59:16-17, 60:6-10. Individual Plaintiffs also testified to the adverse impact of the districting plan on their ability to interact with and influence their representatives. *See, e.g.*, Brewer Dep. 24:8-25:6 (explaining that in "non-competitive districts" representatives from "both parties are not required to reach out to voters in the other party or even truly independent voters," and therefore such voters tend "to be poorly represented because their views and their potential votes are not fairly considered").

The 2016 Plan also chilled the speech and associational rights of voters affiliated with the North Carolina Democratic Party. Because Democratic candidates were unlikely to prevail in districts drawn by the General Assembly to elect Republicans, it "ma[d]e[] it extremely difficult" for the North Carolina Democratic Party "to raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts." Goodwin Dep. 98:1-5. For the same reasons, the party had difficultly recruiting strong candidates. *Id.* at 41:20-42:20; 60:23-61:16. Individual Plaintiffs who supported Democratic candidates testified to similar difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance. *E.g.*, Quinn Dep. 39:1-3 ("[Extreme gerrymandering] makes it harder for me [as a local organizer] to raise money; it makes it harder for me to recruit candidates; makes it

harder to just mobilize a campaign."); Palmer Dep. 27:19-23 (recounting that citizens in one district asked for "help [to] recruit a candidate for [the citizens'] county [because] . . . no Democrats [we]re going to run [t]here" given the significant obstacle to success posed by the partisan gerrymander); Morgan Dep. 23:21-25 ("[P]eople . . . say no sense in us giving money to that candidate because [he or she] is unlikely to prevail, notwithstanding the merit of their positions.").

Expert testimony confirmed the reasonableness of North Carolinians' feelings that their votes "did not count" and the corresponding chilling effects on speech and associational activities. For example, the Republican candidate's vote share (56.10%) and margin of victory (12.20%) in the *least* Republican district which elected a Republican candidate under the 2016 Plan exceeded the thresholds at which political science experts, including Legislative Defendants' expert Dr. Hood, consider a district to be "safe"—*i.e.*, highly unlikely to change parties in subsequent elections. Ex. 5058, at 25, Trial Tr. IV, at 29:16-22, 86:21-88:5. Likewise, Dr. Jackman testified that it would require a swing of votes in Democratic candidates' favor of "historic magnitude" to strip the 2016 Plan of its pro-Republican bias. Trial Tr. II, at 54:24-55:9. And Dr. Hood testified that when a district's lines are drawn so that a particular party's candidate is likely to prevail, the opposing party will have difficulty attracting a strong candidate and raising money to support that candidate. Trial Tr. IV, at 54:9-59:18.

All of these chilling effects on speech and association—difficulty convincing voters to participate

in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials—represent cognizable, and recognized, burdens on First Amendment rights. *See, e.g.*, *Anderson*, 460 U.S. at 792 (finding that plaintiff was injured by election law that made "[v]olunteers . . . more difficult to recruit and retain, media publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign"); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006) (recognizing that electoral restrictions that "affect a political party's ability to perform its primary functions—organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election"—can constitute "severe" First Amendment burdens); *Benkiser*, 459 F.3d at 586-87; *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 834 (D. Md. 2017) (Niemeyer, J., dissenting) ("[T]he purposeful reduction of one party's effectiveness may well chill the protected expression of that party's voters, even if no individual plaintiff establishes, as a factual matter, that *he* was so chilled."), *aff'd on other grounds* 138 S. Ct. 1942 (2018). Importantly, that partisan gerrymanders do not bar citizens from voting or expressing their political views does not render these First Amendment burdens any less significant. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because

it leaves other First Amendment activity unimpaired.").

Additionally, Legislative Defendants' myopic focus on whether a partisan gerrymander, and the 2016 Plan in particular, "chilled" or "deterred" protected speech or association ignores that a retaliatory governmental action also poses a constitutionally cognizable "burden" when it "adversely affects[s]" the speaker and the candidate or political groups with whom he seeks to associate. *Rutan*, 497 U.S. at 73; *Suarez*, 202 F.3d at 686. As detailed above, myriad evidence establishes that the 2016 Plan makes it easier for supporters of Republican candidates to translate their votes into seats in the state's congressional delegation and diminishes the need for Republican representatives to respond to the interests of voters who support non-Republican candidates. *See supra* Part III.B. Accordingly, even if the speech of voters who support non-Republican candidates was not *in fact* chilled—if, for example, they had all continued to vote for, speak on behalf of, donate money to, and campaign for such candidates—the 2016 Plan nonetheless "adversely affected" such voters' First Amendment rights by diluting the electoral power of their votes. *Shapiro*, 203 F. Supp. 3d at 597-98 (recognizing that "dilution" of disfavored party's electoral power constitutes adverse effect cognizable under the First Amendment).

The principle that partisan vote dilution—the intentional diminishment of the electoral power of supporters of a disfavored party and enhancement of the electoral power of supporters of a favored party—constitutes an actionable adverse effect on political

speech and associational rights derives from bedrock First Amendment principles. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the First Amendment*." *Buckley*, 424 U.S. at 48-49 (emphasis added), *superseded by statute on other grounds as stated in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *see also Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 5-6 (D.C. Cir. 2013) (Kavanaugh, J.) (characterizing this sentence from *Buckley* as "perhaps the most important sentence in the Court's entire campaign finance jurisprudence"). Simply put, the First Amendment does not permit the government "to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 572 U.S. at 1441 (plurality op.).

To that end, the government may not, for example, cap the amount of independent expenditures individuals, entities, and political parties may make on behalf of a "clearly identified candidate." *Buckley*, 424 U.S. at 45. Likewise, it is beyond cavil that the First Amendment would forbid the government from making large public spaces available for speakers advocating for a favored political party, while allowing supporters of disfavored speakers only to speak in smaller public venues, simply because government officials preferred the message of the favored party's speakers. Nor is there any question that the government would violate the First Amendment if it allowed supporters or candidates of one party to speak with a bullhorn but barred candidates from other parties from doing the same. Although the supporters of the disfavored candidate or party remain free to

speak as much as they wish—*i.e.* their speech is not chilled—the government nonetheless violates the First Amendment by "enhanc[ing] the relative voice" of the favored party. *Buckley*, 424 U.S. at 48-49.

Just as the government may not altruistically "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections," *Citizens United*, 558 U.S. at 350 (internal quotation mark omitted), neither may the government drown out the political speech of disfavored individuals and groups "in order to enhance the relative influence of others," *McCutcheon*, 134 S. Ct. at 1441; *see also Shapiro*, 203 F. Supp. 3d at 598 ("While citizens have no right to be assigned to a district that is likely to elect a representative that shares their views, the State also *may not intentionally drown out the voices of certain voters* by reason of their views." (emphasis added)). That is particularly true in the republican form of government adopted by the Framers, in which elected officials represent the interests of "the People" in making governing decisions. U.S. Const. art. I, § 2; *see infra* Part V. When a legislature draws a congressional districting plan designed to enhance the electoral power of voters likely to support candidates of a favored party and the districting plan achieves that intended goal by electing more Representatives from the favored party than would have prevailed under a non- discriminatory plan—as was the case with the 2016 Plan in the 2016 election—then the legislature unconstitutionally has "enhanced the relative voice" of the favored party in Congress, at the expense of the viewpoint of the supporters of disfavored parties.

Contrary to Legislative Defendants' assertions, the 2016 Plan's chilling effects and adverse impacts are more than *de minimis*. Even a "slight" burden on "a political party, an individual voter, or a discrete class of voters" can violate the First Amendment if not supported by a justification of commensurate magnitude—as is the case here. *See Crawford*, 553 U.S. 181, 189-90 (2008) (opinion of Stevens, J.). And the myriad burdens on political speech and associational rights attributable to the 2016 Plan—including decreased voter engagement, difficulty raising money and attracting candidates, and vote dilution—are of a different magnitude than numerous retaliatory actions that courts have found to constitute more than *de minimis* burdens on First Amendment rights. *See, e.g.*, *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) (filing of single "false [disciplinary] charge infringed . . . First Amendment right[s]"); *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) ("[P]ecuniary losses . . . sustained in the form of the costs of shipping . . . boxes and replacing clothing, though small, might well deter a person of ordinary firmness . . . from speaking again."), *vacated on other grounds*, 523 U.S. 574 (1998); *Sloman v. Tadlock*, 21 F.3d 1462, 1470 (9th Cir. 1994) (holding that factfinder could reasonably conclude that a police officer's "decisions to issue a citation and warnings to" a citizen expressing his political beliefs "chilled the political expression of [the citizen] and his group"); *see also Anderson*, 460 U.S. at 792 (1983) (finding that plaintiff candidate was burdened by election law that made "[v]olunteers . . . more difficult to recruit and retain, media publicity and campaign contributions . . . more difficult to secure, and

voters . . . less interested in the campaign," even in the absence of evidence the candidate would have prevailed in election).

Taken together, we find that Plaintiffs' evidence establishes that the 2016 Plan's pro-Republican bias had the effect of chilling the political speech and associational rights of individuals and entities that support non-Republican candidates. And we further find that the 2016 Plan adversely affected such individuals' and entities' First Amendment rights by diluting the electoral speech and power of voters who support non-Republican candidates. Therefore, we find that Plaintiffs' evidence is more-than-adequate to establish that the 2016 Plan burdened their political speech and associational rights.

3. Causation

Like the burden requirement, the causation requirement derives from both First Amendment retaliation and election regulation cases. In retaliation cases, the causation element not only requires a plaintiff to demonstrate retaliatory intent, it also allows a governmental actor to escape liability if the actor demonstrates it would have taken the challenged action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287; *Hartman*, 547 U.S. at 260 (explaining that a governmental "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway"). Similarly, the *Anderson/Burdick* framework applied in First Amendment election regulation cases requires that courts assess "'the precise interests put forward by the State as justifications for the burden imposed by its rule,'

taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789; *Tashjian*, 479 U.S. at 213-14). Accordingly, under the causation prong, a challenged districting plan that burdens political speech and associational rights nonetheless passes First Amendment muster if legitimate state interests, unrelated to the redistricting body's intent to burden the rights of supporters of a disfavored party, justify the First Amendment burdens imposed by the plan.

As explained above, the 2016 Plan burdens First Amendment rights both by chilling voters, candidates, and parties' participation in the political process and by diluting the electoral power of supporters of non-Republican candidates. In evaluating Plaintiffs' claims under the Equal Protection Clause, we found that neither North Carolina's political geography nor any other legitimate redistricting objective justified the 2016 Plan's subordination of the interests of non-Republican voters. *See supra* Part III.B. And it is axiomatic that the government has no legitimate interest in "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49. Accordingly, we find that the General Assembly's discriminatory animus against non-Republican voters, candidates, and parties caused the 2016 Plan's burdens on such voters, candidates, and parties' political speech and associational rights.

* * * * *

In sum, we find (1) that the 2016 Plan was intended to disfavor supporters of non-Republican

candidates based on those supporters' past expressions of political beliefs, (2) that the 2016 Plan burdened such supporters' political speech and associational rights, and (3) that a causal relationship existed between the General Assembly's discriminatory motivation and the First Amendment burdens imposed by the 2016 Plan. Accordingly, we conclude that the 2016 Plan violates the First Amendment.

V. Article I

Finally, we turn to Common Clause Plaintiffs' claims under Article I of the Constitution. Common Cause Plaintiffs assert the 2016 Plan runs afoul of two provisions in Article I: section 2, which provides that the "House of Representatives shall be composed of Members chosen . . . by the People," and the Elections Clause, which provides that "the Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations," U.S. Const. art. I, § 4, cl. 1. Although Common Cause Plaintiffs assert distinct claims under Article 1, section 2 and the Elections Clause, framing era records and Supreme Court doctrine reveal that the two provisions are closely intertwined.

A. Background Law

Because the right to elect Representatives to Congress "ar[ose] from the Constitution itself," the States have no "reserved" or "sovereign" authority to adopt laws or regulations governing congressional elections. *Thornton*, 514 U.S. at 802-05; *id.* at 802 ("As Justice Story recognized, 'the states can exercise no

powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'" (quoting Story, 1 Commentaries on the Constitution of the United States § 627 (3d ed. 1858)). Rather, the Constitution—and the Elections Clause in particular—delegates to the States the power to impose certain types of laws and regulations governing congressional elections, including laws or regulations establishing congressional districts. *Id.* at 802-05; *see also Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1283 (11th Cir. 2012) ("[S]tates have the delegated power under the Elections Clause to create districts for congressional elections."). But unless the Elections Clause or another constitutional provision delegates to the States the authority to impose a particular type of election law or regulation, "such a power does not exist." *Thornton*, 514 U.S. at 805.

The plain language of the Elections Clause confers on the States the authority to regulate the "Times, Places, and Manner" of holding congressional elections. U.S. Const. art. I, sec. 4. During the Constitutional Convention, James Madison provided a list of examples of the types of regulations that would fall within States' authority to regulate the "Times, Places, and Manner" of holding elections: "whether the electors should vote by ballot or *viva voce*, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district." *Debates* at 423-24. The Framers, therefore, "understood the Elections Clause as a grant of authority to issue *procedural*

regulations." *Thornton*, 514 U.S. at 833 (emphasis added).

In accordance with the intent of the Framers, the Supreme Court has held that "[t]he Elections Clause gives States authority 'to enact numerous requirements as to *procedure* and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Id.* (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Put differently, the Elections Clause empowers the States to promulgate "regulations designed to ensure that elections are fair and honest and that some sort of order rather than chaos accompanies the democratic processes." *Id.* at 834-35 (emphasis added) (internal quotation marks and alterations omitted).

The States' broad, delegated power under the Election Clause, however, is not without limit. *See, e.g.*, *Cook v. Gralike*, 531 U.S. 510, 527 (2001) (Kennedy, J. concurring) ("The Elections Clause thus delegates but limited power over federal elections to the States."); *Montano v. Lefkowitz*, 575 F.2d 378, 385 (2d Cir. 1978) (Friendly, J.) ("*Wesberry* makes clear that the apparent breadth of the power granted to state legislatures by [the Elections Clause], is not a carte blanche."). In particular, "in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper*, 414 U.S. at 56-57; *see also Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights."). For example, in *Wesberry*, the Court held that the Elections Clause

does not "immunize state congressional apportionment laws which debase a citizen's right to vote." 376 U.S. at 7. Likewise, the Elections Clause does not serve "as a source of power [for States] to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34. In other words, the States' authority under the Elections clause extends *only* to "*neutral* provisions as to the time, place, and manner of elections." *Gralike*, 531 U.S. at 527 (emphasis added).

B. Application

Under this precedent, we conclude that the 2016 Plan exceeds the General Assembly's delegated authority under the Elections Clause for three reasons: (1) the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts; (2) the 2016 Plan's pro-Republican bias violates other constitutional provisions, including the First Amendment, the Equal Protection Clause, and Article I, section 2; and (3) the 2016 Plan represents an impermissible effort to "dictate electoral outcomes" and "disfavor a class of candidates." *Thornton*, 514 U.S. at 833-34.

As to the first reason, the Elections Clause was the product of a vigorous debate at the Constitutional Convention among the delegates regarding whether, and to what extent, to lodge authority over the regulation of congressional elections in Congress. On the one hand, those who feared the power of the new federal government did not want to give Congress the ability to override state election regulations. For

example, the Anti- Federalist propagandist Federal Farmer argued that placing authority to promulgate election regulations in the national government would allow Congress to draft election laws that favored particular representatives or viewpoints. *See Greene*, *supra* at 1033. "'[T]he general legislature may . . . evidently so regulate elections as to secure the choice of any particular description of men.'" *Id.* (quoting Letter from the Federal Farmer (Oct. 10, 1787), *reprinted in* Origins of the House of Representatives: A Documentary Record 52, 53 (Bruce A. Ragsdale ed., 1990)). Other Anti-Federalists, including Patrick Henry, expressed similar concerns about Congress manipulating election regulations to favor a particular group of candidates or their supporters. *Id.* at 1036.

On the other hand, supporters of congressional control over state election regulations—the position that ultimately prevailed—emphasized the risk that States would refuse to hold elections, and thereby strip the federal government of power, or, more relevant to the case at hand, enact election regulations—including districting plans—that would favor particular factions. For example, James Madison argued that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." *Debates* at 424. Likewise, a delegate at the Massachusetts ratifying convention "warned that 'when faction and party spirit run high,' a legislature might take actions like 'making an unequal and partial division of the states into districts for the election of representatives.'" *Ariz. State Leg.*, 135 S. Ct. at 2672

(quoting Theophilus Parsons in Debate in Massachusetts Ratifying Convention (16-17, 21 Jan. 1788), in 2 The Founders' Constitution 256 (P. Kurland & R. Lerner eds. 1987)).

Accordingly, although the Framers disagreed as to whether, and to what extent, the Elections Clause should empower Congress to displace state election regulations, the Framers agreed that, regardless of whether Congress retained such authority, the Elections Clause should not empower legislative bodies—be they state or federal—to impose election regulations that would favor or disfavor a particular group of candidates or voters. *See Thornton*, 514 U.S. at 833 n.47 ("'The constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice.'" (quoting "The Republican," Connecticut Courant (Hartford, Jan. 7, 1788), 1 Bailyn 710, 713)). To that end, the Supreme Court has expressly recognized that the Elections Clause was "intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Leg.*, 135 S. Ct. at 2672.

As explained above in drawing the 2016 Plan, the General Assembly "manipulat[ed]," *id.*, district lines in order to subordinate the interests of non-Republican candidates and their supporters and entrench Republican candidates in power. The 2016 Plan, therefore, does not amount to a "neutral," *Gralike*, 531 U.S. at 527, or "fair" procedural

regulation, *Thornton*, 514 U.S. at 853, but rather an effort to achieve an impermissible substantive goal—providing the Republican party with a "Partisan Advantage," Ex. 1007. Accordingly, the 2016 Plan exceeds the General Assembly's delegated authority under the Elections Clause.

Turning to the second reason, the 2016 Plan's favoring of Republican candidates and their supporters and disfavoring of non-Republican candidates and their supporters violates the Elections Clause by "infring[ing] upon basic constitutional protections." *Kusper*, 414 U.S. at 56-57. As explained above, twelve districts in the 2016 Plan violate the Equal Protection Clause because they reflect a successful, and unjustified, effort by the General Assembly to subordinate the interests of non-Republican voters and entrench Republican Representatives in power. *See supra* Part III. Additionally, as an intentional, and successful, effort to burden the speech and associational rights of supporters of non- Republican candidates, the 2016 Plan violates the First Amendment. *See supra* Part IV.

The 2016 Plan also violates Article I, section 2's grant of authority to "the People" to elect their Representatives. The Framers decision to vest the power to elect Representatives in "the People" was—and is—significant. This feature differentiated the House of Representatives from every other federal government body at the time of the Framing. It is "the only textual reference to 'the People' in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials in the

national government." Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 267 (2006). For example, at the time, Senators were elected by the state legislatures. U.S. Const. art. I, § 3 *repealed by* U.S. Const. amend. XVII. The President was and still is elected through an intermediate body—the Electoral College. U.S. Const. art. II, § 1. Only the House of Representatives was directly accountable to the People.

Article I, section 2 was a product of the so-called Great Compromise, which resolved a bitter dispute between delegates regarding whether representation in the national legislature would be determined by population, with representatives directly elected by the people, or would be awarded equally among the States, with representatives elected by state legislatures. *See Wesberry*, 376 U.S. at 12-13. Under the Great Compromise, the Senate represented the interests of the States, each State was awarded equal representation in that body, and Senators were elected by state legislatures. *Id.* at 13. By contrast, "[t]he House of Represen[t]atives, the Convention agreed, was to represent the people as individuals, and on the basis of complete equality for each voter." *Id.* at 14. The House of Representatives, therefore, provided "a direct link between the National Government and the people of the United States." *Thornton*, 514 U.S. at 803.

The delegates at the Constitutional Convention decided to have the House of Representatives elected directly by the People for two major reasons. First, the Framers viewed popular election of at least one branch of government as an essential feature of a government

founded on democratic principles. James Madison explained, for example, that "[a]s it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 295 (James Madison). Other delegates at the constitutional convention also emphasized the critical importance of direct popular election of representatives in any republican form of government. *Debates* at 39 (reporting that George Mason "argued strongly for an election of the larger branch by the people, stating that "[i]t was to be the grand depository of the democratic principle of the government"); *id.* at 167 (reporting that James Wilson stated he "considered the election of the first branch by the people not only as the corner Stone, but as the foundation of the fabric: and that the difference between a mediate and immediate election was immense"). Put simply, Article I, Section 2 gives effect to the Framers' belief that "'[t]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell*, 395 U.S. at 540-41 (quoting Alexander Hamilton in 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)).

The Framers also saw popular election of Representatives as an important check on the States' power. *See, e.g., Debates* at 40 (reporting that James Wilson stated that: "no government could long subsist without the confidence of the people. In a republican Government, this confidence was peculiarly essential. . . . All interference between the general and local government should be obviated as much as

possible."); *id.* at 167 (reporting that Alexander Hamilton did not want state legislatures to elect both chambers of Congress, because "State influence . . . could not be too watchfully guarded against"); *id.* (reporting that Rufus King worried that "the Legislatures would constantly choose men subservient to their own views as contrasted to the general interest; and that they might even devise modes of election that would be subversive of the end in view"). In sum, "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, *not by States, but by the people*." *Thornton*, 514 U.S. at 821 (emphasis added).

The 2016 Plan's invidious partisanship runs contrary to the Constitution's vesting of the power to elect Representatives in "the People." U.S. Const. art. I, § 2. To begin, partisan gerrymanders, like the 2016 Plan, violate "the core principle of republican government" preserved in Article I, Section 2—"namely, that the voters should choose their representatives, not the other way around." *Ariz. State Leg.*, 135 S. Ct. at 2677 (internal quotation marks omitted). And by favoring supporters of Republican candidates over supporters of non-Republican candidates, the 2016 Plan "defeat[s] the principle solemnly embodied in the Great Compromise" because it reflects a successful effort by the General Assembly to "draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." *Wesberry*, 376 U.S. at 14.

Additionally, rather than having "'an habitual recollection of their dependence on the people,'" as the Framers intended, *Ariz. State Leg.*, 135 S. Ct. at 2677 (quoting The Federalist No. 57, at 320 (James Madison)), partisan gerrymanders render Representatives responsive to the controlling faction of the State legislature that drew their districts, *Vieth*, 541 U.S. at 331-32 (Stevens, J. dissenting) ("The problem [with partisan gerrymandering], simply put, is that the will of the cartographers rather than the will of the people will govern."). By rendering Representatives responsive to the state legislatures who drew their districts rather than the People, the 2016 Plan also upsets the careful balance struck by the Framers in the Great Compromise by "interpos[ing]" the General Assembly between North Carolinians and their Representatives in Congress. *See Gralike*, 531 U.S. at 527 (Kennedy, J., concurring) ("A State is not permitted to interpose itself between the people and their National Government as it seeks to do here."). "Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it." *Id.* at 528.

Finally, the 2016 Plan amounts to a successful effort by the General Assembly to "disfavor a class of candidates" and "dictate electoral outcomes." *Thornton*, 514 U.S. at 833-34. In *Cook v. Gralike*, 531 U.S. 510 (2001), the Court considered an amendment to a state constitution that "instruct[ed]" each member of the state's congressional delegation "to use all of his or her delegated powers to pass the Congressional

Term Limits Amendment," *id.* at 514 (majority op.). To advance that goal, the amendment further provided that "the statement 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' be printed on all primary and general [election] ballots adjacent to the name of a[n incumbent] Senator or Representative who fails to take any of one of eight [enumerated] legislative acts in support of the proposed amendment." *Id.* And the amendment further required that primary and general election ballots expressly indicate if a nonincumbent candidate "'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS.'" *Id.* at 514-15.

The Court concluded that the amendment exceeded the state's authority under the Elections Clause. *Id.* at 524-27. In reaching this conclusion, the Court reaffirmed that because the Elections Clause constitutes the States' sole source of "authority over congressional elections," "the States may regulate the incidents of such elections . . . *only* within the exclusive delegation of power under the Elections Clause." *Id.* at 522-23 (emphasis added). The Court concluded the amendment exceeded that delegated authority for two principal reasons. First, the amendment was "plainly designed to favor candidates who are willing to support the particular form of term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal." *Id.* at 523-25. Second, the placement of the "pejorative" or "negative" labels next to candidates who opposed the term limits amendment on the ballot "handicap[ped] [such] candidates 'at the most crucial stage in the election process—the instant before the vote is cast.'" *Id.* at 524-25 (quoting

Anderson v. Martin, 375 U.S. 399, 402 (1964)). By "handicap[ping]" candidates who opposed the term limits amendment, the state constitutional amendment represented an "attempt[t] to 'dictate election outcomes,'" which "simply is not authorized by the Elections Clause." *Id.* at 524, 526 (quoting *Thornton*, 514 U.S. at 833-34); *see also Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (explaining that, under *Gralike*, the Elections Clause prohibits state election regulations that "dictate political outcomes or invidiously discriminate against a class of candidates"); *Brown*, 668 F.3d at 1284 (explaining that the Elections Clause, as interpreted in *Thornton* and *Gralike*, does not authorize a state legislature to enact an election regulation "meant to prevent or severely cripple the election of particular candidates").

Like the state constitutional amendment at issue in *Gralike*, the Partisan Advantage criterion—and the record evidence regarding Representative Lewis, Senator Rucho, and Dr. Hofeller's implementation of that criterion in drawing the 2016 Plan, *see supra* Parts I.B, III.B.1.a—establishes that the 2016 Plan was intended to disfavor non- Republican candidates and supporters of such candidates and favor Republican candidates and their supporters. And like the constitutional amendment in *Gralike*, the General Assembly's express intent to draw a redistricting plan that would elect a congressional delegation composed of 10 Republicans and 3 Democrats—coupled with the fact that the 2016 election under the 2016 Plan yielded a congressional delegation with the intended composition—demonstrates that the 2016 Plan amounted to a *successful* "attempt[] to 'dictate election

outcomes.'" *Gralike*, 531 U.S. at 526 (quoting *Thornton*, 514 U.S. at 833-34). Accordingly, the 2016 Plan's demonstrated partisan favoritism "simply is not authorized by the Elections Clause." *Id.*

VI. Remedy

Having concluded that the 2016 Plan violates the Equal Protection Clause, the First Amendment, and Article I of the Constitution, we now must determine the appropriate remedy. Absent unusual circumstances, "such as where an impending election is imminent and a State's election machinery is already in progress," courts should take "appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds*, 377 U.S. at 585. Here, the State held primary elections several months ago and the general election is only a few months away. That usually would leave us with little choice but to allow the State to use the 2016 Plan in the 2018 election.

However, this case presents unusual circumstances. To begin, the General Assembly has abolished primary elections for several partisan state offices. *N.C. Democratic Party v. Berger*, 717 Fed. App'x 304, 305 (4th Cir. 2018) (per curiam). Accordingly, the General Assembly has concluded that, for at least some partisan offices, primary elections are unnecessary. Therefore, were this Court to order the State to conduct a general congressional election without holding primary elections, that would be consistent with the General Assembly's policy preference as to at least some offices.

Additionally, on June 26, 2018, Legislative Defendants represented to the Supreme Court that

altering state legislative districts at that time would cause "only minimal disruption to the ongoing election process," notwithstanding that the State had already conducted primary elections using the districts Legislative Defendants sought to set aside. Appellants' Supp. Br. at 5, *North Carolina v. Covington*, No. 17-1364 (S. Ct. June 26, 2018). Therefore, at least from Legislative Defendants' standpoint, the completion of primary elections would not seem to preclude imposition of an alternative districting plan, at least from the perspective of the State's "ongoing election process."

Finally, we further note that North Carolina courts have indefinitely enjoined the State from preparing or finalizing ballots for the November 6, 2018, election on grounds that language adopted by the General Assembly to describe two proposed state constitutional amendments violates the North Carolina Constitution by misleading voters regarding the nature of the amendments. *See* Order on Injunctive Relief at 29-30, *Cooper v. Berger*, No. 18-CVS-9805 (Wake Cty. Super. Ct. Aug. 21, 2018). Accordingly, while that injunction remains in place, any order this Court enters impacting the November 6, 2018, election would not seem to impose additional burdens on the State's electoral machinery.

In such circumstances, we decline to rule out the possibility that the State should be enjoined from conducting *any* further congressional elections using the 2016 Plan. For example, it may be possible for the State to conduct a general election using a constitutionally compliant districting plan without holding a primary election. Or, it may be viable for the

State to conduct a primary election on November 6, 2018, using a constitutionally compliant congressional districting plan, and then conduct a general election sometime before the new Congress is seated in January 2019. Accordingly, no later than 5 p.m. on August 31, 2018, the parties shall file briefs addressing whether this Court should allow the State to conduct *any* future election using the 2016 Plan. Those briefs should discuss the viability of the alternatives discussed above, as well as any other potential schedules for conducting elections using a constitutionally compliant plan that would not unduly interfere with the State's election machinery or confuse voters. Regardless of whether we ultimately allow the State to use the 2016 Plan in the 2018 election, *we hereby enjoin* the State from conducting any elections using the 2016 Plan in any election after the November 6, 2018, election.

As to the drawing of a remedial plan, as a general rule, once a federal court concludes that a state districting plan violates the Constitution or federal law, it should "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise . . . its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). This case presents an exceptional circumstance, however: the General Assembly enacted the 2016 Plan after another panel of this Court invalidated the 2011 Plan as a racial gerrymander. *Harris*, 159 F. Supp. 3d at 627. When a court finds a remedial districting plan also violates the Constitution, courts generally do not afford a legislature a second "bite-at-the-apple" to enact a constitutionally compliant plan. *See Covington*, 138 S.

Ct. at 2553-54 (concluding that district court did not abuse its discretion in denying state legislature second opportunity to draw remedial districts when several redrawn districts failed to remedy constitutional violation); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (holding that if a state fails to enact "a constitutionally acceptable" remedial districting plan, "the responsibility falls on the District Court"); *Reynolds*, 377 U.S. at 586 (holding that a district court "acted in a most proper and commendable manner" by imposing its own remedial districting plan, after the district court concluded that the remedial plan adopted by state legislature failed to remedy constitutional violation).

We nevertheless previously exercised our discretion to allow the General Assembly a second opportunity to draw a constitutional congressional districting plan because at the time the General Assembly drew the 2016 Plan, the Supreme Court had not established a legal standard for adjudicating partisan gerrymandering claims and because redistricting is primarily a legislative function. *Common Cause*, 279 F. Supp. 3d at 690. The intervening months have given us some reason to revisit that determination. To begin, the General Assembly made no discernible effort to take advantage of the previous opportunity we afforded it to draw a plan that cures the partisan gerrymander. *Gill* also clarified the nature of the injury giving rise to a partisan vote dilution claim under the Equal Protection Clause, *see supra* Part II.A.1, rendering somewhat less uncertain the legal standard for evaluating such claims and the validity of our

conclusion that twelve districts in the 2016 Plan violate the Equal Protection Clause.

Additionally, in *Covington* the Supreme Court held that several proposed remedial state legislative districts drawn by the General Assembly—itself elected under one of the most widespread racial gerrymanders ever encountered by a federal court—carried forward the racial gerrymandering that rendered the original versions of the districts unconstitutional, raising legitimate questions regarding the General Assembly's capacity or willingness to draw constitutional remedial districts. 138 S. Ct. at 2553-54. And during the intervening months, the General Assembly has enacted a number of pieces of election-related legislation that federal and state courts have struck down as unconstitutional, *see supra* note 18, further calling into question the General Assembly's commitment to enacting constitutionally compliant, non-discriminatory election laws.

Most significantly, additional time has passed. We continue to lament that North Carolina voters now have been deprived of a constitutional congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles. To the extent allowing the General Assembly another opportunity to draw a remedial plan would further delay electing Representatives under a constitutional districting plan, that delay weighs heavily against giving the General Assembly another such opportunity. Accordingly, in the briefs to be filed not later than 5 p.m. on August 31, 2018, the parties also shall address whether this Court should

allow the General Assembly another opportunity to draw a constitutionally compliant congressional districting plan.

Although we have not yet decided whether we will afford the General Assembly another chance to draw such a plan, we conclude that if we do allow such an opportunity, the General Assembly should do so as quickly as possible. Accordingly, in the event the General Assembly believes it is entitled to another opportunity to draw a constitutionally compliant plan, it should begin work immediately to draw such a plan. To that end, if we do allow the General Assembly the first opportunity to draw a remedial plan, we will not consider a remedial districting plan enacted by the General Assembly after 5 p.m. on September 17, 2018. That deadline will allow the General Assembly approximately three weeks to draw a remedial plan, more than the amount of time state law affords the General Assembly to draw remedial districting plans. N.C. Gen. Stat. § 120-2.4(a) (2017). We further advise Defendants that they should be prepared to file with this Court, soon after that deadline, the enacted proposed remedial plan, along with:

1. transcripts of all committee hearings and floor debates related to the proposed remedial plan;

2. the "stat pack" for the proposed remedial plan;

3. a description of the process the General Assembly, and any constituent committees or members thereof, followed in drawing and enacting the proposed remedial plan,

> including, without limitation, the identity of all participants involved in the process;
>
> 4. any alternative plans considered by the General Assembly, any constituent committee responsible for drawing the remedial plan, or the leadership of the General Assembly or any such committee; and
>
> 5. all criteria, formal or informal, the General Assembly, any constituent committee responsible for drawing the remedial plan, and the leadership of the General Assembly or any such committee applied in drawing the proposed remedial plan, including, without limitation, any criteria related to race, partisanship, the use of political data, or the protection of incumbents, and a description of how the mapdrawers used any such criteria.

In the event we decide to first consider any remedial plan drawn by the General Assembly before the September 14, 2018, deadline, we will provide Plaintiffs an opportunity to file objections to some or all of the districts in the remedial plan.

Given our uncertainty as to whether the General Assembly should be afforded an (additional) opportunity to draw a remedial plan—and the fast-approaching November 6, 2018, general election—we also find it appropriate to take steps to ensure the timely availability of an alternative remedial plan for use in the event we conclude the General Assembly is not entitled to such an opportunity or we conclude that the remedial plan enacted by the General Assembly fails to remedy the constitutional violation. To that

end, we intend to appoint in short order a Special Master pursuant to Federal Rule of Civil Procedure 53 to assist the Court in drawing an alternative remedial plan. *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002) ("[T]he 'eleventh hour' is upon us, if indeed it has not already passed. It is therefore necessary for this Court to prepare for the possibility that this Court will be required to adopt an appropriate redistricting plan."). Accordingly, we direct the parties to confer and file no later than August 29, 2018, a list of three qualified and mutually acceptable candidates to serve as Special Master. In the event the parties fail to agree as to a list of candidates, the Court may identify a special master without input from the parties. The parties should also address in their August 31, 2018, briefing whether any one of the thousands of districting plans currently in the record, including Dr. Chen's Plan 2-297, could—or should—be adopted as a remedial plan.

SO ORDERED

OSTEEN, JR., District Judge, concurring in part and dissenting in part:

In *Gill*, prior to explaining the issue of standing as relevant to a claim of political gerrymandering, the Court summarized the gerrymandering line of cases. *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1926-29, ___ L. Ed 2d ___ (2018). The Court recognized, *inter alia*, that in *Davis v. Bandemer* "[a] majority of the Court agreed that the case before it was justiciable." *Gill*, 138 S. Ct. at 1927. The Court concluded its summary of these cases by stating:

> Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

Id. at 1929.

Of particular note to me are *Bandemer* and *Vieth* in terms of the law a district court is required to apply. As Justice Scalia explained in *Vieth*, "[e]ighteen years ago, we held that the Equal Protection Clause grants judges the power—and duty—to control political gerrymandering, *see Davis v. Bandemer*, 478 U.S. 109 (1986)." *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004). *Bandemer* held "that a political gerrymandering claim could succeed where plaintiffs showed 'both

intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Vieth*, 541 U.S. at 281 (quoting *Bandemer*, 478 U.S. at 127). Although Justice Scalia posited in *Vieth* that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided, *Bandemer* was not overturned by *Vieth*. Similarly, *Gill* did not overturn *Bandemer*, as *Gill* did not reach the question of justiciability.[1] Therefore, absent a contrary ruling from the Supreme Court, partisan gerrymandering claims are justiciable under the Equal Protection Clause and lower courts are

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[1] In my opinion previously, *see Common Cause v. Rucho*, 279 F. Supp. 3d 587, 692 (M.D.N.C. 2018) (Osteen, J., concurring in part and dissenting in part), *vacated and remanded*, 138 S. Ct. 2679 (June 25, 2018) (mem.), I expressed my concern over Equal Protection and First Amendment claims in this context. Justice Scalia, in *Vieth*, explained his opinion that these claims are not justiciable because of an inability to establish "judicially discernible and manageable standards." *See Vieth*, 541 U.S. at 280. After a review of *Gill*, particularly in light of its pointed discussion of an "undifferentiated, generalized grievance about the conduct of government," *Gill*, 138 S. Ct. at 1931, quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007), I remain concerned over the justiciability of Equal Protection and First Amendment claims of political gerrymandering. *See Common Cause*, 179 F. Supp. 3d at 692-93. I am not sure there is a constitutional, and judicially manageable, standard for limiting partisan political consideration by a partisan legislative body in the discharge of its duties except by legislative action, *see* U.S. Const. art. I, § 4, or by what I continue to see as an outside limit established by Article I, Sections 2 and 4 of the United States Constitution prohibiting a legislature from dictating election results. Nevertheless, we are bound to follow existing Supreme Court precedent.

obliged to apply that law and articulate a standard for adjudication.

The Supreme Court remanded this present case for "further consideration in light of *Gill v. Whitford*." *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679 (June 25, 2018) (mem.). This order requires us to reconsider standing and related issues in light of *Gill*. With respect to standing, the Court in *Gill* explained:

> We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker*, 369 U.S., at 206, 82 S. Ct. 691. The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28-29, 32-33, Complaint ¶¶ 5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.*, at 32-33, ¶ 15. To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.

Gill, 138 S. Ct. at 1929-30. In determining standing, therefore, a plaintiff in a political gerrymandering case must demonstrate district-specific injury within the context of:

> the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. ___, ___, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

Id. at 1929-30.

In this case, as in *Gill*, Plaintiffs asserted both district-specific political gerrymandering claims and statewide challenges to the apportionment of Congressional districts. The Court in *Gill* held that statewide challenges are not cognizable for purposes of standing. In rejecting a statewide challenge, the Court stated:

> The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds*, which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds*, 377 U.S., at 561, 84 S. Ct. 1362 because the claims were brought by

> voters who alleged "facts showing disadvantage to themselves as individuals," *Baker*, 369 U.S., at 206, 82 S. Ct. 691.
>
> The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds*, 377 U.S., at 561, 84 S. Ct. 1362.
>
> Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. *That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.* Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts.

Id. at 1930-31 (emphasis added).

Applying *Bandemer*, *Vieth*, and *Gill*, I find under Supreme Court precedent that partisan gerrymandering claims are justiciable under the Equal Protection Clause. I find this to be true even in the absence of a recognized jurisprudential remedy. I join the majority opinion to hold, as required by *Gill*, that Plaintiffs are required to show standing on the

basis of the composition of his or her own district. I also join the majority to find that some of the individual Plaintiffs, as explained below, have alleged and proven both standing and a violation of the Equal Protection Clause. Specifically, I concur with the opinion of the majority that those individual Plaintiffs alleging "cracking" for purposes of partisan advantage have alleged and proven "an individual and personal injury" as opposed to a generalized grievance against governmental conduct of which he or she does not approve. I also concur that the organizations here—Common Cause, the Democratic Party, and the League of Women Voters—have standing to assert the claims of the individual members of their respective organizations with respect to the individual and personal injury sustained by those members residing in individual districts which were cracked. As to the organizational Plaintiffs, I concur with the majority that they have met their burden on behalf of aggrieved individual members (with respect to ten challenged districts instead of thirteen) that "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts testified to, introduced evidence to support, and, in all but one case, ultimately proved the type of dilutionary injury the Supreme Court recognized in *Gill*," that is, the cracking and packing of districts as described in *Gill*. Maj. Op. at 45. I concur with the majority that Plaintiffs have shown both a partisan intent to subordinate the interests of non-Republican voters and that those partisan considerations were the predominant factor in the redistricting. I also concur with the majority that Defendants have not justified the effects of the 2016 Plan. I therefore agree with the

majority's conclusion that the 2016 Plan violates the Equal Protection Clause. Finally, I concur with the majority's remedial action.

For the reasons stated hereafter and to the extent described herein, I also join the majority's conclusion that Plaintiffs have shown that the 2016 Plan violates Article I, Sections 2 and 4 of the United States Constitution by proving that the drawers of the Plan intended to dictate and preordain election outcomes and disfavor a class of candidates. Although *Gill* addressed standing within an Equal Protection claim, I agree with the majority that the individual Plaintiffs have established standing, as voters, to proceed with a claim under Article I, Sections 2 and 4 of the United States Constitution for reasons similar to the Equal Protection standing argument.

I disagree with the majority on several points. First, I disagree that a Plaintiff who demonstrates "packing" but concedes election of the candidate of his or her choice has standing or has demonstrated a constitutional injury under the facts as presently presented. Second, I disagree that there is a distinction between "political considerations" and "partisan interests" or that consideration of partisan, political interests in redistricting constitutes a power that was not delegated to the states or is otherwise prohibited in legislative action, including districting. I therefore weigh the maps created by Dr. Chen differently from the majority, as I do not find a non-partisan map drawing process, as performed by Dr. Chen, to be a necessary or relevant comparison. Third, I disagree that any of the Plaintiffs in this case have standing to assert a statewide claim as to the

statewide collective effect of any political gerrymandering. Finally, assuming that partisan gerrymandering claims are justiciable under the First Amendment, I am unconvinced that Plaintiffs have proven an injury to their First Amendment rights and I dissent, for the same reasons I set forth previously, *see Common Cause*, 279 F. Supp. 3d at 696 (Osteen, J., concurring in part and dissenting in part), from the majority's conclusion that the 2016 Plan violates the First Amendment.

I. Standing

Similar to this case, the plaintiffs in *Gill* alleged vote dilution resulting from packing and cracking districts for the purpose of gaining political advantage. *Gill*, 138 S. Ct. at 1929-30 ("The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters.") However, in my reading of *Gill*, I am not convinced the Court has held that both packing and cracking would serve to establish standing as a matter of law. Instead, as I read *Gill*, packing and cracking may constitute a basis upon which a plaintiff may establish standing if the criteria for standing are met as a factual matter under the test for standing set forth in *Spokeo*. For example, in describing the plaintiffs, the Court stated:

> Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker*, 369 U.S., at 206, 82 S. Ct. 691. The plaintiffs in this case alleged that they suffered such injury from partisan

> gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28-29, 32-33, Complaint ¶¶ 5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.*, at 32-33, ¶ 15.

Gill, 138 S. Ct. at 1929-30. The Court later stated:

> And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

Id. at 1931. The Court phrased the relevant facts in terms of what was claimed ("plaintiffs claim a constitutional right") and how the harm is "understood," such that while I am convinced that cracking and packing could provide a basis upon which to find standing is present, that issue is dependent upon the facts found by a lower court. The Court concluded with the admonition that "[w]e express no view on the merits of the plaintiffs' case. We caution, however, that 'standing is not dispensed in gross.' A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Id.* at 1934 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354 (2006)).

Therefore, in a case involving allegations of cracking and packing, we are to determine whether the facts associated with cracking and packing are sufficient to confer standing by applying the tests set forth in *Spokeo*, 136 S. Ct. at 1547, and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 560 n.1, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

I am of the opinion that packing and cracking are objectively different with respect to standing. Here, as in *Gill*, the individual Plaintiffs in packed districts "claim a constitutional right not to be placed in legislative districts deliberately designed to 'waste' their votes in elections where their chosen candidates will win in landslides (packing)." *Gill*, 138 S. Ct. at 1930. And the vote dilution alleged by packing and proven at trial may establish an individual Plaintiff in a packed district sustained the "invasion of a legally protected interest" assuming a constitutional interest exists in not having a vote wasted. *Lujan*, 504 U.S. at 560. However, standing also requires a concrete and particularized injury which "affects the plaintiff in a personal and individual way." *Id.* at 560 n.1. Because a Democrat plaintiff in a packed district is indisputably able to elect the candidate of his or her choice, that individual has not sustained an injury which affects the voter in a personal and individual way. A packed district does not demonstrably inflict "the representational injury articulated in racial gerrymandering claims—that 'elected officials are more likely to believe that their primary obligation is to represent only the members of [the favored] group, rather than their constituency as a whole,'" *Agre v. Wolfe*, 284 F. Supp. 3d 591, 641 (E.D. Pa.) (Schwarz, J., concurring), *appeal dismissed*, 138 S. Ct. 2576 (May

29, 2018) (mem.), and *appeal dismissed sub nom.*, *Scarnati v. Agre*, 138 S. Ct. 2602 (June 4, 2018) (mem.) (quoting *United States v. Hays*, 515 U.S. 737, 744 (1995)). Instead, I believe a Democrat plaintiff living in a "packed" district is complaining about the process, the intent, and the invasion of a legally protected interest but all in the absence of an injury.

For example, the majority describes the packing in District 1 and its effect on Plaintiff Larry Hall. Maj. Op. at 47-48. As described by the majority, "District 1 amounts to a successful effort by the General Assembly to concentrate, or pack, voters who were unlikely to support a Republican candidate, and thereby dilute such voters' votes." *Id.* at 47. The majority finds that "Plaintiff Larry Hall resides in District 1, is a registered Democrat, and typically votes for Democrat candidates", *id.*, and that "Hall's vote would have carried greater weight in numerous other 'hypothetical districts.'" *Id.* at 48 (quoting *Gill*, 138 S. Ct. at 1931). For purposes of standing, I find that Plaintiff Hall has not established standing because his interest as a registered Democrat in voting for Democrat candidates has not been injured. He was able to elect the candidate of his choice from his district, a Democrat. I conclude that a Plaintiff residing in a packed district on the facts present before this court has not sustained an individual and personal injury but, instead, has proven a "collective political interest," and a "generalized grievance against governmental conduct of which he or she does not approve." *Gill*, 138 S. Ct. at 1930, 1932.

Nevertheless, the majority of the districts at issue in this case are ones within which Democrats contend

and ultimately proved that cracking occurred, diminishing the power of Democrat voters to elect a Democrat candidate. As to these "cracked" districts, I agree with the majority that Plaintiffs have demonstrated the dilution of voting strength which appears to be recognized by *Gill* for purposes of standing. Those Plaintiffs who contend districts were cracked have alleged and proven an (1) an individual injury in fact resulting from their vote dilution claims, that is, the reduced ability to elect the candidate of his or her choice; (2) that is fairly traceable to the challenged conduct of the defendant, that is, cracking communities of interest; and (3) that is likely to be redressed by favorable decision. And although both cracking and packing may involve splitting communities of interest, only cracking has the result of producing a concrete and particularized harm.

Gill reminds us that the Federal Judiciary is charged with respecting "the proper—and properly limited—role of the courts in a democratic society." *Gill*, 138 S. Ct. at 1929 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Consistent with that limited role, *Gill* markedly, and for the first time in the context of political gerrymandering, directed the attention of courts and parties to the distinction between individualized injury and general political grievance. I therefore believe, based upon those considerations described by *Gill*, that Plaintiffs have not established standing as to statewide challenges to political gerrymandering. I would further find that the organizational Plaintiffs have standing only to the extent they challenge the districts on the basis of district-specific injury to individual members.

The Court in *Gill* reminds us, as lower courts, that:

> [P]laintiffs may not rely on 'the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.' A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public."

Gill, 138 S. Ct. at 1931 (internal citations omitted). I find that the overall composition of the congressional delegation, whether 10-3, 9-4, or 7-6, or any other statewide claim of injury, is a non-justiciable claim of "general interest common to all members of the public." *Id.* (quoting ***Ex parte Levitt***, 302 U.S. 633, 636 (1937) (per curiam)). To be clear, I find that the admissions of certain legislators of an intent to create a 10-3 congressional delegation constitutes evidence which may be considered in determining the manner of drafting individual districts and the intent to dilute certain voters within those districts, but I am not convinced that intent or the statewide plan provides standing for any Plaintiff to assert a claim based on statewide injury.

As noted above and found by the majority, the organizational Plaintiffs have standing, by and through their members, to challenge individual districts on behalf of the individual member-voters. Maj. Op. at 58-60. "An association has standing to

bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). However, I do not agree that the organizations have standing to challenge the districting plan on a statewide basis, nor do I find the organizational Plaintiffs have standing to assert political gerrymandering claims because of other organizational purposes. The Court in *Gill*, applying a standard derived from racial gerrymandering, observed that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hayes*, 515 U.S. 737, 744-45 (1995)).

For example, League of Women Voters allege in the Complaint:

> LWVNC has standing to challenge the 2016 Plan. The Plan discriminates against North Carolina voters who associate with the Democratic Party by diluting their votes for the purpose of maintaining a 10-to-3 Republican advantage in congressional seats. The Plan thus directly impairs LWVNC's mission of encouraging civic engagement and nonpartisan redistricting reform. Additionally, LWVNC is a membership

> organization, and its members are harmed by the Plan because it dilutes Democratic votes and impairs Democratic voters' ability to elect their preferred congressional candidates. LWVNC's members' right to participate freely and equally in the political process is burdened as well by the Plan, which in many cases denies the ability to cast a meaningful vote altogether.

(Complaint, 1:16CV1164 (Doc. 1) at 7.) I do not find the League has standing to challenge an overall statewide plan drawn "for the purpose of maintaining a 10-to-3 Republican advantage in congressional seats," nor do I find the League has standing on behalf of voters who associate with the Democratic Party generally. To hold otherwise, in my opinion, is to recognize injury on the basis of general political grievance, a matter specifically rejected by *Gill*.

Similarly, Common Cause has asserted claims "on behalf of its members who are citizens of North Carolina and are registered Democratic voters, whose votes have been diluted or nullified . . .", (Complaint, 1:16CV1026 (Doc. 1) at 2), and as to those claims I agree with the majority that Common Cause has standing. However, Common Cause further alleges that:

> Common Cause is at the forefront of efforts to combat gerrymandering, no matter what party is responsible, in the belief that when election districts are created in a fair and neutral way, the People will be able to elect representatives who truly represent them. To that end, Common Cause has organized and

> led the coalitions that secured passage of ballot initiatives that created independent redistricting commissions in Arizona and California and campaigned for ratification of an amendment to the Florida Constitution prohibiting partisan gerrymandering.

Id. at 3. While those interests may or may not be appropriate from a policy objective, I do not find these interests, or similar interests in statewide reform, to provide standing on a statewide basis. For similar reasons, I find the Democratic Party has standing on behalf of individual members only.

II. Equal Protection and Partisan Political Considerations

The majority's opinion rejects Legislative Defendants' arguments that some degree of partisan gerrymandering is permissible, Maj. Op. at 108, and further finds that:

> neither the constitutional delegation of redistricting to political bodies, nor historical practice, nor Supreme Court precedent supports Legislative Defendants assertion that it is sometimes permissible for a state redistricting body to draw district lines for the purpose of diminishing the electoral power of voters who supported or are likely to support a disfavored party or candidate.

Id. The majority proceeds to clarify that:

> our conclusion that twelve of the thirteen districts violate the Equal Protection Clause *does not rest* on our determination that States lack authority to engage in partisan

> gerrymandering . . . in drawing congressional districts. In particular, we assume that a congressional district amounts to an unconstitutional partisan gerrymander *only if* the legislative body's *predominant* purpose in drawing the district was to subordinate the interests of a disfavored party . . . ."

Id. at 109.

I dissent from this portion of the majority's opinion and agree with the Legislative Defendants to find that the Constitution does permit consideration by a legislative body of both political and partisan interests in the redistricting process. This question has been addressed at length in a number of cases, and I agree with those cases recognizing the fact that political consideration and partisan advantage are not prohibited by the Constitution. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 274-76 (2004); *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting), *vacated and remanded*, *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Agre v. Wolf*, 284 F. Supp. 3d 591,620-24 (E.D. Pa.), *appeal dismissed*, 138 S. Ct. 2576 (May 29, 2018) (mem.), and *appeal dismissed sub nom.*, *Scarnati v. Agre*, 138 S. Ct. 2602 (June 4, 2018) (mem.).

The Constitution delegates redistricting power for federal elections to the States and their legislatures.[2]

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[2] In North Carolina, redistricting is conducted by the General Assembly, a partisan body, consistent with the Constitution. As Chief Justice Roberts explains:

> [S]tates have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U.S. 89, 91, 85

Legislative action is a political process, and issues addressed by those legislative bodies affecting constitutional questions—redistricting, the Second Amendment, the First Amendment, abortion, and the like—are all inherently political in nature. All of those constitutional issues, specifically the Second Amendment and abortion, are affected by legislation passed by legislative bodies which are partisan and political. Even if the legislative process should result in an unconstitutional law, that law can be overturned only on constitutional grounds and not due to any perceived inappropriate level of partisan political consideration. Courts have never considered or required that constitutional issues be addressed only in a nonpartisan, fair, and neutral manner. I find the same is true for political and partisan consideration as part of redistricting. As the plurality in *Bandemer* observed, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it . . . . Politics and political considerations

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S.Ct. 775, 13 L.Ed.2d 675 (1965) (internal quotation marks omitted); see also *Arizona, ante*, at ___ U.S., at ___ - ___, 133 S.Ct., at 2257 - 2259. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry v. Perez*, 565 U.S. ___, ___, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012) (per curiam) (internal quotation marks omitted).

Shelby Cty. v. Holder, 570 U.S. 529, 543, 133 S. Ct. 2612, 2623 (2013).

are inseparable from districting and apportionment." *Bandemer*, 478 U.S. at 128 (internal citations omitted) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)). Although *Bandemer* has been abrogated to some degree, *see Common Cause v. Rucho*, 240 F. Supp. 3d 376, 387 (M.D.N.C. 2017) (per curiam), this observation remains true today.

The Court has recognized many times in redistricting and apportionment cases that some degree of partisanship and political consideration is constitutionally permissible in a redistricting process undertaken by partisan actors. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . ."); *Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment."); *see also Cooper v. Harris*, ____ U.S. ____, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in part and dissenting in part) (recognizing the constitutionality of at least some amount of political gerrymandering); *Whitford*, 218 F. Supp. 3d at 934-35 (Griesbach, J., dissenting) ("The Supreme Court has long acknowledged partisan considerations are inevitable when partisan politicians draw maps."). And Congress, though it could presumably act to limit partisan gerrymandering under its Article I, Section 4

authority, has chosen only to require single-member districts. 2 U.S.C. § 2c.

I do not find, therefore, that the Constitution forbids a political body from taking into account partisan considerations, and indeed partisan advantage, when producing a redistricting plan. I agree with the majority, however, that when partisan considerations predominate a legislature may act contrary to the Equal Protection Clause under existing precedent.

Because I do not find the Constitution forbids a political body from taking into account partisan considerations, I do not find the North Carolina congressional maps submitted by Plaintiff's expert, Jowei Chen, as persuasive as the majority. Dr. Chen drafted maps without consideration to partisan interests. Declaration of Dr. Jowei Chen, 1:16CV1026 (Doc. 130-2) at 2. As Dr. Chen describes:

> In connection with my March 1, 2017 expert report in this litigation, I turned over all data concerning 1,000 North Carolina congressional maps created as Simulation Set 1, *produced using a computer simulation process following only the non-partisan portions of the Adopted Criteria* used for the 2016 Plan. I also turned over all data concerning 1,000 additional congressional maps created as Simulation Set 2, *produced using a simulation process following the non-partisan portions of the Adopted Criteria and avoiding the pairing of any incumbents.*

Id. (emphasis added). Dr. Chen then compared those maps as to each district and the enacted 2016 Plan. *Id.*

at 2-3. I do not think there is any dispute that maps for purposes of establishing congressional districts could be drawn using non-partisan criteria. It is also undisputed that partisan advantage was a factor in drawing the 2016 Plan. *See* Maj. Op. at 12-14 (describing the process used to draw maps under the 2016 Plan).

In my opinion, Dr. Chen's maps demonstrate two facts. First, they provide evidence that political partisan consideration affected the districts as drafted in the 2016 Plan, a fact which is hardly noteworthy as Defendants admit as much. Second, and significantly, Dr. Chen's maps have been admitted and argued as the alternative to the 2016 Plan. The League Plaintiffs argue:

> Turning from the fact of the 2016 Plan's cracking and packing to their lack of necessity, plaintiffs focus here on a single alternative map: Professor Chen's Plan 2-297. As noted earlier, several types of evidence may be used at this stage of the inquiry, including the data about thousands of simulated maps presented by the Common Cause plaintiffs. Dkt. 130-2. In the League plaintiffs' view, a single alternative map is a simple and intuitive way to show that a challenged plan's cracking and packing could have been avoided. A single alternative map also has the nice property of demonstrating that supporters of the opposing party could be simultaneously uncracked and unpacked—within one particular plan than an array of alternatives.

See, e.g., League of Women Voters Plaintiffs' Brief, 1:16CV1026 (Doc. 138) at 11-12. But this evidence, and any remedy, is based upon maps which were drafted in a completely nonpartisan fashion, and I do not find that action or that remedy to be constitutionally required or even appropriate. As Justice Scalia described in *Vieth*:

> The Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. *See Miller*, *supra*, at 914, 115 S.Ct. 2475 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ..."); *Shaw*, *supra*, at 662, 113 S.Ct. 2816 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics ..."); *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences").

Vieth, 541 U.S. at 285-86.

Instead, I believe that only the state legislatures, through their power to draft congressional districts in the first instance, and Congress with its power under Article I, Section 4 of the United States Constitution, have the authority to remove political partisan considerations entirely from the redistricting process. "It is significant that the Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted

Congress to 'make or alter' those districts if it wished." *Vieth*, 541 U.S. at 275. With respect to political or partisan considerations in the drawing of congressional districts, the Constitution provides the people of this State with the power to "seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers who won passage of the Seventeenth Amendment." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, ___ U.S. ___, 135 S. Ct. 2652, 2692 (2015) (Roberts, C.J., dissenting). I therefore do not assign the same weight or consideration to Dr. Chen's maps as the majority has in its opinion, and further find the comparison of Dr. Chen's maps to the 2016 Plan of only limited relevance.

III. First Amendment

Assuming that partisan gerrymandering claims are justiciable under the First Amendment,[3] I find that the majority's adopted test would in effect foreclose all partisan considerations in the redistricting process—a result I am unable to conclude

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[3] As we recognized, "the splintered opinions in *Bandemer* and *Vieth* stand for, at a minimum, [that] Fourteenth Amendment partisan gerrymandering claims are justiciable[.]" *Common Cause*, 240 F. Supp. 3d at 387. But the justiciability (or nonjusticiability) of a claim under one legal theory does not necessitate the same result under another. *See Baker v. Carr*, 369 U.S. 186, 209-11 (1962). Although "nothing in the Court's splintered opinions in *Vieth* rendered nonjusticiable Plaintiffs' First Amendment claims[,]" *Common Cause*, 240 F. Supp. 3d at 389, the Court has not expressly ruled in this area, which remains unsettled at best.

that the First Amendment requires—and would allow redress for an injury that Plaintiffs have not proven rises to a constitutional level. Therefore, I respectfully dissent.

No one disputes that the First Amendment protects political expression and association. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). But as another court aptly noted in rejecting plaintiffs' claim that the inability to elect a preferred candidate burdened their political expression, "[p]laintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011) (second alteration in original) (quoting *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *17 (N.D. Ga. May 16, 2006)). As the *Radogno* court explained, "[i]t may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights." *Id.* (citing *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981)).

Plaintiffs are likewise free under the 2016 Plan to "field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs." *Id.* (quoting *Kidd*, 2006 WL 1341302, at *17). The fact that some Plaintiffs testified about difficulties involving voter outreach, fundraising, and

candidate recruitment, (*see, e.g.*, Dep. of Elizabeth Evans 16:4-9, April 7, 2017, 1:16-CV-1026, Doc. No. 101-7; Dep. of John J. Quinn, III 39:1-3, April 10, 2017, 1:16-CV-1026, Doc. No. 101-22), fails to persuade me that the 2016 Plan objectively chilled the speech and associational rights of the citizens of North Carolina so as to prove a First Amendment violation.[4]

Justice Kennedy, suggesting in *Vieth* that the First Amendment may be an applicable vehicle for addressing partisan gerrymandering claims, proposed that such an analysis should ask "whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring). The *Vieth* plurality rejected this proposal because "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." *Id.* at 294 (plurality op.). Common Cause Plaintiffs essentially agree, arguing that strict scrutiny is triggered once a plaintiff shows that a redistricting body intended for a plan to discriminate against a certain set of voters. (Common Cause Br. at

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[4] It should also be noted that the "concept of a 'chilling effect' is associated with the doctrine of overbreadth, and describes the situation where persons whose expression is protected are deterred from exercising their rights by the existence of an overly broad statute regulating speech." *Kidd*, 2006 WL 1341302, at *18 n.12 (internal citation omitted); *see also New York v. Ferber*, 458 U.S. 747, 772 & n.27 (1982). While Plaintiffs and other citizens may feel a sense of disillusionment toward the political process due to the 2016 Plan, this differs from fear of enforcement due to an "overly broad statute regulating speech."

5-8.) The majority adopts an intermediate scrutiny standard requiring the showing of a concrete burden to political speech or associational rights. Maj. Op. at 263. However, in practice, I find the result to be indistinguishable, for partisan consideration in a political process is an attempt to create some sort of political advantage for the supporters of a candidate or party. This advantage necessarily comes at the expense of or burden to the other.

As explained above, Congress has declined to expressly limit partisan gerrymandering by statute, *see* 2 U.S.C. § 2c, and the Court's cases accepting or tolerating some amount of partisan consideration are many, *see, e.g.*, *Cromartie*, 526 U.S. at 551; *Miller*, 515 U.S. at 914; *Gaffney*, 412 U.S. at 753; *see also Harris*, ____ U.S. ____, 137 S. Ct. at 1488 (Alito, J., concurring in part and dissenting in part); *Whitford*, 218 F. Supp. 3d at 934-35 (Griesbach, J., dissenting). It might be desirable for a host of policy reasons to remove partisan considerations from the redistricting process. But I am unable to conclude that the First Amendment requires it, or that Plaintiffs here have proven violations of their speech or associational rights under the First Amendment.

IV. Article I, Sections 2 and 4

I agree with the majority's conclusion that Plaintiffs have alleged and proven standing to challenge the 2016 Plan. Under Article I, Sections 2 and 4, I would again find standing on behalf of those voters in cracked districts who were not able to elect the candidate of their choice. Under this same theory, if such standing is ultimately found constitutionally proper as a matter of law by the Court, those voters

unable to elect the candidate of their choice have sustained injury due to legislative control of their district's electoral result.

I join the majority and find that the 2016 Plan amounts to a successful attempt to dictate election outcomes. I join in the majority's opinion as to Article I, Sections 2 and 4 to the extent consistent with the discussion above. I differ slightly from the majority in that I do not find that the Elections Clause completely prohibits State legislatures from disfavoring a particular party. *See Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1284 & n.10 (11th Cir. 2012) (rejecting the prohibition of all regulations influencing election outcomes and instead reading the cases as prohibiting States from attempting "to prevent or severely cripple the election of particular candidates").

"[T]he people should choose whom they please to govern them." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). In this case, the legislature, not the people, dictated the outcome when the districts were drawn, and Defendants have presented no specific facts to support a finding that the election results were due to anything other than the maps being drawn to reach a specific result. General suggestions of other factors possibly contributing to the election results such as fundraising disparities, voter turnout, the quality of the candidates, and unforeseen candidate circumstances, *see, e.g.*, Legislative Defs.' Post-Trial Br. 10-11, Nov. 6, 2017, ECF No. 115; Leg. Defs.' Proposed Findings of Fact and Conclusions of Law 67, Nov. 6, 2017, ECF No. 114, are insufficient to establish that something other than

partisan consideration dictated the election results across the State.

V. Remedy

I concur with the majority's remedial action. I agree that the General Assembly generally is entitled to a second opportunity to draw a constitutional congressional districting plan. As noted in both the majority opinion and this opinion, the adjudication of partisan gerrymandering claims against a redistricting plan is a developing area of law, and the General Assembly generally should have the opportunity to remedy its plan under the standards set forth in the majority opinion.

Appendix B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:16-CV-1026

COMMON CAUSE, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

No. 1:16-CV-1164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

Filed: Aug. 31, 2018

NOTICE OF APPEAL

Defendants Robert A. Rucho, David R. Lewis, Philip E. Berger, and Timothy K. Moore ("legislative defendants") in the above-captioned consolidated actions hereby give notice of their appeal to the Supreme Court of the United States from the Memorandum Opinion and associated Order [D.E. 142 in Case No. 1:16-cv-1026 & D.E. 141 in Case No. 1:16-cv-1164] entered by the Court on August 27, 2018.

This appeal is taken under 28 U.S.C. § 1253.

Respectfully submitted this 31st day of August, 2018.

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

/s/ Phillip J. Strach
Phillip J. Strach
* * *
Counsel for Legislative Defendants

Appendix C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:16-CV-1026

COMMON CAUSE, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

No. 1:16-CV-1164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

Filed: Sept. 4, 2018

ORDER

PER CURIAM:

In a memorandum opinion and order entered August 27, 2018 (the "Order"), this Court held that North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan") constitutes an unconstitutional partisan gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I of the Constitution. *Common Cause v. Rucho*, No. 1:16-CV-1026, 1:16-CV-1164, 2018 WL 4087220 (M.D.N.C. Aug. 27, 2018). In that opinion and order, this Court enjoined the State from using the 2016 Plan in any election *after* the November 6, 2018, general election. *Id.* at *108. We further directed the parties to submit briefing no later than August 31, 2018, addressing (1) whether this Court should allow the State to use the 2016 Plan in the November 6, 2018, general election and (2) whether this Court should allow the General Assembly a third opportunity to draw a constitutionally compliant congressional districting plan. *Id.* at *108-09.

Having carefully reviewed the parties' briefing and supporting materials, we conclude that there is insufficient time for this Court to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019. And we further find that

imposing a new schedule for North Carolina's congressional elections would, at this late juncture, unduly interfere with the State's electoral machinery and likely confuse voters and depress turnout. Accordingly, we decline to enjoin use of the 2016 Plan in the November 6, 2018, general election.

On August 31, 2018, Legislative Defendants[1] noticed an appeal of our August 27, 2018 opinion and order to the Supreme Court, Notice of Appeal, Aug. 27, 2018, ECF No. 145, and moved this Court to stay that order pending review by the Court, Leg. Defs.' Emer. Mot. to Stay Pending Sup. Ct. Rev. & Request for Expedited Ruling, Aug. 27, 2018, ECF No. 146. No later than 5 p.m. on September 5, 2018, Plaintiffs and State Defendants shall file a response to Leg. Defs.' stay motion. In particular, Plaintiffs should focus on whether Legislative Defendants will suffer

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[1] Legislative Defendants in both actions are Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting; David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate. Plaintiffs also name as defendants A. Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of the North Carolina State Board of Elections ("Whitney"); the North Carolina State Board of Elections (collectively, with Whitney, the "State Board Defendants"); and the State of North Carolina (collectively, with the State Board Defendants, "State Defendants").

irreparable harm from our order to not allow the use of the unconstitutional 2016 Plan beyond the November 6, 2018, general election. This Court will expeditiously rule on Legislative Defendants' stay motion thereafter.

SO ORDERED.

Date: September 4, 2018

/s/James A. Wynn, Jr.
Hon. James A. Wynn, Jr.
United States Circuit Judge

/s/William L. Osteen, Jr.
Hon. William L. Osteen, Jr.
United States District Judge

/s/W. Earl Britt
Hon. W. Earl Britt
Senior United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:16-CV-1026

COMMON CAUSE, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

No. 1:16-CV-1164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, et al.,

Defendants.

Filed: Sept. 12, 2018

ORDER

PER CURIAM:

In a memorandum opinion and order entered August 27, 2018 (the "Order"), this Court held that North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan") constituted an unconstitutional partisan gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I of the Constitution. *Common Cause v. Rucho ("Common Cause II")*, --- F. Supp. 3d ---, 2018 WL 4087220 (M.D.N.C. Aug. 27, 2018). Before the Court is a motion (the "Motion") by only the Legislative Defendants[1] in this matter—four Republican members of the North Carolina General Assembly—to stay this Court's Order pending Supreme Court review. Leg. Defs.' Emer. Mot. To Stay Pending S. Ct. Rev. & Req. for Exp. Hr'g., Aug. 31, 2018, ECF No. 146. Neither the State of North Carolina nor any of the State Board Defendants have sought an emergency stay. Nor has the State of North Carolina or the State Board Defendants appealed this Court's Order to the Supreme Court. For the reasons stated below, we grant the Motion, subject to certain conditions.

[1] All undefined capitalized terms in this Order have the same meaning as in this Court's August 27, 2018, opinion and order.

I.

On February 5, 2016, this Court held that two districts established by North Carolina's 2011 decennial congressional redistricting plan constituted racial gerrymanders in violation of the Equal Protection Clause. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). Less than two weeks later, the General Assembly adopted the 2016 Plan. *Common Cause II*, 2018 WL 4087220, at *9. Several months later, Plaintiffs filed the instant actions. *Id.* at *10-11.

In October 2017, this Court held a four-day trial, during which the parties introduced evidence and presented testimony and arguments. *Common Cause II*, 2018 WL 341658, at *11. Thereafter, the parties filed extensive post-trial briefing. *Id.* at *11-13. On January 9, 2018, this Court ruled in favor of Plaintiffs on all of their claims and gave Defendants until January 24, 2018, to enact a remedial plan. *Common Cause v. Rucho ("Common Cause I")*, 279 F. Supp. 3d 587, 691 (M.D.N.C. 2018), *vacated sub nom. Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) (mem.). Without making any discernible effort to draw a new map, Legislative Defendants then successfully sought a stay from the Supreme Court. *Rucho v. Common Cause*, 138 S. Ct. 923 (2018). On June 25, 2018, the Supreme Court vacated this Court's judgment for reconsideration in light of *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which addressed what evidence a plaintiff must put forward to establish Article III standing to assert a partisan gerrymandering claim

under the Equal Protection Clause based on a vote dilution theory.

Thereafter, this Court invited the parties to submit briefing regarding the impact of *Gill* on this Court's previous decision striking down the 2016 Plan. *Common Cause II*, 2018 WL 4087220, at *13. After carefully considering the parties' briefing, this Court unanimously held that at least some of the Plaintiffs had standing to lodge a partisan gerrymandering challenge under Article I of the Constitution, and further unanimously held that the 2016 Plan violates Article I. *Id.* at *13; *id.* at *112 (Osteen, J., concurring in part and dissenting in part). This Court also unanimously held that, under *Gill*, at least one Plaintiff had standing to assert an Equal Protection challenge to 10 of the 13 districts in the 2016 Plan, and that 9 of those 10 districts violate the Equal Protection Clause. *Id.* at *13 (majority op.); *id.* at *112 (Osteen, J., concurring in part and dissenting in part). A majority of the Court further held that at least one Plaintiff had standing to assert Equal Protection challenges to the remaining three districts in the 2016 Plan and that those districts also violate the Equal Protection Clause. *Id.* at *9, 22 (majority op.). Finally, a majority of the Court held that Plaintiffs had standing to assert a First Amendment partisan gerrymandering challenge to the 2016 Plan as a whole, and that the 2016 Plan violates the First Amendment. *Id.* at *9, 26 (majority op.).

This Court's August 27, 2018, memorandum opinion and order unanimously enjoined the State from using the 2016 Plan in any election *after* the November 6, 2018, general election. *Id.* at *108. The

Court invited the parties to submit briefing no later than August 31, 2018, addressing whether to allow the State to use the unconstitutional 2016 Plan in the November 6, 2018, election. *Id.* And the Court further asked the parties to address whether the General Assembly should be given a third opportunity to draw a constitutionally compliant congressional redistricting plan, notwithstanding that its first two efforts had been ruled unconstitutional. *Id.* at 109.

In a joint brief submitted August 31, 2018, Plaintiffs asked this Court *not* to enjoin use of the 2016 Plan in the November 6, 2018, general election on grounds that doing so would unduly interfere with the ongoing election and the State's electoral machinery, as well as depress turnout. In accordance with Plaintiffs' request, this Court entered an order on September 4, 2018, stating that it would not bar the State from using the 2016 Plan in the November 6, 2018, general election. Order, Sept. 4, 2018, ECF No. 150.

Also, on August 31, 2018, Legislative Defendants filed the Motion and noticed an appeal of this Court's July 27, 2018, opinion and order to the Supreme Court. Leg. Defs.' Notice of Appeal, Aug. 31, 2018, ECF No. 145. In a response brief filed September 4, 2018, Common Cause Plaintiffs consented to the entry of Legislative Defendants' stay Motion, subject to two conditions: (1) Legislative Defendants file their Jurisdictional Statement with the Supreme Court on or before October 1, 2018, and (2) Legislative Defendants seek no requests for extensions of time while their appeal is pending before the Supreme Court. Common Cause Pls.' Br. in Resp. to Leg. Defs.'

Emer. Mot. To Stay Pending S. Ct. Rev. & Req. for Exp. Hr'g 2-3, Sept. 4, 2018, ECF No. 149. If Legislative Defendants breach either of those conditions, the stay would immediately dissolve. Common Cause Plaintiffs requested those conditions to ensure that Legislative Defendants promptly prosecute their appeal to the Supreme Court. *Id.* at 3. Legislative Defendants subsequently expressed support for Common Cause Plaintiffs' approach, and League Plaintiffs similarly did not object.

II.

"The Court considers four factors when determining whether to issue a stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *accord Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appeal." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted).

"[A] stay is considered 'extraordinary relief' for which the moving party bears a 'heavy burden,'" and "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less

exacting in the redistricting context." *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (quoting *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (Burger, Circuit Justice, 1971)); *see Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558-59 (E.D. Va. 2016) (Diaz, J.) (same); *Does 1-5 v. Cooper*, No. 1:13CV711, 2016 WL 10587195, at *1 (M.D.N.C. March 2, 2016) ("The granting of a stay pending appeal is 'an extraordinary remedy.'" (quoting *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973))). To that end, "[a]s with other types of cases, district courts evaluating redistricting challenges have generally denied motions for a stay pending appeal." *Harris*, 2016 WL 6920368, at *1 n.1 (collecting cases).

Neither Legislative Defendants' Motion nor their supporting brief explicitly addresses any of the well-established factors set forth in *Hilton*. Normally, that failure alone would be fatal to Legislative Defendants' Motion. *See, e.g.*, *Hickman-Bey v. Livingston*, No. 2:13-CV-266, 2013 WL 6890767, at *2 (S.D. Tex. Dec. 31, 2013). Nonetheless, given the parties' agreement, we grant the Motion, subject to the two agreed upon conditions: (1) Legislative Defendants file their Jurisdictional Statement with the Supreme Court by October 1, 2018, and (2) Legislative Defendants seek no requests for extension of time while their appeal is pending before the Supreme Court. If Legislative Defendants breach either of these conditions, the stay will immediately, and without any action by this Court, dissolve. Additionally, if Legislative Defendants breach either of these conditions, this

Court will move forward immediately with drawing its own remedial districting plan.[2]

III.

Although we exercise our discretion to grant Legislative Defendants' motion, we admonish counsel for Legislative Defendants regarding their briefing submitted allegedly "in support" of the Motion. Under Federal Rule of Civil Procedure 11, "[b]y presenting to the court a [brief]—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the brief "is not being presented for any improper purpose" and that "the factual contentions [therein] have evidentiary support[.]" Rather than addressing the relevant legal standard and why Legislative Defendants are entitled to the extraordinary relief of a stay under that standard, counsel for Legislative Defendants devote much of their briefing to making baseless ad hominem attacks against the motives and integrity of this Court and appealing to irrelevant extra-legal sources.

First, in their brief, counsel for Legislative Defendants state that this Court "threat[ened] to impose a proportional representation congressional map on North Carolina" in what amounts to an effort "to sway election results in an ongoing election for one set of candidates," characterizing this Court as

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[2] This Court reserves judgment as to whether, in such circumstances, it will consider a remedial plan drawn by the General Assembly.

"meddl[ing]" in the State's election. Leg. Defs.' Mem. in Supp. of Mot. to Stay & in Resp. to the Court's Order of August 27, 2018 ("Leg. Defs.' Br.") at 2, Aug. 31, 2018, ECF No. 137. That statement is a baseless affront to this Court. To the contrary, this Court's simple *request for briefing* as to how to best remedy the constitutional violation did not amount to a "threat." Rather, it reflected an effort by this Court to engage in informed decision-making with the assistance of the parties, nothing more.

Second, there is no evidence in the record to support counsel for Legislative Defendants' claim that this Court desires to "sway" an election in favor of Democratic candidates. On the contrary, the guiding principle of this Court's opinion and judgment is that the Constitution *bars* the government—whether the legislature, the executive, or the judiciary and whether controlled by Republicans or Democrats—from "swaying" an election in favor of one set of candidates. *Common Cause II*, 2018 WL 4087220, at *1 ("[T]he Constitution does not allow elected officials to enact laws that distort the marketplace of political ideas so as to intentionally favor certain political beliefs, parties, or candidates and disfavor others."). In this instance, the only party to these proceedings that has sought to "sway election results . . . for one set of candidates" is the North Carolina General Assembly's Republican majority, which counsel for Legislative Defendants concede, as they must, expressly sought to draw a map that would "advantage" the Republican Party. Ex. 1007.

Third, this Court's exercise of its constitutional authority and obligation under Article III and the

Supremacy Clause to review state law to determine whether it complies with the Constitution—an authority recognized by the Supreme Court more than 200 years ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.), and repeatedly relied on by the Supreme Court to strike down state laws, including state districting plans, *e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017)—in no way amounts to "meddl[ing]" in a State's election. To suggest otherwise reflects a fundamental misunderstanding of—or refusal to accept the authority of—the Constitution.

Fourth, counsel for Legislative Defendants further characterize this Court's remedial efforts as "unelected federal judges usurping the role of the State's elected representatives by enjoining a congressional plan two months before a general election under a legal theory that has never before been accepted by the Supreme Court." Leg. Defs.' Br. at 4. To begin, as a matter of fact, this Court's order *did not* "enjoin[] a congressional plan two months before a general election," but rather asked the parties to submit briefing addressing whether it would be feasible to do so, so as to remedy Plaintiffs' injury as quickly as possible. And under our Constitution, the Framers determined that the public's best interests are served by an appointed, as-opposed to elected, judiciary. *See generally* The Federalist No. 78 (Alexander Hamilton). Therefore, that the judges on this Court and the remainder of the federal judiciary are "unelected" in no way undermines the authority of the federal judiciary to act in its constitutionally defined sphere.

Fifth, counsel for Legislative Defendants state in their brief that this Court intended to "engag[e] in judicial gerrymandering that would perpetuate the very conduct it is supposedly remedying," citing in support *only* a newspaper editorial. Leg. Defs.' Br. at 4 (citing Editorial, *North Carolina's Gerrymander Coup*, Wall St. J., Aug. 31, 2018, at A14). Our federal courts decide cases on the basis of legal authorities, not newspaper editorials, let alone a selectively chosen[3] editorial that counsel for Legislative Defendants knew or should have known is riddled with misleading factual and legal assertions.[4] That

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[3] *Compare, e.g.*, Editorial, *No easy answer on gerrymandering*, Winston-Salem Journal, Sept. 1, 2018, *available at* https://www.journalnow.com/opinion/editorials/ourview-no-easy-answer-to-gerrymandering/article_2e734dea-4ed0-5c6f-9e4b-b51eb1a6b3a9.html; David Daley, Op-Ed, *The Four Corners offense has returned. Now NC Republicans are using it*, The News & Observer, Aug. 30, 2018, *available at* https://www.newsobserver.com/opinion/op-ed/article217568145.html.

[4] Among other misleading and inaccurate assertions, the editorial states that "[a] liberal panel of judges in 2016 invalidated the state's congressional *map* as an unconstitutional racial gerrymander," *see* Leg. Defs.' Br. Ex. 1 (emphasis added), an apparent reference to another panel of this Court's decision in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). *Harris* held that *two* of the State's *thirteen* congressional districts constituted racial gerrymanders in violation of the Equal Protection Clause. *Id.* at 604. The Supreme Court *affirmed Harris*, reaching that conclusion *unanimously* with respect to one of the two districts. *Cooper*, 137 S. Ct. at 1463; *id.* at 1487 n.1 (Alito, J., concurring in the judgment in part and dissenting in part).

The editorial also repeatedly suggests that this Court was divided as to its judgment that the 2016 Plan violated the Constitution, with only the "liberal judges" voting to strike down the 2016 Plan. *See* Leg. Defs.' Br. Ex. 1. But except for the

the editorial relies on misleading legal and factual assertions to foster distrust in the judiciary by calling into question its impartiality renders the decision of counsel for Legislative Defendants—as officers of the court and representatives of the leadership of the North Carolina General Assembly—to rely on the editorial all the more inappropriate. N.C. Rule of Prof'l Conduct R. 8.2 cmt. [4] ("[F]alse statements by a lawyer can unfairly undermine public confidence in the administration of justice."). And most assuredly, that newspaper's editorial[5] did not provide counsel for Legislative Defendants with a basis—let alone a factual basis sufficient to satisfy Rule 11 and their ethical obligations as members of the bar—to impugn this Court's motives, integrity, and independence. *See id.* R. 8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the

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majority opinion's conclusions (1) that the 2016 Plan as a whole violated the First Amendment and (2) that Plaintiffs had standing to lodge Equal Protection challenges to three of the thirteen districts in the 2016 Plan, this Court was *unanimous* in holding that nine other districts violated the Equal Protection Clause and that the 2016 Plan as a whole violated two provisions in Article I. *Id.* at *13 (majority op.); *id.* at *112 (Osteen, J., concurring in part and dissenting in part).

[5] We further note that certain adjudicative facts reported in news articles may be admissible under Federal Rule of evidence 201(b). But the Federal Rules of Evidence prohibit opinion testimony by lay witnesses. *See* Fed. R. Evid. 701. Accordingly, newspaper editorials, like the opinion editorial relied upon by counsel for Legislative Defendants, do not constitute competent opinion evidence when, as here, the authors of the editorial have not been qualified as experts.

qualifications or integrity of a judge, or other adjudicatory officer . . .").

In sum, there is no place in the legal system for unsupported attacks on the judiciary's motives and integrity by counsel representing parties before our courts. As in all cases, counsel should abide by the constraints of the legal profession to represent their clients zealously within the bounds of the law with due respect for the judiciary, and in accordance with their obligations under the Rules of Civil Procedure and as members of the bar.

IV.

For the reasons set forth above, and subject to the conditions set forth in Part II *supra*, the Motion is GRANTED.

Date: September 12, 2018

/s/_____
Hon. James A. Wynn, Jr.

/s/_____
Hon. William L. Osteen, Jr.

/s/_____
Hon. W. Earl Britt

OSTEEN, Jr., J., concurring and writing separately to provide additional reasons for granting the stay:

A stay is an exercise of discretion. *Williford v. Armstrong World Indus.*, 715 F.2d 124, 127 (4th Cir. 1983). I find the exercise of discretion to grant Legislative Defendants' motion to stay reasonable and agree with the opinion of this court. While I might otherwise decline to impose a condition of requiring Legislative Defendants to prosecute their appeal with no requests for extension of time, Plaintiffs agree upon that condition and Legislative Defendants do not oppose that condition.

I write separately because I find a stay is appropriate for additional reasons to those addressed in this court's memorandum opinion.

Throughout this case, I believe we have applied Supreme Court precedent as required. However, the Supreme Court's opinion in *Gill v. Whitford*, ____ U.S. ____, 138 S. Ct. 1916 (2018), created enough uncertainty in this area of the law such that I believe a stay is appropriate. I find this particularly true in light of the Supreme Court's comment in remanding *Gill* that "[t]his is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved." 138 S. Ct. at 1933-34.[1]

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[1] I agree with the majority here that "[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context." (Mem. Op. at 6 (quoting *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004)). I have considered the four factors generally required for the issuance of a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

Even if this Supreme Court should agree that Plaintiffs here have standing, this Supreme Court may very well conclude that partisan gerrymandering claims are not justiciable. Four Justices in *Vieth v. Jubelirer* recognized in 2004 that "[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." 541 U.S. 267, 305 (2004) (referencing *Davis v. Bandemer*, 478 U.S. 109 (1986)). The Supreme Court decided *Vieth* fourteen years ago, and questions still remain as to the principled application of *Bandemer*.

The question of justiciability in this context involves application and review of "six independent tests for the existence of a political question." *Vieth*, 541 U.S. at 277 (citing *Baker v. Carr*, 369 U.S. 186 (1962)). Those six tests include:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate

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(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Given Common Cause Plaintiffs' lack of objection to a stay, at least on conditions, it does not appear any injury will inure to Plaintiffs and arguably the applicants confront some harm if required to act pursuant to this court's order. In light of the unsettled nature of the claim and the relationship of the claim to legislative action, I find the public interest falls in favor of a stay. With respect to a strong showing of a likelihood of success on the merits, I find that the unsettled nature of the claim and its unresolved contours and justiciability create unique circumstances and enough uncertainty as to possible outcomes to suggest a stay is appropriate.

> political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth, 541 U.S. at 277-78 (citing *Baker*, 369 U.S. at 217) (alterations in original). In my opinion, when the Supreme Court in *Bandemer* answered the question of justiciability affirmatively, that Court necessarily found that partisan gerrymandering did not meet the political question factors described above. I therefore interpret Supreme Court precedent to require us, as a district court, to hold that political gerrymandering claims can succeed where plaintiffs prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127; *Vieth*, 541 U.S. at 281 (quoting the same); *see also Bandemer*, 478 U.S. at 161-62 (Powell, J., concurring in part and dissenting in part) ("[T]he plurality expresses the view, with which I agree, that a partisan political gerrymander violates the Equal Protection Clause only on proof of 'both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.'"). I believe lower

courts are obliged to apply that precedent until the Supreme Court states otherwise. *See United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) ("The *Agostini* principle provides that in circumstances when Supreme Court precedent has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions.") (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1989)).

This Supreme Court may ultimately conclude that no judicially discernible and manageable standard exists, as argued by the plurality in *Vieth*. 541 U.S. at 281. This Supreme Court has the authority to and therefore may reconsider the six-factor political question test from *Baker* and find that the original standard for partisan gerrymandering claims—intentional discrimination and discriminatory effect—does not provide a judicially workable framework. The Court may, after review and consideration, find other *Baker* factors problematic.[2]

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[2] Justiciability also turns on whether political gerrymandering requires an initial policy determination of a kind clearly for nonjudicial discretion, *see Baker*, 369 U.S. at 217; that is, whether political and partisan interests should be limited in the political process of drafting districts. While it appears to me that *Bandemer* found political gerrymandering issues justiciable, in light of the uncertainty described in *Gill*, it is possible that all of the political question factors raised in *Baker* may be considered by this Court. These include whether the predominance of partisan considerations is appropriate for judicial determination or whether that is a matter for nonjudicial, i.e., legislative or Congressional, discretion.

With respect to a challenge under Article I, reasonable jurists may disagree as to Article I's applicability in this context. *See Agre v. Wolfe*, 284 F. Supp. 3d 591, 601-03 (E.D. Pa. 2018) *appeal dismissed*, 138 S. Ct. 2576 (May 29, 2018) (Mem.), and *appeal dismissed sub nom., Scarnati v. Agre*, 138 S. Ct. 2602 (June 4, 2018) (Mem.). Nevertheless, assuming this Supreme Court finds political gerrymandering claims justiciable under the Equal Protection clause, I believe that for many of the same reasons a similar claim exists under Article I. *See, e.g., Shapiro v. McManus*, 203 F. Supp. 3d 579, 599 (D. Md. 2016) ("These factual allegations . . . therefore support a plausible claim that the State's redrawing of the Sixth District's lines violated the plaintiffs' rights under . . . Article I, § 2."). Even so, the Court may very well find that partisan gerrymandering is not justiciable under any Constitutional theory.

The "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). We have made our findings in our order. However, I believe judicial economy dictates deliberation before proceeding with the implementation of that order. Until the Supreme Court either affirms or reverses the holding of this court, I believe the public interest is best served by a stay of our order.

I concur in the decision to grant the motion and stay this case pending the timely filing and disposition of an appeal to the Supreme Court.

Appendix E

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, §2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

....

U.S. Const. art. I, §4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

....

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

—v.—

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM BY THE *COMMON CAUSE* APPELLEES

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QUESTIONS PRESENTED

1. Whether the District Court correctly held that Appellees have Art. III standing to challenge the 2016 North Carolina Congressional Plan and its individual districts as unconstitutional partisan gerrymanders?

2. Whether the District Court correctly held that, on the facts of this case, Appellees' claims are justiciable and do not present "political questions"?

3. Whether the District Court correctly held that the 2016 Plan and 12 of its 13 individual districts violate the First Amendment, Equal Protection Clause, and/or Art. I?

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INTRODUCTION

The 2016 North Carolina Congressional Plan ("2016 Plan" or "Plan") is the most overt partisan gerrymander this Court has ever seen. The written criteria that governed the redistricting process, formally adopted by a party-line vote of the General Assembly's Joint Redistricting Committee, commanded the map-drawer to pursue "Partisan Advantage" for the Republican Party. Indeed, those criteria *expressly dictated* a quota of "10 Republican" districts and just "3 Democrat[ic]" ones—despite a near-equal split among the State's voters. To implement this directive, the map-drawer admittedly "packed" as many Democrats as possible into three overwhelmingly blue districts and "cracked" the remainder across ten red ones. The only reason the Plan did not contain even fewer Democratic districts was because it was "not ... possible to draw [such] a map." The heads of the Joint Redistricting Committee, Appellants here, publicly declared that the Plan was intended "to gain partisan advantage" for their side because "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan is] a political gerrymander."

This egregious self-entrenchment is "incompatible with democratic principles," *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and "jeopardizes 'the ordered working of our Republic, and of the democratic process,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring)). As the Chief Justice observed, "those who govern should be the *last* people to ... decide who *should* govern."

McCutcheon v. FEC, 572 U.S. 185, 192 (2014). Yet that is what North Carolina's legislative majority did here—openly and shamelessly.

As the District Court held, Appellants' actions violate multiple, well-established constitutional restraints. By burdening the speech and association rights of Appellees (which include the North Carolina Democratic Party and individual Democratic voters) based on their viewpoint and identity, the Plan violates the First Amendment. By intentionally discriminating against Appellees without any legitimate justification, the Plan violates the Equal Protection Clause. And by nakedly dictating the outcomes of federal elections, the Plan exceeds Art. I's limited grant of power to the States. None of these principles is the least bit novel, and nothing in this Court's jurisprudence suggests that they are inapplicable to redistricting.

Appellants do not attempt to defend their actions as consistent with these settled principles. Instead, they hide behind a smokescreen of unsound standing and justiciability arguments.

As for standing, Appellants all but ask this Court to overrule *Gill v. Whitford*, unanimously decided just months ago. *Gill* held that the plaintiff in a partisan-gerrymandering case establishes Art. III standing on a vote-dilution theory by proving that his or her district was "packed" or "cracked." 138 S. Ct. at 1930-31. The District Court found that 12 of the Plan's 13 districts were intentionally packed or cracked, and at least one voter-plaintiff resides in each district. Appellants do not dispute these facts; rather, they insist—contrary to *Gill*—that a voter who lives in an

intentionally packed or cracked district suffers no injury. If that were so, there would have been no reason to remand *Gill* to allow the plaintiffs to prove what Appellees here have proved: "that [they] live in districts where Democrats ... have been packed or cracked." *Id.* at 1934. Meanwhile, Appellants virtually ignore the District Court's undisputed findings that Appellees also proved classic *non*-dilutionary injury to their rights of speech and association.

As to justiciability, Appellants assert that challenges to partisan gerrymanders, whatever their facts or legal theories, are "political questions" beyond the judicial ken. This is so, they say, because there is no "limited and precise test" that separates constitutional maps from unconstitutional ones. JS28. But the District Court's "tests" were taken directly from this Court's precedents and are perfectly up to the task. And regardless, the political question doctrine calls for a fact-specific, case-by-case inquiry to assess whether the relevant issue is "susceptibl[e] to judicial handling ... in *the specific case*." *Baker v. Carr*, 369 U.S. 186, 211-12, 217 (1962) (emphasis added). Whatever difficulties courts may face in adjudicating other partisan-gerrymandering cases, there are no such difficulties here, where the formally adopted redistricting criteria are facially discriminatory. Indeed, Appellants' counsel has *conceded* before this Court that facially discriminatory districting is unconstitutional.

Given that facial discrimination, the admissions in the record, and the absence of any factual disputes, the Court could easily resolve this appeal through summary affirmance, saving for another day the

question of how to handle cases where extraordinary circumstances like these are absent. In all events, the judgment should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is a "purple state," its voters split almost equally between support for Democratic and Republican candidates. A13-14. Its congressional delegation once reflected this, often dividing 7-6 or 6-7. That changed markedly when the Republican Party captured the General Assembly in 2010, "giving [it] exclusive control over the ... redistricting process." A10. On a party-line vote, it adopted a new congressional map (the "2011 Plan") that yielded a 9-4 Republican supermajority in the 2012 election, even though Democratic candidates received more votes statewide. A13. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the vote. A13-14.

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which alleged that two of its districts were racially gerrymandered. The State's "defense" was that the 2011 Plan was actually a *partisan* gerrymander. The map-drawer, Dr. Thomas Hofeller, testified that partisanship "was the primary ... determinant in the drafting"—*i.e.*, that his "primary goal" was "to create as many districts as possible in which GOP candidates would be ... successful[]" and "to minimize the number of districts in which Democrats ... [could] elect a Democratic candi-

date." A180. Before this Court, the State's counsel—who represents Appellants here—explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out [of them]." Oral Argument Tr., *Cooper v. Harris*, No. 15-1262 (Dec. 6, 2016) at 10-11 (argument of Paul D. Clement). This Court affirmed the judgment invalidating the two challenged districts as predominantly race-motivated, without disputing the State's admission as to the remaining districts and the 2011 Plan overall.

2. Creation Of The 2016 Plan

In February 2016, the district court in *Harris* ordered a remedial map. The heads of the Joint Redistricting Committee, Rep. David Lewis (R) and Sen. Robert Rucho (R), instructed Hofeller to remedy the two invalidated districts' racial infirmities while "maintain[ing]" the predetermined partisan split of "10 Republicans and 3 Democrats." A14-15. Hofeller used past election results "to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate." A16, 157-158. As Hofeller testified, this information is highly predictive of future voting patterns. *Ibid.* Hofeller then used that partisanship index to guide his line-drawing, with the admitted goal of "cracking" and "packing" Democrats to minimize their voting strength. A17, 158-59. In so doing, Hofeller "divide[d] counties and communities of interest along partisan lines, and join[ed] sections of the state that have little in common." A252.

Lewis then presented for the Joint Redistricting Committee's retroactive approval a set of written "cri-

teria" that Hofeller had employed. A19-21. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated:

> The partisan makeup of the congressional delegation ... is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 ... Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Another criterion, "Political data," stated that "[t]he only data other than population data to be used ... shall be election results in statewide contests since January 1, 2008...." A20. Hofeller agreed that the 2016 Plan "adhered to the Committee's Partisan Advantage and Political Data criteria." A23. The Committee adopted these partisan criteria on party-line votes. *Ibid.* Both chambers of the General Assembly then approved the 2016 Plan, also "by party-line votes." A24.

Lewis proclaimed the intentions behind the Plan on the record, both during Committee hearings and on the House floor:

- "[W]e want to make clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage."
- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

- "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."

- "I acknowledge freely that [the 2016 Plan] would be a political gerrymander, which is not against the law."

Rucho agreed, stating that there is "nothing wrong with political gerrymandering" because "[i]t is not illegal." A22-24. On this basis, the resulting Plan was enacted as law by the North Carolina legislature.

3. Effect Of The 2016 Plan

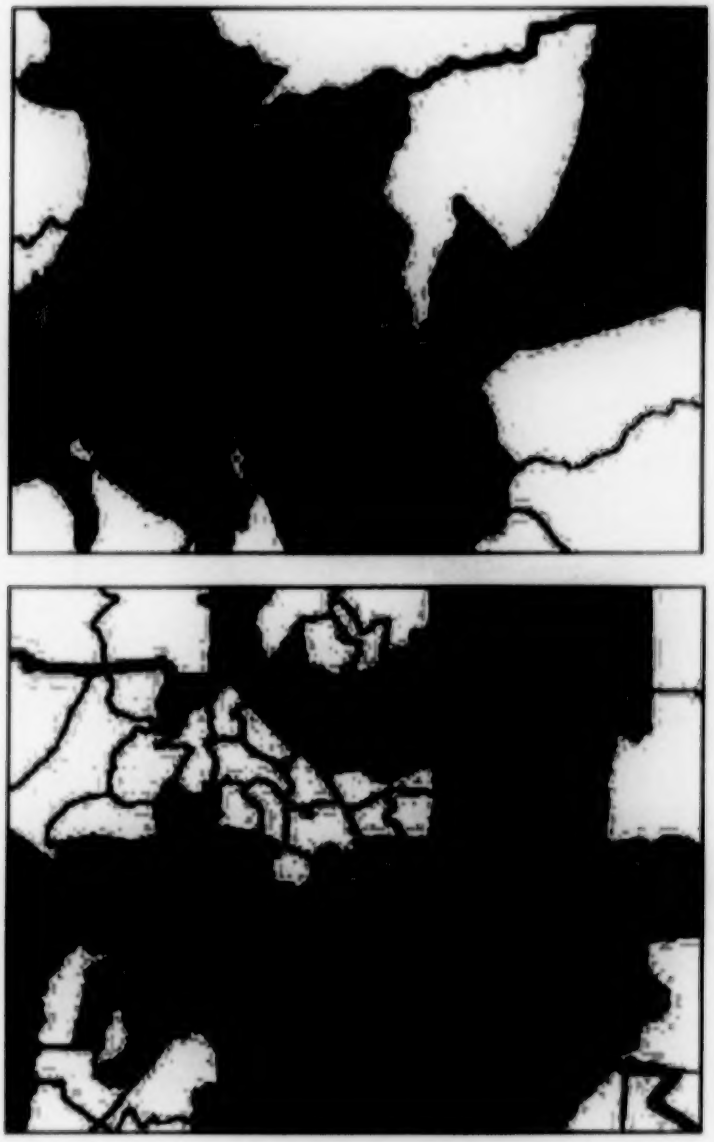
In the 2016 election, Republicans prevailed in all ten cracked districts where they were "intended and expected ... to prevail," and Democrats prevailed in the three packed districts drawn to be "predominantly Democratic." A26. Republican candidates thus won 77% of the total seats despite receiving just 53% of the statewide vote. *Ibid.* Not one district had a competitive race. A190.

The 2016 Plan's intentional packing and cracking harmed Appellees at the district level by diluting their votes. A51-65, 74, 82-83. For example, Appellees Coy E. Brewer, Jr. and John McNeill are Democratic voters in the heavily Democratic Fayetteville area. A57-59. The Plan intentionally cracked that area (shown in blue on the map below) and submerged the pieces within heavily Republican Congressional Districts ("CDs") 8 and 9:

Appellants' expert "conceded that [this] area constituted a 'cluster of Democratic' [voters] that the 2016 Plan 'split,'" and that absent this "crack[ing]," either CD 8 or CD 9 "would not have been a safe Republican district." A252-53. Due to this cracking, Brewer was relegated to CD 8 and McNeill to CD 9, intentionally wasting their votes. A57-59, 251-255.

Similar district-specific harms were visited on Appellees across the State. For example, both Appellant Lewis and Appellants' expert conceded that the 2016 Plan "split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between [safe-Republican] Districts 10 and 11" (below top), A25, and "'cracked' ... the Democratic city of Greensboro between Republican Districts 6 and 13"

(below bottom), A158; *see also* A186-187, 216-217, 271.



Appellees residing in the resulting districts had their votes intentionally wasted, including Democratic voters Robert Warren Wolf (CD 10), Jones P. Byrd (CD 11), Melzer A. Morgan, Jr. (CD 6), and Russell G. Walker, Jr. (CD 13). A56-57, 60-61, 62-63, 70, 243-248, 259-266, 270-273.

In addition, because of the 2016 Plan, the North Carolina Democratic Party and its member-plaintiffs residing in every district in the State undisputedly suffered a "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70.

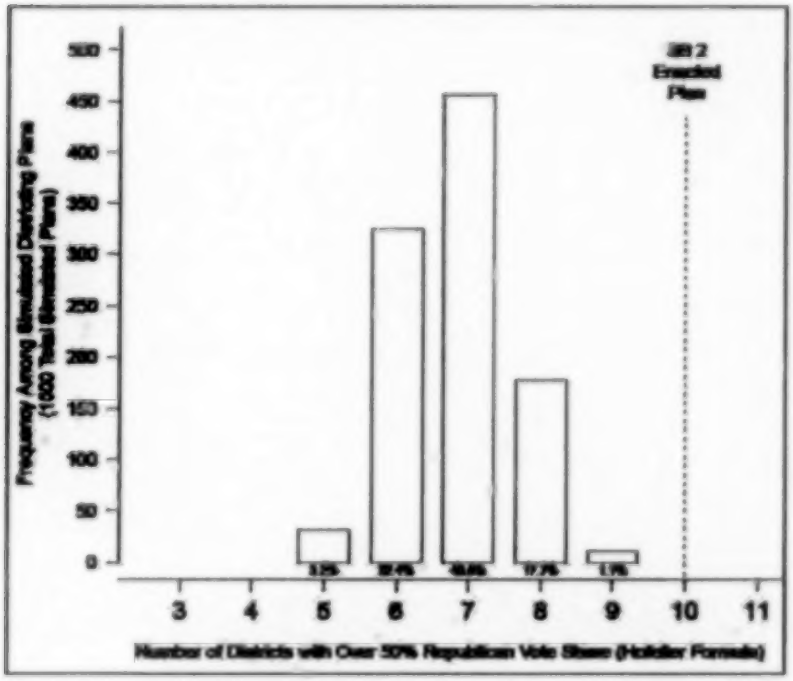
B. Proceedings Below

1. Trial and Appeal

In August 2016, *Common Cause* Appellees—14 voters from all 13 districts in the 2016 Plan, the North Carolina Democratic Party, and the nonpartisan organization Common Cause—filed a complaint challenging the Plan under the First Amendment, Equal Protection Clause, and Art. I, §§ 2 and 4. The case was consolidated with *League of Women Voters of N. Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.), which also challenged the plan as a partisan gerrymander. In October 2017, the District Court held a four-day bench trial. As the facts were essentially undisputed, the trial focused on expert testimony.

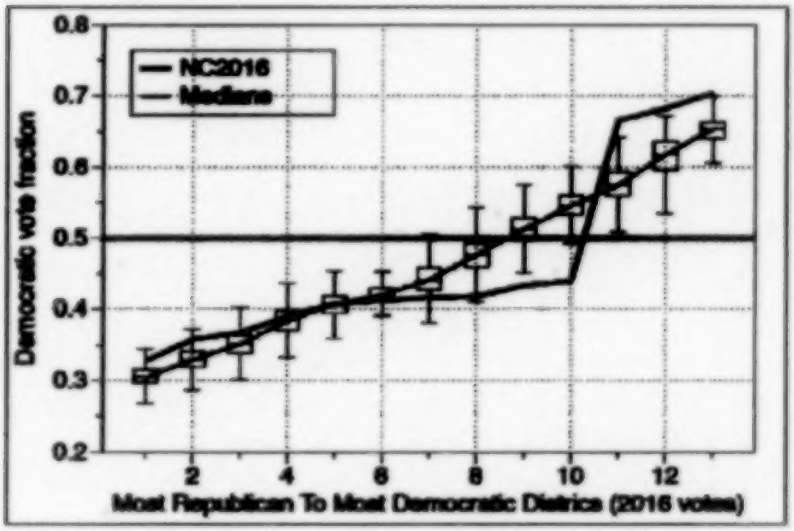
Common Cause Appellees presented testimony from Dr. Jonathan C. Mattingly, a mathematician at Duke University, and Dr. Jowei Chen, a political sci-

entist at the University of Michigan. A160, 167. They used computer algorithms to generate thousands of alternative districting maps using only traditional criteria and disregarding partisan data. Next, they used actual election results from each precinct statewide to simulate hypothetical elections under each alternative map. The results were striking. Dr. Chen generated 3,000 alternative maps under which the composition of North Carolina's delegation formed a bell curve (shown below), mostly split 7-6 or 6-7. None of Dr. Chen's 3,000 maps yielded a Republican advantage as great as the 10-3 split of the 2016 Plan (shown by the dashed red line). A167-171.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. A162.

Dr. Mattingly also corroborated the packing and cracking of individual districts. He showed this by plotting the Democratic vote share of each district on a graph, with the most Republican on the left and the most Democratic on the right. With no packing or cracking, the median map in Dr. Mattingly's simulation set yields a straight line (in yellow below). By contrast, the plot for the 2016 Plan (in blue) resembles an "S" curve, with Democratic voters packed into overwhelmingly Democratic districts at the top of the "S" or cracked across safe Republican districts at the bottom. A163-166.



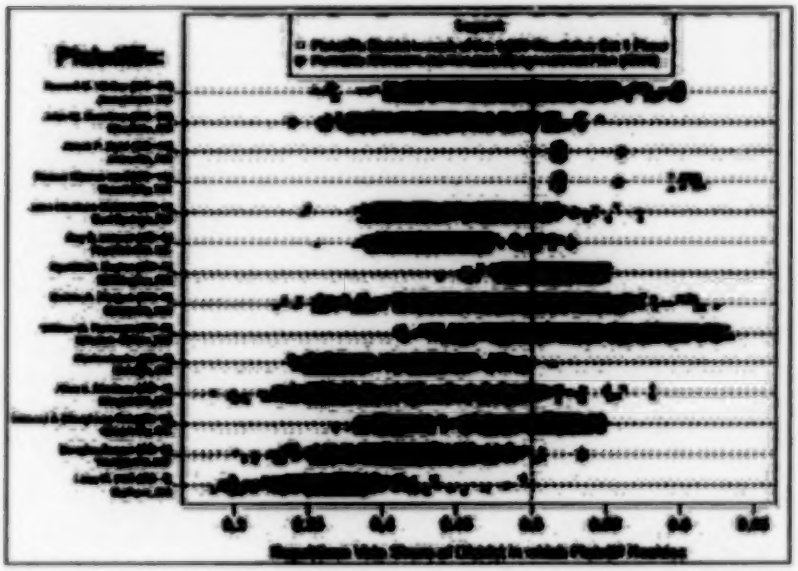
In January 2018, the District Court held that Appellees had standing to challenge the 2016 Plan on a statewide *and* district-by-district basis, and that the Plan violates the First Amendment, the Equal Protection Clause, and Art. I, §§ 2 and 4. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). This Court stayed the judgment pending appeal. On June 25, 2018, this Court vacated and remanded for consideration in light of *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which held that, when proceeding under a vote-dilution theory, partisan-gerrymandering plaintiffs must establish standing by showing that the district in which they reside is "cracked" or "packed."

2. Remand

On remand, the District Court requested briefing on the impact of *Gill*. Besides highlighting the packing and cracking evidence already in the record, *Common Cause* Appellees submitted a supplemental declaration from Dr. Chen.

Dr. Chen used each *Common Cause* voter-plaintiff's residential address to determine the district in which that plaintiff would have resided in 1,000 of the alternative maps he had previously generated. He then determined how the partisan vote split of each plaintiff's actual district under the 2016 Plan compares to the vote split of the array of "hypothetical district[s]" in which he or she might have been placed. A51 (quoting *Gill*, 138 S. Ct. at 1931). The results are shown below. For each plaintiff, the gray horizontal band—actually 1,000 individual gray circles—depicts the partisan vote split in each alternative district in which he or she might have been

placed. The red star indicates the partisan vote split of each plaintiff's actual district under the 2016 Plan.



This analysis further evidences that the districts where these voter-plaintiffs live were packed or cracked. Specifically, all the plaintiffs who reside in majority-Republican districts under the 2016 Plan (where the red stars are to the right of the dashed line) would have resided in more Democratic-leaning districts in the overwhelming majority of alternative maps. A52-53, 57-59, 61. And all the plaintiffs who reside in majority-Democratic districts under the 2016 Plan (where the red stars are to the left of the dashed line) would have resided in less Democratic-leaning districts in virtually all alternative maps. A51-52, 54, 62.

On August 27, 2018, the District Court issued a new opinion. The majority held that at least one

plaintiff had standing to challenge each of the 2016 Plan's 13 districts under a vote-dilution theory and that the plaintiffs further had non-dilutionary standing to challenge the Plan as a whole. A3. Judge Osteen agreed that at least one plaintiff had standing to challenge 10 of the Plan's 13 districts under a vote-dilution theory, but disagreed (contra *Gill*) that voters living in *packed* districts suffer dilutionary injury. A330. The District Court also held unanimously that Appellees' claims were justiciable and not "political questions." A33-35.

On the merits, the majority held that 12 of the Plan's 13 districts (all except CD 5) violate the Equal Protection Clause, because they were drawn with the predominant intent to discriminate against Democratic voters and no legitimate—let alone compelling—state interest justifies this discrimination. A227. Judge Osteen agreed that the nine of those 12 districts that were *cracked* violate the Equal Protection Clause. A365 n.4. The majority also held that the Plan violates the First Amendment because, *inter alia*, it constitutes viewpoint and speaker-based discrimination, and because there is no legitimate justification for these burdens. A283. Finally, the Court held unanimously that the Plan violates Art. I, §§ 2 and 4, because it was nakedly intended to "dictate [federal] electoral outcomes." A303.

Because it was impracticable to redistrict in time for the November 2018 elections, the District Court stayed its judgment on the condition, accepted by Appellants, that this appeal be pursued expeditiously.

ARGUMENT

I. *COMMON CAUSE* APPELLEES HAVE STANDING

The District Court correctly held that *Common Cause* Appellees suffered Art. III injury-in-fact. First, the voter-plaintiffs (and the North Carolina Democratic Party on behalf of its members) pleaded and proved that each of the Plan's districts was packed or cracked, establishing vote-dilution standing under *Gill*. A3. Second, both the voter and organizational plaintiffs pleaded and proved burdens on their rights of speech and association. A74. Third, these same injuries-in-fact also afforded Appellees standing to challenge the 2016 Plan as *ultra vires* under Art. I. A309.

Appellants, however, insist that *no* plaintiff proved injury-in-fact under *any* theory. Their arguments mischaracterize Appellees' claims and fly in the face of precedent.

A. The *Common Cause* Appellees Proved Dilutionary Injury-in-Fact

Gill addressed Equal Protection claims brought by voter-plaintiffs asserting vote-dilution harm. That harm, the Court recognized, "arises through a voter's placement in a 'cracked' or 'packed' district." 138 S. Ct. at 1931. Although several plaintiffs had *alleged* that their districts' lines were the result of packing or cracking, they had not "followed up with ... proof." *Id.* at 1923, 1931-32. The Court remanded, affording them "an opportunity to prove" that they "live in districts where Democrats ... ha[d] been packed or cracked," and thereby establish standing. *Id.* at 1934.

Here, by contrast, *Common Cause* Appellees "alleged, argued, and prove[d] district-specific [vote-dilution] injuries *throughout* the course of this litigation." A41. The District Court methodically catalogued the undisputed packing and cracking evidence for each district and the Plan as a whole. A223-274. For example, Dr. Hofeller, the map-drawer, conceded that his aim was to "pack" Democrats into three specific districts (CD 1, 4, and 12) and "crack" them across the remaining ten; *Common Cause* voter-plaintiffs (and members of the North Carolina Democratic Party) live in each of these districts. A12. Appellants and their expert conceded that the Plan intentionally split specific Democratic clusters where these voter-plaintiffs live. A216. And Drs. Mattingly and Chen's expert analyses confirmed that the Plan's individual districts were packed or cracked, and that the votes of their Democratic residents "would have carried greater weight" in virtually any "other 'hypothetical district.'" A51 (quoting *Gill*, 138 S. Ct. at 1931). This is exactly what *Gill* requires.

Ignoring the pleadings, the evidence, and the District Court's findings, Appellants insist that this case "has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress." JS18. Not so. "[E]ach individual *Common Cause* plaintiff alleged in their complaint"—and subsequently proved—"that his or her vote [was] 'diluted or nullified as a result of his [or her] placement in his or her particular district.'" A41 (cleaned up). That is not a "generalized" grievance about the composition of North Carolina's congressional delegation, but rather one about the intention-

al debasement of each plaintiff's personal vote through the drawing of his or her own district's lines. Supposedly to support their argument, Appellants cite testimony from three voter-plaintiffs in the *League of Women Voters* case (not the *Common Cause* case) who testified that their only grievance with the 2016 Plan was its statewide imbalance. JS18-19 (citing A66-67). But, based on that testimony, the District Court *rejected* the standing of those three plaintiffs to bring vote-dilution claims. Their failure of proof does not taint the separate claims of the *Common Cause* voter-plaintiffs, who live in each of the Plan's districts and who *did* assert and prove district-specific dilutionary injury via packing and cracking. A42. Nor does their testimony undermine the separate claim of the North Carolina Democratic Party, which asserted and proved district-specific dilutionary injury on behalf of its members throughout the State. A63-65.

Appellants also argue that, in some districts, the Plan's manipulation may not have changed the bottom-line electoral outcome. JS20-21. But *Gill* did not hold that the injury in a vote-dilution claim is the deprival of one's preferred election result. The injury, rather, is that the "composition of [a] voter's own district ... causes his vote—having been packed or cracked—to *carry less weight*...." 138 S. Ct. at 1930-31 (emphasis added). A voter whose preferred candidate won, or would have lost regardless, is perfectly capable of suffering this form of vote devaluation.[1]

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[1] Appellants' comparison of *Common Cause* plaintiff Larry Hall with William Whitford, "the lead plaintiff in *Gill*," JS20, is thus inapt. The reason Whitford lacked vote-dilution standing was *not* because his representative would have been a Democrat

See Gill, 138 S. Ct. at 1936 (Kagan, J., concurring); *cf. N.E. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury-in-fact' in an equal protection case ... is the denial of equal treatment ..., not the ultimate inability to obtain the [desired] benefit."). For this same reason, even if the November 2018 election is a "wave" election and one or more of North Carolina's seats flip to Democratic control, the vote-dilution injury to Democratic voters in those districts would be unchanged.

Since Appellants cannot deny that *Common Cause* Appellees satisfied *Gill*, they attack *Gill* itself, arguing that the injury the Court unanimously recognized in that case is no injury at all. JS22. They maintain that whenever a voter complains that his or her personal vote has been diluted through packing or cracking, that voter is *really* just complaining of an "inability to add another Democrat [or Republican] to the overall composition of the legislature"—and thus, expressing a "repackaged version of a non-cognizable desire to influenc[e] the legislature's overall ... policymaking." JS20, 22 (cleaned up). This is verbal sleight-of-hand. That vote-dilution plaintiffs may *also* desire a legislature that reflects their policy preferences does not mean that they are not aggrieved by the "individual and personal" dilution of their votes. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *cf. Baker*,

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"under any plausible circumstances," *ibid.*, but because his district was neither packed nor cracked: "the Democratic share of the ... vote" in his district was *exactly the same* under both the challenged plan and "the plaintiffs' ideal map." 138 S. Ct. at 1924-25. Here, by contrast, 1,997 of Dr. Chen's 2,000 alternative maps "would have placed [Larry] Hall into a less Democratic-leaning district." A22.

369 U.S. at 226-27 (that plaintiffs "might conceivably have added a claim under the Guarantee Clause" that courts could not hear "does not [mean] that [they] may not be heard" on the vote-dilution claims "which in fact they tender").

Crediting Appellants' argument would not only eviscerate *Gill*; it would also undo much of this Court's other voting-rights jurisprudence. By Appellants' reasoning, an urban plaintiff who brings a one-person-one-vote claim is not *actually* complaining about the dilution of her vote; she is really just dissatisfied with urban voters' "inability to add" more representatives who support their interests "to the overall composition of the legislature." By similar thinking, a racial-gerrymandering plaintiff who alleges that his district resulted from cracking of minority voters is not actually complaining about being sorted by his race; he is *really* just aggrieved with minority voters' "inability to add" more minority-preferred representatives "to the overall composition of the legislature." Of course, the plaintiffs in such cases may hope that their success will ultimately impact the legislature's "overall composition." But that has never been grounds for ignoring the personalized harm of which they complain.

B. *Common Cause* Appellees Also Proved Non-Dilutionary Injury-in-Fact

"[P]artisan gerrymanders inflict other kinds of constitutional harm" beyond vote dilution. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). The District Court found such non-dilutionary injury here based on undisputed evidence, and it correctly held

that these injuries support standing. Specifically, it found—and Appellants do not dispute—that the 2016 Plan burdened Appellees' rights of political speech and association, exactly as Appellants intended.

The voter-plaintiffs gave unopposed testimony that the Plan "decreased [their] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A50. These are classic injuries-in-fact. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (election law inflicted cognizable "burden" on association by making "[v]olunteers ... more difficult to recruit," "contributions ... more difficult to secure," and "voters ... less interested in the campaign"). And "what [was] true for" the voter-plaintiffs was "triply true" for the North Carolina Democratic Party. A71 (quoting *Gill*, 138 S. Ct. at 1938) (Kagan, J., concurring). The Party's entire *raison d'être* is to engage in political activity and association, and it was undisputed that the Plan "weaken[ed]" its capacity "to perform all its functions." *Ibid.* It is hard to imagine a more concrete and personal injury-in-fact to a political party. *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615-16 (1996) (striking down law that hampered party's ability to "convince others to join").

Rather than dispute the District Court's factual findings that Appellees suffered these burdens, Appellants argue that they do not constitute injuries-in-fact because Appellees remain "free ... to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise [engage in political] expression." JS23. On countless

occasions, however, this Court has found that voters, candidates, and parties have standing to challenge laws that stop short of altogether denying them the franchise; completely barring their candidacy; or flatly forbidding them to speak. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (public "matching funds" law injured opponents of candidates receiving such funds, even though they remained free to speak as they wished); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 580-81 (2000) ("blanket primary" law injured political parties even though they remained "free to endorse and financially support the candidate of their choice"); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (2-year waiting period to vote in party primary injured voters, even though it "d[id] not ... deprive [them] of all opportunities to associate with the political party of their choice"); *Terry v. Adams*, 345 U.S. 461, 483-84 (1953) (plurality) (white pre-primary system injured black voters even though the franchise was "nominally open to [them]").

Appellants also dispute that these non-dilutionary injuries afford standing to challenge the 2016 Plan as a unitary enactment. But that is as it should be. Vote-dilution claims are district-specific because citizens vote only in one district—their own. *Gill*, 138 S. Ct. at 1930. By contrast, "the associational injury flowing from a statewide partisan gerrymander ... has nothing to do with the packing or cracking of any single district's lines." *Id.* at 1938-39 (Kagan, J., concurring). Democrats from Asheville fundraise for candidates in Fayetteville; Democrats from Raleigh conduct voter outreach in Charlotte; and the Party itself does these things statewide. The 2016 Plan, the

District Court found, burdened all of these activities. Where, as here, "the harm alleged is not district specific, the proof needed for standing should not be district specific either." *Ibid.*

II. *COMMON CAUSE* APPELLEES' CLAIMS ARE JUSTICIABLE

Appellants next argue that cases involving partisan gerrymanders present nonjusticiable "political questions." This argument fails, both in general and especially in this case.

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). The political question doctrine is "a narrow exception to that rule." *Ibid.* Despite the name, it is not implicated "merely because [a suit] ha[s] political implications." *Id.* at 196. Rather, a case must threaten "the separation of powers" between "the judiciary and the coordinate branches of the Federal Government." *Baker*, 369 U.S. at 210, 217. Cases implicating "the federal judiciary's relationship *to the States*," as this one does, cannot "give[] rise to [a] 'political question'" in the necessary sense. *Ibid.* (emphasis added); *see Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (partisan-gerrymandering claims "do[] not involve [this Court] in a matter more properly decided by a coequal branch of our Government").

Nor does this case exhibit any of *Baker*'s other hallmarks of "political questions." 369 U.S. at 217. Appellants briefly argue that, under the first *Baker* factor, the Elections Clause is a "textually demonstrable ... commitment" of plenary authority to State

legislatures (or, alternatively, the United States Congress). JS27-28. But the Court rejected this argument over half a century ago, holding that "nothing in the language of" the Elections Clause "immunize[s] state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964); *see also Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) (invalidating state election regulation under Elections Clause); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) (same). It is inconceivable that the Framers—who intended the Constitution to prevent "interested and overbearing majorit[ies]" from trampling "the rights of the minor party," The Federalist No. 10 (Madison)—meant the Elections Clause to be an affirmative grant of permission to engage in extreme partisan self-entrenchment.

Appellants chiefly argue the second *Baker* factor: "lack of judicially discoverable and manageable standards for resol[ution]." 369 U.S. at 217. But, as *Baker* recognized, "[j]udicial standards under the Equal Protection Clause are well developed and familiar," *id.* at 226, and so are standards under the First Amendment and Elections Clause. Merely shifting the *basis* of the alleged discrimination in districting from geography or race—claims long recognized as justiciable—to political creed or expression does not change the fact that "judicial standards" exist to detect and remedy invidious discrimination in districting. *See Davis*, 478 U.S. at 125.

Appellants nevertheless maintain that there are no "judicial standards" because there is supposedly no

single test that will delineate "how much partisanship is too much" in drawing district lines. JS15. This argument fails for several reasons. First, even if other cases might present adjudicative difficulties, cases of this type—involving facially discriminatory state action—could hardly be simpler to adjudicate. Second, Appellants' line-drawing conundrum stems from asking the wrong question. The right question is not one of *quantity* ("how much partisanship is too much?"), but one of *kind* ("was the purpose of the map-drawers' reliance on partisan data an invidious one?"). Finally, that the District Court's tests permit consideration of social-science evidence is no flaw, and does not sound in justiciability in any event.

A. Appellants' Constitutional Violation Is Manifest Under *Any* Standard

Appellants would have the Court pronounce *all* challenges to partisan gerrymanders nonjusticiable. But the political question doctrine calls for "case-by-case inquiry," not "blanket rule[s]" or "semantic cataloguing." *Baker*, 369 U.S. at 210-11, 215-16. Courts must make a "discriminating inquiry into the precise facts and posture of *the particular case*" and determine the issue's "susceptibility to judicial handling ... in *th[at] specific case*." *Id.* at 211-12, 217 (emphasis added). The question, then, is not whether "partisan gerrymandering" cases as a category are judicially determinable, but whether the claims in *this* case are. The answer to that question is yes: as several Justices have suggested, and as Appellants' counsel has conceded, districting plans designed under a *facially* discriminatory mandate are unconstitutional.

In *Vieth*, Justice Kennedy observed that if "a State passed an enactment that declared" expressly that districts "shall be drawn ... to burden" one party, "we would surely conclude that the Constitution had been violated." 541 U.S. at 311-12. At oral argument in last Term's partisan-gerrymandering cases, Justice Kennedy asked again whether a law expressly requiring partisan favoritism in districting would violate the Constitution. *See* Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 26; Oral Argument Tr., *Benisek v. Lamone*, No. 17-333 (Mar. 28, 2018) at 45. In both cases, counsel for the defendant agreed that it would. So did counsel for the legislative *amici* in *Gill*, who also represents Appellants here:

> JUSTICE KENNEDY: ... If the state has a law ... saying all legitimate factors must be used in a way to favor party X or party Y, is that ... an equal protection violation or First Amendment violation? ...
>
> MS. MURPHY: Yes. It would be ... unconstitutional, if it was on the face of it.

Gill Tr. 26-27.

In *Benisek*, Justice Kagan asked a similar question and received the same answer from the defendants' counsel:

> JUSTICE KAGAN: ... Suppose the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district?

> MR. SULLIVAN: ... It would be [viewpoint discrimination] on its face.

Benisek Tr. 47.

As Justice Alito observed, if nothing else, a "manageable standard" exists to adjudicate cases of *this* type:

> JUSTICE ALITO: ... It's not a manageable standard that you cannot have a law that [expressly] says draw maps to favor one party or the other[?] *That seems like a perfectly manageable standard.*

Gill Tr. 20:8-15 (emphasis added).

This is the case that Justice Kennedy described in *Vieth* and Justices Kennedy, Kagan, and Alito postulated last Term. North Carolina formally adopted binding written criteria *expressly* requiring a "Partisan Advantage" for Republicans, and even a quota of "10 Republicans" and "3 Democrats." For good measure, Appellants Lewis and Rucho, who led the Redistricting Committee, proclaimed that the Plan's "intent" was to implement their belief that "electing Republicans is better than electing Democrats." As Justice Alito observed, it is "perfectly manageable" to conclude that *these* facts make out a constitutional violation. That cases with different facts might present different concerns is no reason to "stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 216.

B. Appellants Conflate Mere Politics With Invidious Discrimination

Appellants' line-drawing argument rests on the premise that some amount of "politics" is permitted in districting. That premise, however, conflates two separate concepts: mere use of "political classifications" and use of such classifications "in an invidious manner." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *see* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2024-27 & n.147 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 367-68 (2017). It may be impossible for legislators to make districting decisions without considering the political consequences of their actions. But that does not entitle legislators to make such decisions *for the purpose of* harming a disfavored political group. This Court has never held that "a naked purpose to disadvantage a political minority provides a rational basis for drawing a district line." *Vieth*, 541 U.S. at 337 (Stevens, J., dissenting); *cf. USDA v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group ... cannot, in and of itself and without reference to some independent considerations in the public interest, justify [state action]" (cleaned up)).[2]

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[2] Appellants cite *Hunt v. Cromartie*, 526 U.S. 541 (1999), a racial-gerrymandering case, for the proposition that "a jurisdiction may engage in constitutional political gerrymandering." JS29, 32. However, they elide the second half of this sentence, which shows that what the *Hunt* Court meant is that "political gerrymandering," even when race-conscious, does not give rise to a *race-discrimination* claim. 526 U.S. at 551.

Reflecting this distinction, the Court has stated that certain "political considerations" may factor into districting. *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). For instance, states may consider party identification to promote proportional representation, *ibid.*, or to avoid pairing incumbents, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). But these same cases warn that map-drawers may not "invidiously minimiz[e]" the "voting strength" of a "political group." *Gaffney*, 412 U.S. at 754; *see also ibid.* ("courts have [no] constitutional warrant to invalidate a state plan ... because it undertakes, *not to minimize or eliminate the political strength of any group or party*, but to recognize it" (emphasis added)).[3]

This distinction resolves Appellants' professed justiciability concerns. Far from making redistricting a politics-free zone, the Constitution prohibits only "action *specifically intended* to punish or subordinate opposing partisans." Levitt, *supra*, at 2025 (emphasis added). And a requirement that a plaintiff plausibly plead and then prove such invidious intent—not mere political calculation or partisan disparities—will set a meaningful limit on judicial involvement.

Should the Court wish to cabin challenges even further, the District Court offered a solution: a *predominant*-intent requirement. Appellants call this predominance standard "vague and indeterminate." JS30. But this Court "has treated predominance as a

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[3] Analogously, race may be considered in districting for certain purposes, such as compliance with the Voting Rights Act, *Harris*, 137 S. Ct. at 1464, but a districting body may never act "invidiously to minimize or cancel out the voting potential of racial ... minorities," *Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

judicially manageable standard" for "determining how much consideration of *race* is 'too much' in [districting]." A119 (emphasis added) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Especially since "*Gill* expressly analogized partisan gerrymandering claims to racial gerrymandering claims," A120, the same predominance standard would fit comfortably here. Indeed, "courts routinely engage" in predominant-purpose inquiries "in many areas of constitutional jurisprudence." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000) (constitutionality of police checkpoint program turns on "primary purpose"); *see also McCreary Cnty. v. ACLU*, 545 U.S. 844, 860-62 (2005) (whether action impermissibly advances religion turns on "predominant purpose"). True, there may be cases—unlike this one—where discerning the legislature's predominant intent presents a close factual question. But fact-finders are routinely called upon to decide close questions of intent, legislative and otherwise. That does not render such cases *nonjusticiable*.

C. Appellants' Objection To "Social Science" Evidence Is Meritless

Lastly, Appellants impugn the District Court for "conclud[ing] that plaintiffs may rely on all manner of social science metrics ... to prove their case under a 'totality of the evidence'" approach. JS11, 31. In Appellants' view, this is "the antithesis" of a "judicially manageable standard." JS31. This argument, however, confuses legal standards *themselves* with the *evidence* offered to prove their violation.

As detailed below, the legal standards that govern Appellees' claims are the same familiar ones that

govern in this Court's other First Amendment, Equal Protection, and Art. I cases: for example, a State may not regulate political activity in a manner that discriminates based on viewpoint. *These* are the "standards" with which the political-question inquiry is concerned. Thus, in *Baker*, long before the Court had fleshed out the precise quantitative thresholds and evidentiary burdens in one-person-one-vote cases, it held that such cases are justiciable, because "[j]udicial standards under the Equal Protection Clause are well developed and familiar"—namely, its prohibition of arbitrary and invidious discrimination. 369 U.S. at 226.

Below, the District Court used statistical *evidence* (along with other evidence) to assess whether these generally applicable standards were violated. There is nothing unusual about this.[4] Courts routinely consult statistical or social-science evidence for this purpose. A121-124 (citing cases). For example, in *Castaneda v. Partida*, 430 U.S. 482 (1977), this Court held that Texas's system for selecting grand juries violated the Equal Protection Clause's prohibition of "purposeful discrimination" based on race. *Id.* at 501. In assessing whether that standard had been violated, the Court consulted a statistical technique called the "binomial distribution" model, which suggested that the "discrepancy between the expected and observed" numbers of Mexican-American jurors "did not

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[4] Nor is there anything unusual about courts considering multiple kinds of evidence, under a "totality of the evidence" approach, to determine whether a legal standard has been violated. In fact, this Court has held *in the gerrymandering context* that courts must do just that. *Harris*, 137 S. Ct. at 1481.

occur by chance." *Id.* at 495-96 & n.17, 501. But *Castaneda* did not adopt that statistical model as a "standard." Rather, like the District Court here, it relied on it as *evidence* to conclude that a familiar legal principle had been violated. It would be error to "treat a mere form of evidence as the very substance of a constitutional claim." *Harris*, 137 S. Ct. at 1481.

The statistical analyses that *Common Cause* Appellees presented below—Drs. Chen and Mattingly's large-scale simulations based on alternative maps—were appropriately tailored to the legal standards at hand. Appellants' dismissive discussion of "social science metrics" focuses on the type of statewide statistics—the "efficiency gap" and other indicia of "partisan asymmetry"—relied upon by the plaintiffs in *Gill*. 138 S. Ct. at 1932-33. Chen and Mattingly's analyses are completely different. They proved packing and cracking on a district-by-district basis by comparing the actual districts of the 2016 Plan to the gamut of "hypothetical district[s]" that could have been drawn instead—exactly as Gill suggested. *Id.* at 1931; *see also id.* at 1936 (Kagan, J., concurring) (discussing suitability of "alternative maps" for proving dilution and citing Dr. Chen's *amicus* brief in *Gill*); *cf. Harris*, 137 S. Ct. at 1477-79 (calling alternative maps "key evidence" in racial-gerrymandering cases).

In any event, there is no need in this case to settle definitively the role of social-science evidence in partisan-gerrymandering litigation. Here, that evidence was merely corroborative of what Appellants, their witnesses, and their counsel readily admitted.

III. THE 2016 PLAN AND ITS INDIVIDUAL DISTRICTS ARE UNCONSTITUTIONAL

The District Court correctly held that the 2016 Plan violates the First Amendment, the Equal Protection Clause, and Art. I. Appellants do not challenge the findings of fact underlying these holdings, let alone assert clear error. And, while they lodge various complaints about the District Court's legal analysis, they do not seriously contend that the Plan actually *complies with* these constitutional standards—nor could they.

A. The District Court's First Amendment Holding Is Correct

The First Amendment "safeguards [the] right[s] to ... political expression and political association," *McCutcheon*, 572 U.S. at 203, and it protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). It is thus "a vital guarantee of democratic self-government." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). As five Justices have recognized, partisan gerrymandering strikes at the core of these rights. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). And Appellants' counsel has conceded that facts like those presented here would prove a First Amendment violation. *Ante* at 26.

As the District Court observed, the 2016 Plan runs afoul of four well-established lines of First Amendment precedent. A275-279. First, the Plan burdens protected activity based on the "motivating

ideology ... of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, the written criteria that Appellants adopted "favor one set of political beliefs over another" on their face. A275. Second, the Plan regulates protected activity "based on the identity of the speaker." *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Third, by "penalizing" individuals "because of ... their association with a political party[] or their expression of political views," the Plan constitutes unlawful First Amendment retaliation. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). And fourth, the Plan does not constitute a "reasonable, non-discriminatory" election regulation. *Burdick v. Takushi*, 504 U.S. 428 (1992). Appellants make no attempt to reconcile the Plan with these well-settled principles.

The District Court also correctly found that these violations caused the North Carolina Democratic Party and the voter-plaintiffs to suffer well-recognized First Amendment harms, including "decreas[ed] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70. Again, these factual findings were not disputed.

Lastly, the District Court correctly held that this burdening of First Amendment rights was not narrowly tailored to a compelling state interest. A111. Indeed, Appellants "never argued [below] ... that the 2016 Plan's express partisan discrimination advance[d] *any* democratic, constitutional, or public interest." A110. Appellants now implausibly assert that the Plan advances the purported state interest of "avoid[ing] the concentration of majority-party voters

in a small number of districts." JS31. But this *post hoc* "interest," never articulated during the creation of the Plan or at trial, is tantamount to calling it a positive good to crack Democratic constituencies in order to increase Republican power. That is not a legitimate state interest; it is a private, partisan one.[5]

Appellants' criticisms of the District Court's First Amendment analysis miss the mark. First, the District Court did not "divine" these principles, JS11; they have been established law for generations. Second, the District Court's analysis would not banish all political considerations from the redistricting process. *Ante* at 28-29; *see Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring) (refuting this argument). Third, the District Court did not err by refusing to require a heightened "effects" showing. JS32. "This Court's decisions have prohibited" state action that unjustifiably burdens First Amendment rights, "however slight[ly]." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976). Lastly, Appellants are incorrect that the District Court's First Amendment analysis "would invalidate nearly every legislatively drawn districting plan in the country." JS34. By and large, only plans drawn by States under one-party control would even be at risk of a challenge, and only those with the demonstrable intent (or predominant intent) and effect of

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[5] Appellants assert that "there are First Amendment values on both sides of the political ledger"—as if the abridgement of Democrats' First Amendment rights could be justified by the purported interest of enhancing those of Republicans. JS33. *But see McCutcheon*, 572 U.S. at 191 (government may not "restrict the political participation of some ... to enhance the relative influence of others").

discriminating on the basis of political beliefs, activity, or association would be "invalidate[d]."

B. The District Court's Equal Protection Holding Is Correct

The Equal Protection Clause requires "that all persons similarly situated ... be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It has long prohibited state action that intentionally disfavors a class of citizens absent sufficient justification. Where a constitutional right is burdened, that means narrow tailoring to a compelling state interest. *Id.* at 440. The District Court faithfully applied this precedent via its "three-step framework," which required "discriminatory intent," "discriminatory effects," and lack of justification in terms of a "legitimate redistricting objective." A138-139.

The District Court correctly found that the cracking and packing of 12 of the 13 districts in the 2016 Plan was motivated—not just in part, but *predominantly*—by the invidious intent to burden Democrats' political rights. A35. This was not meaningfully disputed below, and Appellants themselves, their mapdrawer, their experts, and their counsel have all admitted as much. Moreover, Drs. Mattingly and Chen's simulations controlled for both "clustering" of Democrats and incumbent protection and showed that neither could explain the extreme partisan deviation of these districts. A211-212.

The District Court also correctly found that the 2016 Plan had a "discriminatory effect." It believed that this required a showing of long-term harm—*i.e.*, "that the dilution of the votes of supporters of [the]

disfavored party ... is likely to persist in subsequent elections." A152. And it found that requirement met based on the actual election results under the 2016 Plan and its predecessor plan, as well as the statistical and simulation analyses of multiple highly qualified experts. A168-170. Appellants do not challenge these factual findings.

If anything, this "effect" analysis was too demanding. Setting aside *Davis v. Bandemer*—whose Equal Protection test (as opposed to its justiciability holding) has effectively been abandoned by this Court—the only "effect" inquiry in this Court's Equal Protection cases has been whether the challenged intentional discrimination caused the plaintiff to suffer an Art. III injury-in-fact. Faithful application of an invidious-intent requirement—especially with a predominance gloss—will appropriately limit judicial intervention. There is no need to engraft a "durability" requirement foreign to Equal Protection doctrine. *Cf. Bethune-Hill v. Virginia Bd. of Elecs.*, 137 S. Ct. 788, 798-99 (2017) ("[T]he [Equal Protection] violation in racial gerrymandering cases stems from the racial purpose of state action, not its stark manifestation.").

Finally, the District Court correctly held that Appellants' intentional discrimination was not tailored to any rational—let alone compelling—state interest. A222. Appellants did not contend otherwise below, and the *post hoc* "interests" they muster on appeal are unsupported and unpersuasive. *Ante* at 34-35.

C. The District Court's Art. I Holding Is Correct

The States have no "reserved" power over *federal* elections—districting included. They have only those powers that the Constitution expressly grants them. *Gralike*, 531 U.S. at 522-23; *see also Thornton*, 514 U.S. at 805. Art. I, § 4 (the Elections Clause) grants State legislatures the limited power to set the "Times, Places and Manner" of federal elections. By contrast, Art. I, § 2 grants "the People"—*not* State legislatures—the power to "cho[ose]" their representatives. Together, these clauses provide a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," thereby "ensur[ing] to the *people* their rights of election." *Ariz. State Legis.*, 135 S. Ct. at 2672 (citation omitted).

It is well-settled that, when the States legislate with respect to federal elections, they may act only "within the exclusive delegation of power under the Elections Clause." *Gralike*, 531 U.S. at 522-23. Whatever the bounds of that delegation may be, three limits are clear: it is "not ... a source of power" (1) "to dictate electoral outcomes," (2) "to favor or disfavor a class of candidates," or (3) "to evade important constitutional restraints." *Ibid.*; *Thornton*, 514 U.S. at 833-34. This flows directly from Art. I, § 2, which assigns the task of "cho[osing]" representatives to "the People" alone. As the District Court unanimously found, the 2016 Plan is *ultra vires* under each of these tests.

Appellants object that the District Court's Elections Clause analysis is "[e]ntirely [n]ovel." JS34. In fact, it follows *a fortiori* from *Gralike*. In that case, Missouri adopted a law requiring candidates' posi-

tions on term limits to be included on the ballot. The Court held that this exceeded Missouri's "delegated power" under the Elections Clause because it was "designed to favor candidates" with one position and "disfavor those" with an opposing view—and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. But Missouri's attempt to bias voters' choices by providing them with selected information was subtle compared to North Carolina's approach. The 2016 Plan *literally* sought to "dictate" the outcome of North Carolina's congressional elections by fixing the composition of the State's delegation ("10 Republicans" and "3 Democrats"), and the party of each district's winning candidate, before a single vote was cast.

Rather than explain how this can be squared with *Gralike*, Appellants raise their perennial objection that applying settled Elections Clause precedent to districting legislation would banish politics from the process. JS35. The answer remains the same: it is not awareness of political outcomes, or even the desire to achieve them, that results in a violation. It is demonstrable invidious intent. And if the Court believes a safe harbor for "some" discrimination is appropriate, the predominance standard is available.

D. Appellants Offer No Colorable Defense Of The 2016 Plan On The Merits

The closest Appellants come to an actual substantive defense of the 2016 Plan is a single paragraph at the very end of their Jurisdictional Statement. There, they assert that the Plan must be constitutional—despite its rampant packing and cracking, its concededly invidious motivation, and its express viewpoint

discrimination—because it splits fewer counties and precincts than some previous maps did. JS36-37.

But, as this Court observed just last year, the Constitution "does not prohibit misshapen districts. It prohibits unjustified ... classifications." *Bethune-Hill*, 137 S. Ct. at 798-99. The infirmity "stems from the [improper] purpose," not the ultimate "manifestation" of that purpose in the form of divided counties or irregular borders. *Ibid.* Thus, a map drawn with predominantly invidious intent—as this one concededly was—violates the Constitution, even if it superficially complies with "traditional redistricting principles." *Ibid.*; *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("With [modern] tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements.").

* * *

"The first instinct of power is the retention of power." *McConnell v. FEC*, 540 U.S. 93, 263-65 (2003) (Scalia, J., dissenting), *overruled in part by Citizens United*, 558 U.S. 310. Because "the State is itself controlled by the political party ... in power," the courts play an "important role" in ensuring "that those in power [are not] using electoral rules" as a "pretext" for suppressing "electoral competition." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). Here, there was no "pretext" at all: Appellants openly and unabashedly used State power to engage in facially invidious discrimination, for the admitted purpose of destroying meaningful electoral competition. Appellees have standing; such a case is justiciable; and Appellants have no colorable defense on the merits. This Court should therefore affirm.

CONCLUSION

The Court should summarily affirm or note probable jurisdiction.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,
Appellants,
v.
COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

MOTION TO AFFIRM OF LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the district court correctly found that plaintiffs have standing to challenge particular North Carolina congressional districts on partisan vote dilution grounds because those districts unnecessarily crack or pack plaintiffs?

2. Whether the test for partisan vote dilution claims set forth by the district court—requiring proof of (1) the intent to subordinate adherents of one party and entrench a rival party in power; (2) the effect of such subordination and entrenchment; and (3) the lack of a legitimate justification for such subordination and entrenchment—is judicially discernible and manageable?

3. Whether the district court's unanimous decision that particular North Carolina congressional districts are unconstitutional under this test is correct?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the League of Women Voters of North Carolina states that it is a non-profit corporation that has no parent corporation and issues no stock.

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INTRODUCTION

In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), this Court supplied a roadmap for plaintiffs bringing claims of partisan vote dilution. Because "the dilution of their votes . . . is district specific," these plaintiffs may challenge only their own districts, not a district plan in its entirety. *Id.* at 1930. To establish their standing to sue, the plaintiffs must also show that they were unnecessarily packed or cracked: that "the particular composition of the voter's own district . . . causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931. And if the plaintiffs prove both standing and liability, their remedy is restricted to "revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be." *Id.*

In its thorough decision, the district court scrupulously followed this roadmap. For each North Carolina congressional district in which it found standing to allege partisan vote dilution, the court held that the district had packed or cracked Democratic voters. The court further held that a plaintiff living in each district could have been unpacked or uncracked by an alternative map. App.51-65. Consider District 1 in northeastern North Carolina, into which most of the region's Democratic voters are crammed. It is a textbook example of a packed Democratic district. App.227-31. It is also a needlessly packed district, because in a map generated without consideration of partisanship, the League of Women Voters of North Carolina

("League")[1] plaintiffs in District 1 are placed in a district nearly ten points less heavily Democratic. Dkt.129-2:6. Or take District 2 in central North Carolina, which severs three counties in its quest to avoid Democratic voters and muster a Republican majority. App.231-36. This is quintessential cracking—and unnecessary cracking since in the alternative map, the League member in District 2 ends up in a Democratic district. Dkt.129-2:6.

After carefully heeding the guidance this Court provided in *Whitford*, the district court adopted a test for partisan vote dilution claims that dovetails with this Court's standing analysis. This test "proceed[s] on a district-by-district basis." App.139. It requires, first, that a district be drawn with the *intent* of packing or cracking the opposing party's voters. App.139-46. Second, the district must have the *effect* of packing or cracking these voters, in a durable manner that renders the legislator nonresponsive to her constituents. App.146-52. And third, there must exist no legitimate *justification*, like political geography or compliance with traditional districting criteria, for the packing or cracking. App.152-54.

Moreover, even if these showings are made, the district is not necessarily unlawful. Rather, it only fails the district court's test if the map as a whole *also* purposefully and unjustifiably "subordinate[s]

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[1] The League is an organizational plaintiff in this litigation and has members who support Democratic candidates and policies in every district in North Carolina. Ex.4080. Counsel representing the League also represent twelve individual plaintiffs: William Collins, Elliott Feldman, Carol Faulkner Fox, Annette Love, Maria Palmer, Gunther Peck, Ersla Phelps, John Quinn, III, Aaron Sarver, Janie Smith Sumpter, Elizabeth Torres Evans, and Willis Williams.

adherents of one political party and entrench[es] a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). In other words, the intent, effect, and justification prongs must be satisfied statewide as well as for each individual district. App.155-222. This statewide inquiry prevents liability from arising when a plaintiff can point to packing or cracking but a plan is balanced in its treatment of the two major parties. The inquiry thus plays the same role as the existing degree of minority representation, across a jurisdiction, in a racial vote dilution case. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (*LULAC*). It ensures that a district is struck down only if the map to which it belongs is dilutive too.

Notably, Appellants do not argue that the district court misapplied its test with respect to *any* of the districts it invalidated on partisan vote dilution grounds. And for good reason. The evidence of dilution in this case is overwhelming and irrefutable. To cite a few of the highlights: The committee that approved North Carolina's current congressional plan (the "2016 Plan") ratified a "Partisan Advantage" criterion. It explicitly required "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App.20. The committee's co-chair added that Republicans would have a ten-three edge only because it was not "possible to draw a map with 11 Republicans and 2 Democrats." Ex.1005:50. These facts—amounting to an official state policy to maximize a party's representation—support the facial invalidation of the 2016 Plan, no matter how the broader issue of the justiciability of partisan gerrymandering is resolved.

In the 2016 election, furthermore, Republican candidates won ten out of thirteen seats even though the statewide vote was nearly tied. These results yielded the worst partisan asymmetry, in that year, of any congressional plan in the *country*. App.195. And when Appellees' expert randomly generated thousands of maps using the same (nonpartisan) criteria as the 2016 Plan's drafters, *not one* was as skewed as the Plan. In fact, the typical map slightly favored Democrats, indicating that North Carolina's spatial patterns and districting principles cannot explain the Plan's extreme pro-Republican tilt. App.168-71.

While not contesting any of this evidence, Appellants do contend that Appellees have not proven their standing to allege partisan vote dilution. In making this claim, Appellants ignore both this case's post-*Whitford* remand and *Whitford* itself. They fail to address the district court's meticulous explanations of how particular districts unnecessarily pack or crack Democratic voters. App.51-65, 223-74. They quote pre-*Whitford* statements from plaintiffs who *lack* standing, according to the district court, precisely because their grievances are not district-specific. J.S.18-19. And they ultimately assert that standing does not follow even when districts "may have shifted from Republican to Democrat under plaintiffs' alternative plans." J.S.21. This position, of course, directly contradicts this Court's unanimous holding in *Whitford*.

Appellants next pretend not just that *Whitford* never happened—but that the last fifty years of redistricting decisions did not either. Echoing the dissenters in the one person, one vote cases of the

1960s, they maintain that partisan gerrymandering is nonjusticiable because it violates only the Guarantee Clause, can be curbed by Congress, and was accepted by the Framers. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting). But these arguments are no more persuasive today than they were half a century ago. That partisan gerrymandering may offend the Guarantee Clause does not prevent it from breaching other constitutional provisions too. The vanishingly unlikely prospect of congressional intervention does not release courts from their independent obligation to enforce the Constitution. And far from endorsing partisan gerrymandering, the Framers would have been appalled by this archetypal "mischief[] of faction." The Federalist No. 10.

Lastly, almost as an afterthought, Appellants turn their attention to the partisan vote dilution test adopted by the district court. Puzzlingly, they object that the test's intent requirement is too lax, even though it is satisfied only by deliberately "'subordinat[ing] adherents of one political party and entrench[ing] a rival party in power'"—a stringent formulation drawn from this Court's own case law. App.142 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). Still more puzzlingly, Appellants complain about the district court's assumption in the alternative that predominant partisan intent must be shown, even though this higher bar is exactly what they (profess to) want. If anything, Appellants' criticism of the test's effect prong is even stranger. They argue that partisan gerrymandering somehow makes legislators *more* responsive to their constituents. But saying day is night does not make it so. In fact, empirical evidence confirms what common

sense suggests: that gerrymandering sharply skews legislatures (and the laws they pass) in favor of the line-drawing party (and against the will of the electorate). *See, e.g.*, Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017).

The Court should therefore affirm the decision below. The Court could do so summarily since this case's exceptional facts violate any plausible gerrymandering standard. However, the League acknowledges that the importance of the issue may warrant full briefing and argument.

STATEMENT OF THE CASE

I. The 2016 Plan Was Enacted with Discriminatory Intent.

The 2016 Plan is the second congressional map that North Carolina has used in the current cycle. The 2012 and 2014 elections were held under the map that was passed in July 2011 (the "2011 Plan"). This Court held in *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017), that two of the 2011 Plan's districts were unconstitutional *racial* gerrymanders, drawn with race as their predominant motive. In defense of those districts, the 2011 Plan's drafter, Dr. Thomas Hofeller, stated repeatedly that the map as a whole was intended to benefit Republican (and handicap Democratic) candidates and voters.

In his deposition in this case, for example, Hofeller testified that the "'primar[y] goal' in drawing the [2011] districts was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" App.11. Similarly, in his expert report in *Harris*, Hofeller wrote that

"[p]olitics was the primary policy determinant in the drafting of the [2011] Plan." Ex.2035:8. He continued: "The General Assembly's overarching goal in 2011 was to create as many safe and competitive districts for Republican incumbents or potential candidates as possible." Ex.2035:23.

After the 2011 Plan was invalidated in part, the same actors took the lead in designing its replacement. Representative David Lewis and Senator Robert Rucho were again the co-chairs of the Joint Select Committee on Congressional Redistricting (the "Joint Committee"). Hofeller was once more the drafter of the map. Lewis and Rucho verbally instructed Hofeller to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," which "included 10 Republicans and 3 Democrats." App.15. They added that he should exclusively use "political data" in his work: "precinct-level election results from all statewide elections." *Id.*

Following his directions, Hofeller aggregated these election outcomes into a sophisticated multi-year average that, in his expert view, would accurately capture district partisanship "'in every subsequent election.'" App.16-17. Employing this metric, he systematically cracked and packed Democratic voters throughout North Carolina. Where possible, that is, he divided clusters of Democrats that could have anchored congressional districts and submerged the fragments within larger masses of Republicans. And where Democratic concentrations were too large to be split, he wedged them into a handful of districts. This intentional, methodical, and

unnecessary cracking and packing is described in more detail below. *See infra* Statement Part II.

After Hofeller finished drafting the 2016 Plan—alone and in secret—Lewis and Rucho convened a pair of Joint Committee meetings. App.19. At the first session, the Joint Committee approved, on party line votes, the criteria that Lewis and Rucho had previously conveyed orally to Hofeller. App.23. The "Partisan Advantage" criterion stated that "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." App.20. The "Political Data" criterion added that, other than population counts, "[t]he only data . . . to be used to construct congressional districts shall be election results in statewide contests." *Id.*

Also at the first session, Lewis declared about the 2016 Plan: "I acknowledge freely that this would be a political gerrymander." Ex.1005:48. He further "propose[d] that to the extent possible, the map drawers create a map which is . . . likely to elect 10 Republicans and 3 Democrats." *Id.* He remarked as well: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." Ex.1005:50. And he made clear that "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage." App.22.

At the second Joint Committee meeting (held the day after the first), Lewis and Rucho finally unveiled the 2016 Plan. App.24. Lewis reiterated that it "will produce an opportunity to elect ten Republican members of Congress." *Id.* The Joint Committee subsequently approved the Plan, again on a party line

basis. *Id.* Two days later, the North Carolina House of Representatives and Senate debated and passed the 2016 Plan, once more on party line votes. *Id.*

II. Particular Districts Intentionally and Unnecessarily Cracked or Packed Democratic Voters.

As noted above, the 2016 Plan cracked and packed Democratic voters on a massive scale; that was the only way to achieve a ten-three Republican advantage in an evenly divided state. The League now summarizes the evidence of this rampant cracking and packing, focusing on nine of North Carolina's thirteen congressional districts. The district court found that District 5 did not intentionally crack Democratic voters, App.242-43, and the League does not contest that finding. In the League's view, Districts 3, 10, and 11 also did not *unnecessarily* crack any plaintiffs. No plaintiffs living in these districts, that is, were uncracked by the alternative map on which the League relies.

This map, Plan 2-297, is one of the three thousand North Carolina congressional maps randomly generated by Appellees' expert, Professor Jowei Chen, without considering any partisan data. App.49. Plan 2-297 was selected from this group because it has the most compact districts, on average, of maps that meet the following criteria: (1) splitting fewer counties than the 2016 Plan; (2) pairing fewer incumbents than the 2016 Plan; (3) containing at least one district with a black voting age population above 40%; and (4) exhibiting perfect partisan symmetry. *Id.* Plan 2-297 thus matches or surpasses the 2016 Plan in terms of all its nonpartisan aims, while treating the two major parties perfectly symmetrically. *Id.*

• *District 1:* District 1 packs Democratic voters in northeastern North Carolina. It splits Pitt and Wilson Counties, in both cases capturing their Democratic precincts and excluding their Republican areas. Hofeller expected District 1 to have a Democratic vote share of 69%. App.227-31. In Plan 2-297, League plaintiffs living in District 1 are unpacked by being placed in a district with a Democratic vote share of 59%. Dkt.129-2:6.[2]

• *District 2:* District 2 cracks Democratic voters in central North Carolina. It splits Johnston, Wake, and Wilson Counties, avoiding Democratic precincts (particularly around Raleigh-Durham) in order to secure a Republican majority. Hofeller expected District 2 to have a Republican vote share of 56%. App.231-36. In Plan 2-297, a League member living in District 2 is uncracked by being placed in a district with a Democratic vote share of 63%. Dkt.129-2:6.[3]

• *District 4:* District 4 packs Democratic voters in Raleigh-Durham. It splits Durham and Wake Counties, in both cases capturing their Democratic precincts and excluding their Republican areas. Hofeller expected District 4 to have a Democratic vote share of 62%. App.238-41. In Plan 2-297, a League member

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[2] The League focuses here on its own members and plaintiffs. The district court also discussed other plaintiffs, whom the League cites only in footnotes. To wit, Larry Hall is another plaintiff who lives in District 1 and is unpacked by Plan 2-297. App.51-52.

[3] Douglas Berger is another plaintiff who lives in District 2 and is uncracked by Plan 2-297. App.52-53.

living in District 4 is unpacked by being placed in a district with a Democratic vote share of 53% Dkt.129-2:6.

• *District 6:* District 6 cracks Democratic voters in central North Carolina. It splits the Democratic cluster in Greensboro, while avoiding the larger concentration of Democratic precincts in Raleigh-Durham. Hofeller expected District 6 to have a Republican vote share of 54%. App.243-48. In Plan 2-297, a League member living in District 6 is uncracked by being placed in a district with a Democratic vote share of 51%. Dkt.129-2:6.

• *District 7:* District 7 cracks Democratic voters in southeastern North Carolina. It splits the Democratic clusters in Bladen and Johnston Counties and submerges the Democratic concentration in Wilmington. Hofeller expected District 7 to have a Republican vote share of 53%. App.248-51. In Plan 2-297, a League member living in District 7 is uncracked by being placed in a district with a Democratic vote share of 59%. Dkt.129-2:6.

• *District 8:* District 8 cracks Democratic voters in central North Carolina. It splits the Democratic cluster in Cumberland County, while avoiding the larger concentration of Democratic precincts in Charlotte-Mecklenburg. Hofeller expected District 8 to have a Republican vote share of 55%. App.251-55. In Plan 2-297, a League member living in District 8 is uncracked by being placed in a

district with a Democratic vote share of 54%. Dkt.129-2:6.[4]

• *District 9:* District 9 cracks Democratic voters in southern North Carolina. It splits the Democratic clusters in Cumberland and Bladen Counties, while capturing almost exclusively Republican precincts in Mecklenburg County. Hofeller expected District 9 to have a Republican vote share of 56%. App.255-59. In Plan 2-297, a League member living in District 9 is uncracked by being placed in a district with a Democratic vote share of 54%. Dkt.129-2:6.[5]

• *District 12:* District 12 packs Democratic voters in Charlotte-Mecklenburg. It captures virtually all of Mecklenburg County's Democratic precincts, while excluding most of its Republican areas. Hofeller expected District 12 to have a Democratic vote share of 63%. App.266-70. In Plan 2-297, a League member living in District 12 is unpacked by being placed in a district with a Democratic vote share of 54%. Dkt.129-2:6.[6]

• *District 13:* District 13 cracks Democratic voters in west-central North Carolina. It splits the Democratic cluster in Greensboro, while avoiding the larger concentration of Democratic precincts in Charlotte-Mecklenburg. Hofeller expected

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[4] Coy Brewer is another plaintiff who lives in District 8 and is uncracked by Plan 2-297. App.57-58.

[5] John McNeill is another plaintiff who lives in District 9 and is uncracked by Plan 2-297. App.58-59.

[6] John Gresham is another plaintiff who lives in District 12 and is unpacked by Plan 2-297. App.62.

District 13 to have a Republican vote share of 54%. App.270-73. In Plan 2-297, a League member living in District 13 is uncracked by being placed in a district with a Democratic vote share of 51%. Dkt.129-2:6.[7]

III. The 2016 Plan Has Exhibited a Large and Durable Partisan Asymmetry.

Turning from individual districts to the state as a whole, North Carolina's 2012 and 2014 congressional elections were held under the 2011 Plan, while the 2016 election was held under the 2016 Plan. All three of these elections were exceedingly close. Democrats earned a slight majority of the statewide vote in 2012 (51%), while Republicans won small majorities in 2014 (54%) and 2016 (53%). App.188-91, 212-14. Yet Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and *ten* seats in 2014 and 2016. *Id.* These ten seats, moreover, were exactly the ones that Hofeller expected Republicans to win. App.188.

Appellees' expert, Professor Simon Jackman, calculated three measures of partisan asymmetry using these election results. (Partisan asymmetry refers to "whether supporters of each of the two parties are able to translate their votes into representation with equal ease." App.191.) First, the *efficiency gap* is the difference between the parties' respective "wasted votes" (ballots that do not contribute to a candidate's election), divided by the total number of votes cast. App.192-93. Second, *partisan bias* is the difference between a party's seat

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[7] Russell Walker is another plaintiff who lives in District 13 and is uncracked by Plan 2-297. App.62-63.

share and 50% in a hypothetical tied election. App.205-06. And third, the *mean-median difference* subtracts a party's median vote share, across a plan's districts, from its mean vote share. App.207-08.

All of these metrics tell the same story about the 2011 and 2016 Plans: Both maps have benefited Republican (and handicapped Democratic) candidates and voters to a staggering, nearly unprecedented, degree. North Carolina recorded efficiency gaps of -21%, -21%, and -19% in 2012, 2014, and 2016 (negative scores being pro-Republican and positive scores pro-Democratic). App.193, 213. That is, votes for Republican candidates were wasted at a rate about twenty percentage points lower than votes for Democratic candidates. North Carolina also registered partisan biases of -27%, -27%, and -27% in 2012, 2014, and 2016, indicating that in hypothetical tied elections, Republicans would have won 77% of the State's congressional seats. App.206; Ex.4003:4. And North Carolina's mean-median differences were -8%, -7%, and -5% in 2012, 2014, and 2016, meaning that, throughout this period, the State's median congressional district was much more pro-Republican than the State as a whole. App.208; Ex.4003:8.

Professor Jackman also testified about the durability of the 2016 Plan's partisan asymmetry. He conducted what is known as "sensitivity testing," swinging the 2016 election results by up to ten percentage points in each party's direction and then recalculating the Plan's efficiency gap for each incremental shift. App.191. This testing indicated that it would take a six-point pro-Democratic swing for Democrats to capture just one more seat. *Id.* For the Plan's asymmetry to disappear, Democrats would

have to improve on their 2016 showing by *nine* points—a wave whose only precedent is the post-Watergate election of 1974. App.197.

IV. The 2016 Plan's Large and Durable Partisan Asymmetry Cannot Be Justified.

The final factual issue addressed at trial was whether the 2016 Plan's partisan asymmetry can be justified by any neutral factor, such as North Carolina's political geography or nonpartisan redistricting criteria. Three sets of district maps established the lack of any legitimate explanation. *First*, as discussed above, Professor Chen used a computer simulation technique to generate three thousand different congressional plans for North Carolina. App.167-71. All of these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan criteria adopted by the Joint Committee. The maps' districts were contiguous and equal in population; they were created without considering racial data; they split as many or fewer counties; and, on average, they were significantly more compact. *Id.*

Yet *not one* of these three thousand maps ever resulted in a ten-three Republican advantage or an efficiency gap as large as the 2016 Plan's. Whether Professor Chen analyzed the maps' partisan implications using Hofeller's full set of twenty prior elections, Hofeller's seven-election subset, or a predictive regression model, *all* of the maps were more symmetric than the Plan. App.167-71, 210-12. In fact, the maps tilted slightly in a Democratic direction, with a median outcome of six Republican seats out of thirteen. Ex.2010:13. Thus, far from justifying the Plan's pro-Republican asymmetry, North Carolina's

political geography and the Joint Committee's nonpartisan criteria seem mildly to favor Democrats.

Second, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed as well as the Plan in terms of traditional criteria but were far less skewed. Both of these maps' districts were more compact, on average, than the Plan's districts. Ex.4022. The "ST-B" map divided three fewer counties than the Plan; the "17A" map split two more. *Id.* But using Hofeller's own set of twenty prior elections, both maps were expected to yield seven (rather than ten) Republican seats and six (instead of three) Democratic seats. *Id.*

And *third*, during the 2000s, North Carolina used a congressional plan for all five elections that complied with all federal and state requirements. (Indeed, this map was so plainly lawful that it was not even challenged in court.) But unlike its successors in the current cycle, the 2000s plan had an average efficiency gap of just 2%, or very close to perfect symmetry. Ex.4002:63.

V. The District Court Carefully Followed This Court's Decision in *Whitford*.

This litigation began in August 2016, shortly after the 2016 Plan was enacted. The plaintiffs include individual North Carolina voters and Democratic supporters in every congressional district in the State. The plaintiffs also include two groups with longstanding interests in the proper functioning of North Carolina's democracy: the League and Common Cause. The North Carolina Democratic Party—the organization dedicated to advancing the interests of Democratic candidates and voters

throughout the State—is a plaintiff as well. Dkt.12:2-9; Dkt.41:6-11.

Throughout the litigation, the plaintiffs emphasized the 2016 Plan's intentional and unnecessary cracking and packing of Democratic voters in particular areas. At trial, for example, the League introduced a series of screenshots from Hofeller's redistricting software showing how he cracked Democratic clusters in Bladen, Buncombe, Cumberland, Guilford, and Johnston Counties; and packed Democratic concentrations in Durham, Mecklenburg, Pitt, Wake, and Wilson Counties. Exs.4007-15, 4066-77. On remand from this Court, similarly, the League demonstrated that it has members in Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13 who are Democratic voters, who were deliberately cracked or packed by the 2016 Plan, and who would be uncracked or unpacked by Plan 2-297. Dkt.129-1; Dkt.129-2; App.44-50.

Appellants moved to dismiss, Dkt.30, but the district court unanimously denied their motion in March 2017, Dkt.50. Appellants declined to move for summary judgment, so trial took place in October 2017. Only expert witnesses testified: Professors Jackman and Chen, another expert for the Common Cause plaintiffs (Professor Jonathan Mattingly), and two experts for Appellants (Professor M.V. Hood, III and Sean Trende). App.29. In January 2018, the district court unanimously held that the 2016 Plan unconstitutionally dilutes plaintiffs' votes. App.34. This Court vacated the district court's judgment in June 2018, remanding for reconsideration in light of *Whitford*. *Id.*

On remand, the League established that the 2016 Plan intentionally and unnecessarily cracked or packed its members in nine congressional districts. Common Cause made a similar showing for its plaintiffs, but based on thousands of Professor Chen's randomly generated maps rather than a single alternative plan. Dkt.130-2. In its August 2018 decision, the district court, too, diligently followed the roadmap this Court provided in *Whitford*. The district court found that at least one plaintiff was needlessly cracked or packed in each district it struck down on partisan vote dilution grounds. App.51-65. The district court also found that several plaintiffs *lacked* standing under *Whitford* because their alleged injuries did not involve the cracking or packing of specific districts. App.65-67. The district court further adopted a partisan vote dilution test that, like *Whitford*'s standing inquiry, "proceed[s] on a district-by-district basis." App.139. This test requires discriminatory intent, a discriminatory effect, and the absence of a legitimate justification for each district that is invalidated as well as for the plan in its entirety. App.137-222. Lastly, applying the test, the district court held that certain districts unlawfully dilute plaintiffs' votes. App.223-74.

Judge Osteen concurred as to almost all of these points. He disagreed, however, that there can be standing (or liability) on partisan vote dilution grounds when a district is packed (rather than cracked). He would therefore have upheld Districts 1, 4, and 12: the three districts in the 2016 Plan that overconcentrated Democratic voters. App.328-31. Judge Osteen also argued that the mere pursuit of partisan advantage is not constitutionally problematic. He would thus have held (not just

assumed) that a *predominant* partisan purpose must be proven in order to establish liability. App.336-40.

ARGUMENT

Appellants do not dispute that the 2016 Plan's official aim was the maximization of Republican partisan advantage. Nor do they deny that the Plan achieved its goal in the 2016 election: a ten-three Republican edge in the face of an evenly divided electorate. These concessions are enough to decide this case without reaching the broader issue of the justiciability of partisan gerrymandering. After all, "[i]f a State passed an enactment that declared" that a district map would be "'drawn so as most to burden Party X's rights to fair and effective representation,'" this Court "would surely conclude the Constitution had been violated." *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment). The 2016 Plan *is* this patently unconstitutional—and no longer hypothetical—law.

Appellants' argument that Appellees lack standing to challenge particular districts on partisan vote dilution grounds misstates the record. Appellants claim that Appellees seek to "vindicate a generalized preference to see more Democrats from North Carolina elected to Congress." J.S.18. But that is simply not true. Appellees' *sole* basis for asserting partisan vote dilution standing is that their *own* districts have been unnecessarily cracked or packed. This was also the district court's only rationale for finding partisan vote dilution standing. This, too, was the standard for partisan vote dilution standing that this Court unanimously adopted in *Whitford*. Appellees and the district court have sought to comply

with this standard, while Appellants have disregarded it.

Appellants' contention that partisan gerrymandering is inherently nonjusticiable is similarly flawed. To hold that the judiciary must exit this domain—an area where its presence is desperately needed—this Court would have to reverse a series of decisions spanning more than thirty years. The Court would also have to credit Appellants' evidence-free speculation about the mutability of voter behavior. In fact, Appellants' own expert testified at length about the stable partisanship of North Carolina voters. And the Court would need to accept a set of propositions (about the Guarantee Clause, Congress, and the Framers) that it has rejected since it entered this field in the 1960s. Appellants have not even tried to explain why these long-buried points should now be exhumed.

Lastly, Appellants' complaints about the district court's test for partisan vote dilution claims are conclusory where they are not self-contradictory. Appellants object *both* to a conventional discriminatory intent prong *and* to one that requires a predominant partisan purpose. But either a regular or a heightened intent showing must surely be made; it is not logically possible to dismiss both thresholds. Appellants also grumble about the variety of social science analyses on which the district court relied. But they do not identify problems with any of these methods, nor deny that they all confirm the 2016 Plan's large and durable asymmetry. And Appellants' odd discussion of responsiveness puts things exactly backwards. Partisan gerrymandering gravely

undermines—it does not somehow promote—legislators' responsiveness to their constituents.

I. Appellees Have Proven Their Standing to Challenge Particular Districts on Partisan Vote Dilution Grounds.

1. In its unanimous decision in *Whitford*, this Court could not have been clearer about how an injury in fact must be proven in a partisan vote dilution case. First, a plaintiff must show that "the particular composition of the voter's own district . . . causes his vote [to be] packed or cracked." 138 S. Ct. at 1931; *see also id.* ("[T]hat burden arises through a voter's placement in a 'cracked' or 'packed' district."); *id.* at 1932 (a plaintiff must "prove that he . . . lives in a cracked or packed district"). And second, a plaintiff must demonstrate that his vote "carr[ies] less weight than it would carry in another, hypothetical district"—in other words, that he could be *un*cracked or *un*packed by a different set of boundaries. *Id.* at 1931.

Applying this standard, the Court suggested that the lead plaintiff in *Whitford* lacked standing. While he did live in a packed district, he could not be unpacked by any (reasonable) alternative configuration. Since "Democrats are 'naturally' packed [in Madison] due to their geographic concentration," "even plaintiffs' own demonstration map resulted in a virtually identical district for him." *Id.* at 1933. Conversely, the Court held that four other plaintiffs *would* have standing if they could "prove[] at trial" what they had "alleged at the pleading stage"—namely, that they were subjected to unnecessary "packing or cracking in their legislative districts." *Id.* at 1931. That is why the Court

remanded the case to the district court instead of dismissing these plaintiffs' claims. *Id.* at 1933-34.

The Court's focus on needless cracking and packing mirrors its approach in the analogous context of racial vote dilution. In that area as well, the Court has long recognized that cracking and packing are the techniques through which equipopulous, single-member districts dilute the influence of targeted voters. *See, e.g.*, *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.) (a district map may "dilute minority voting power if it packed minority voters in a few districts . . . or dispersed them among [many] districts"); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In that area too, the Court requires plaintiffs to prove they could be uncracked or unpacked by a different district map. *See, e.g.*, *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.) ("[A] § 2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one."); *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). *Whitford*'s standing analysis is thus entirely consistent with existing vote dilution precedent.

2. Under *Whitford*, in the League's view, plaintiffs plainly have standing to challenge nine of the 2016 Plan's thirteen districts on partisan vote dilution grounds. League members who support the Democratic Party live in, and are cracked or packed by, Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13. They are also unnecessarily cracked or packed, because Plan 2-297 simultaneously uncracks or unpacks them all. *See supra* Statement Part II. These League members have therefore proved that "the particular composition of [their] own district[s] . . . causes [their] vote[s]—

having been packed or cracked—to carry less weight than [they] would carry in [other], hypothetical district[s]." *Whitford*, 138 S. Ct. at 1931. They have proved, that is, the injury the four plaintiffs the Court discussed in *Whitford* merely alleged.

3. Appellants primarily resist this conclusion by dissembling about the district court's decision. As evidence that the court treated partisan vote dilution as a theory "not specific to an individual's right to cast his own undiluted vote," J.S.19, they cite the court's passages about the *First Amendment* and *Article I* harms caused by partisan gerrymandering, *see id.* (quoting App.70, 74, 78). These passages, though, have nothing to do with the court's approach to standing on the basis of partisan vote dilution. Still more misleadingly, Appellants quote a number of plaintiffs who testified about the 2016 Plan in its entirety (instead of the cracking or packing of their own districts). J.S.18-19. But Appellants never mention that these litigants *were held to lack standing*, precisely because "they believe their vote was diluted by the 2016 Plan *as a whole*, rather than by the lines of their particular district." App.65-66.

4. Next, Appellants latch onto three of the many plaintiffs in this case: Larry Hall in District 1, and Richard and Cheryl Taft in District 3. With respect to Hall, Appellants assert that he is "[l]ike the lead plaintiff in *[Whitford]*" because his district is overwhelmingly Democratic. J.S.20. It is true enough that District 1 packs Hall and other Democratic voters. But unlike the "'naturally' packed" Madison-area district in *Whitford*, 138 S. Ct. at 1933, District 1 does so entirely unnecessarily. In Plan 2-297, Hall is placed in a district that is six percentage points less

heavily Democratic than District 1. Dkt.130-2:11. Likewise, the League plaintiffs in District 1 end up in a district that is fully *ten* points less heavily Democratic. Dkt.129-2:6. This district is also far more compact than District 1. *Compare* Ex.5048 (showing Reock and Polsby-Popper scores of 0.34 and 0.20 for District 1), *with* Dkt.129-2:4 (showing analogous scores of 0.47 and 0.33 for District 12 in Plan 2-297). Accordingly, Hall and the other litigants in District 1 do not resemble the lead plaintiff in *Whitford* in the only way that matters. Unlike him, they *can* be unpacked by an alternative map—and *are* unpacked by Plan 2-297.[8]

With respect to the Tafts, the League agrees that they do not have standing on partisan vote dilution grounds. While they are cracked by District 3, they are not uncracked by Plan 2-297 since it places them in a district with almost exactly the same partisan composition. Dkt.130-2:11. The League also concedes that none of its members in District 3 are uncracked by Plan 2-297 either. Of course, the fact that some of the 2016 Plan's districts may be unlawfully dilutive, while others may not be, refutes Appellants' claim that Appellees are attacking the Plan as an undifferentiated whole. If they were, all of the Plan's districts would rise or fall together—which, on this theory, they emphatically do not.

5. Lastly, Appellants fall back on the argument that Appellees lack standing *even if* "their representative may have shifted from Republican to

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[8] Moreover, the unpacking of these litigants facilitates the uncracking of Democratic voters in adjacent districts. Because District 1 becomes less heavily Democratic, in particular, the analogue to District 2 in Plan 2-297 leans in a Democratic rather than a Republican direction. Dkt.129-2:2.

Democrat under plaintiffs' alternative plans." J.S.21. This is because, in Appellants' view, "[t]here is no 'vote dilution' in partisan gerrymandering cases because the one-person, one-vote principle already ensures that votes are 'equally weighted.'" J.S.22. It is worth pausing to appreciate the radicalism of this position. It defies this Court's unanimous conclusion in *Whitford* that plaintiffs *can* bring "allegations that their votes have been diluted," and *do* have standing if their votes, "having been packed or cracked . . . carry less weight than [they] would carry in [other], hypothetical district[s]." 138 S. Ct. at 1930-31.

Appellants' stance is also irreconcilable with the Court's repeated recognitions, in its partisan gerrymandering and racial vote dilution cases, that voters' influence can be diluted not just through malapportionment but through cracking and packing as well. In *Vieth*, for instance, the plurality defined partisan gerrymandering as "intentional vote dilution," 541 U.S. at 298 (plurality opinion), and explained that it operates by "filling a district with a supermajority of a given group" or "splitting . . . a group . . . among several districts," *id.* at 286 n.7. In *LULAC*, similarly, Chief Justice Roberts pointed out that racial vote dilution, too, works by "pack[ing] minority voters in a few districts" or "dispers[ing] them among [many] districts." 548 U.S. at 495 (opinion of Roberts, C.J.); *see also, e.g.*, *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 153-54; *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion). All of these precedents would have to be revisited under Appellants' theory of standing, because all of them acknowledge that malapportionment does not exhaust the set of dilutive mechanisms.

II. The Court Should Adhere to Its Consistent Holdings That Partisan Gerrymandering Is Justiciable.

1. Appellants next assert that the whole cause of action for partisan gerrymandering is categorically nonjusticiable. J.S.23-28. But this Court has repeatedly rejected that sweeping claim. In *Bandemer*, six Justices agreed that partisan gerrymandering suits are justiciable. *See* 478 U.S. at 118-27. In *Vieth*, "five Members of the Court" were again "convinced" that "political gerrymandering claims are justiciable." 541 U.S. at 317 (Stevens, J., dissenting). In *LULAC* as well, the Court observed that "a majority [in *Vieth*] declined" to deem partisan gerrymandering suits "nonjusticiable political questions," and refused to "revisit [*Vieth*'s] justiciability holding." 548 U.S. at 414.

These cases should be followed not just because they are precedents but also because they are right. It is implausible, in particular, that racial vote dilution could be justiciable—under both the Voting Rights Act and the Constitution, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982)—while partisan vote dilution is not. As noted above, racial and partisan vote dilution both function by cracking and packing targeted voters. Racial and partisan vote dilution both also depend on voter behavior that is predictable and polarized. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52-74 (1986) (discussing racial polarization in voting). And racial and partisan vote dilution both require analyses of individual districts as well as "whether line-drawing in the challenged area as a whole dilutes [a group's] voting strength." *LULAC*, 548 U.S. at 504 (opinion of Roberts, C.J.). These issues cannot be judicially

manageable in the racial context but beyond courts' powers in the partisan arena.

Strongly supporting justiciability, too, is this Court's vigilance against the partisan manipulation of the electoral process in other domains. In its campaign finance cases, for example, the Court has remarked that "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). It is to prevent "such basic intrusion by the government into the debate over who should govern" that the Court scrutinizes regulations of money in politics so stringently. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011). The Court prohibits patronage hiring and firing for much the same reason. These practices "starve political opposition by commanding partisan support," and "thus tip[] the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). If anything, this insight applies even more urgently to partisan gerrymandering, which not only influences voters' choices but also determines how their votes are aggregated. The Court's concern about partisan self-aggrandizement should reach its peak when a party can entrench itself directly, without even needing to change voters' minds.

2. Despite these precedents, Appellants contend that partisan gerrymandering is nonjusticiable because voters' partisan affiliations can vary from race to race and year to year. J.S.25-26. But Appellants cite no evidence that partisanship is highly volatile. To the contrary, their own expert line-drawer, Hofeller, testified that "'past voting behavior' . . . is 'the best predictor of future election success.'"

App.11. He added that "'[t]he underlying political nature of the precincts in the state *does not change no matter what race you use to analyze it*,'" so "'once a precinct is found to be a strong Democratic [or Republican] precinct, it's probably going to act as a strong Democratic [or Republican] precinct in every subsequent election.'" App.175. Professor Chen confirmed Hofeller's testimony by examining how well a model including the presidential vote explains the congressional vote in North Carolina elections. The model does so almost perfectly, indicating that North Carolina voters behave nearly identically in races at different electoral levels. Ex.2010:38.

Moreover, the fact that voters' opinions may shift does not distinguish the partisan context from the racial one. Minority voters do not always support the same candidate, nor do nonminority voters always oppose that candidate. That is why racial vote dilution doctrine "does not assume the existence of racial bloc voting," but rather insists that "plaintiffs must prove it." *Gingles*, 478 U.S. at 46. Here, Appellees not only showed that North Carolina voters are impressively stable in their partisan preferences. Appellees further demonstrated that even if the electorate's views *do* change significantly, the 2016 Plan will *still* remain highly skewed in a Republican direction. App.191, 197. Thus, even if Appellants' speculation about voters' volatility is correct, it makes no difference. The Plan will continue to favor Republicans in future elections.

3. Appellants' other justiciability arguments all repeat points that were previously made by the dissenters in the reapportionment cases of the 1960s. Appellants assert that partisan gerrymandering

challenges should really be "called Guarantee Clause claims." J.S.27. Justice Frankfurter similarly contended that one person, one vote suits are "Guarantee Clause claim[s] masquerading under a different label." *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting). In Appellants' view, authority over congressional redistricting is limited to state legislatures and to Congress. J.S.27-28. That was also Justice Harlan's opinion: that judicial intervention in this area is "derogatory not only of the power of the state legislatures but also of the power of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting). And according to Appellants, the Framers accepted partisan gerrymandering and did not want the courts to prevent it. J.S.15, 24-25, 27. Justice Frankfurter thought the same: that population "inequalities survived the constitutional period," and that "[t]he Framers . . . refused so to enthrone the judiciary" by authorizing it to address malapportionment. *Baker*, 369 U.S. at 270, 308 (Frankfurter, J., dissenting).

These arguments are as weak today as they were half a century ago, when this Court rejected them. With respect to the Guarantee Clause, the Court provided the definitive rebuttal in *Baker*. While "appellants might conceivably have added a claim under the Guaranty Clause," "it does not follow that appellants may not be heard on the equal protection claim which in fact they tender." *Id.* at 227-28. In other words, a suit remains justiciable if it implicates issues of republican government, so long as it *also* involves violations of other constitutional provisions.

Justice Clark's concurrence in *Baker* also identified the flaw in Appellants' position that state

legislatures or Congress can stop partisan gerrymandering: that, in reality, they are extremely unlikely to do so. "The people [are] rebuffed at the hands of the Assembly," and "by the votes of [its] incumbents a [fair] reapportionment . . . is prevented." *Id.* at 259 (Clark, J., concurring). Likewise, "[i]t is said that there is recourse in Congress," but "from a practical standpoint this is without substance" since "[t]o date Congress has never undertaken such a task." *Id.* The *Wesberry* Court offered an even more powerful rejoinder to Appellants' view of the Elections Clause. While the provision may empower state legislatures and Congress to fight gerrymandering, it does not disable courts from doing so too. "Nothing in the language of that article . . . immunize[s] state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6.

As for the drafters of the Constitution, it is plainly partisan gerrymandering—not, as Appellants allege, judicial intervention *against* gerrymandering—that is "contrary to the Framers' basic design." J.S. 24. The Framers were obsessed with the "mischiefs of faction": the "instability, injustice, and confusion [it] introduced," which are the "mortal diseases under which popular governments have everywhere perished." The Federalist No. 10. Gerrymandering, of course, is the epitome of faction run amok: a classic case of "the public good [being] disregarded" due to "the superior force of an interested and overbearing majority." *Id.* The Framers also wanted the House of Representatives to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52. Again, few forces make House

members less dependent on, and less in sympathy with, their constituents than gerrymandered districts. *See also, e.g., Ariz. State Legislature*, 135 S. Ct. at 2672 (discussing the Framers' concern about the "manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate"); *Wesberry*, 376 U.S. at 7-17 (same).

4. In any event, this Court need not reach the general justiciability of partisan gerrymandering to decide this case. Whatever difficulties might be presented by district plans that are *not* "'drawn so as most to burden [a party's] rights to fair and effective representation'" are not posed by a map, like the 2016 Plan, that *does* overtly aim for, and achieve, maximal partisan advantage. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). This sort of map can and should be struck down under the Court's "'well developed and familiar' standard" that a law is invalid if it "'reflects *no* policy, but simply arbitrary and capricious action.'" *Id.* at 316, 320 (quoting *Baker*, 369 U.S. at 226).

III. The District Court's Test for Partisan Vote Dilution Is Judicially Discernible and Manageable.

1. Lastly, almost in passing, Appellants address the topic to which the district court devoted almost two hundred pages: the articulation and application of its test for partisan vote dilution claims. This test, again, is district-specific; it must be satisfied separately for each challenged district. App.139. To find liability, the test requires that a district (1) be drawn with the intent of cracking or packing the opposing party's voters; (2) have the effect of cracking

or packing these voters, in a durable manner that renders the legislator nonresponsive to her constituents; and (3) lack a legitimate justification for the cracking or packing. App.139-54. As an additional safeguard, the test requires discriminatory intent, a discriminatory effect, and the absence of a valid justification to be proved statewide. Before a district can be struck down, that is, the plan to which it belongs must be shown to be purposefully, severely, durably, and unjustifiably dilutive. App.155-222.

While the district court recognized this test under the Equal Protection Clause, the test also captures the First Amendment injury of viewpoint discrimination. A district that fails the test "has the purpose and effect of subjecting a group of voters . . . to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). The test's inclusion of district-specific and statewide elements, furthermore, parallels the existing doctrinal structures for numerical and racial vote dilution claims. A malapportionment plaintiff must establish not just that her district is overpopulated but also that the total population deviation of the entire map exceeds ten percent (in a state legislative case). *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Similarly, a racial vote dilution plaintiff must demonstrate not just her own cracking or packing but also "the possibility of *additional* single-member districts that minority voters might control." *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.). Without such evidence, the plaintiff "does not show vote dilution, but 'only that lines could have been drawn elsewhere.'" *Id.* at 497(quoting *De Grandy*, 512 U.S. at 1015).

2. Appellants' first objection to this test has a heads-I-win, tails-you-lose feel. Either the test's intent prong is too lax, because it is satisfied by any pursuit of partisan advantage, or it is unworkably stringent, because it requires a predominant partisan motivation. J.S.29-30. In fact, neither aspect of this critique has merit. To start, it is hardly easy to prove an "intent to 'subordinate adherents of one political party and entrench a rival party in power.'" App.142 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). Certainly, this Court did not think so when it defined gerrymandering in precisely these terms. It is also false that the Court has previously blessed redistricting for raw partisan gain. The Court has endorsed *other* political aims, like "preserving the cores of prior districts" and "avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). But there has never been "the slightest intimation in any opinion . . . that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336-37 (Stevens, J., dissenting).

Nor does this Court share Appellants' skepticism of a predominant partisan intent requirement (which the district court employed in the alternative, App.145-46). While a plurality in *Vieth* was unwilling to adopt such a heightened threshold, a *unanimous* Court did exactly that in *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016). Under *Harris*, a one person, one vote plaintiff challenging a plan with a total population "deviation of less than 10%" must show that the variance "reflects the *predominance* of illegitimate reapportionment factors," such as "partisanship." *Id.* at 1307, 1310

(emphasis added). Relying on this standard, every Justice concluded that the map at issue was lawful, because its "deviations *predominantly* reflected Commission efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party." *Id.* at 1307 (emphasis added). Every Justice, that is, did what Appellants say cannot be done: apply a predominant partisan intent requirement.

3. Appellants' attacks on the effect prong of the district court's test are equally unpersuasive. They complain that the court did not identify a partisan asymmetry threshold for use in all future cases. J.S.30-31. But lower courts are not in the habit of making such grand pronouncements. To resolve the dispute in front of it, it was enough for the district court to find that the 2016 Plan's skew is exceptionally severe, and thus above any plausible bar. App.193-96. Appellants also protest the district court's consideration of "all manner of social science metrics." J.S.31. But beyond their quantity, Appellants do not flag any issues with these measures. Moreover, as the district court noted, "when a variety of different pieces of evidence . . . all point to the same conclusion . . . courts have *greater* confidence in the correctness of the conclusion." App.132-33.

Finally, Appellants contend that partisan gerrymandering "ameliorate[s]" responsiveness by "avoid[ing] the concentration of majority-party voters in a small number of districts." J.S.31. Responsiveness is indeed "at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, but Appellants could not be more wrong about how to achieve it. For one thing, gerrymanderers do not

design *competitive* districts for their party's candidates; they draw districts that are *safe*—just not as inefficiently overconcentrated as the packed districts they craft for the opposing party. *See* App.190 ("[A]ll ten Republican-held districts[] in the 2016 Plan are 'safe.'"). For another, in a highly polarized period like the present, legislators' party affiliations are far better predictors of their records than their districts' compositions. *See, e.g.*, Caughey et al., *supra*, at 458. This is why partisan asymmetry is linked so strongly to legislative non-responsiveness. It leads to the election of more of a party's candidates than voters want, who then take more extreme positions than voters support. *See, e.g.*, *id.* at 461-65.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

October 31, 2018

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No. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

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November 20, 2018

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INTRODUCTION

As this Court stated mere months ago, partisan gerrymandering cases "concern[] an unsettled kind of claim," "the contours and justiciability of which are unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). In the decision below, with the ink on *Gill* barely dry, the district court purported to divine what has eluded this Court for decades: a justiciable test for adjudicating partisan gerrymandering claims. In fact, the court discovered *four* tests in *four* constitutional provisions, including two in the Elections Clauses of Article I—which had long been understood to empower state legislatures, not federal judges. That extraordinary decision would routinely place federal courts in the middle of partisan disputes without any textual justification or anything approaching judicially manageable standards. The decision plainly merits plenary review. Indeed, the *League* plaintiffs "acknowledge[]" that "full briefing and argument" is appropriate, as do the *Common Cause* plaintiffs. LWV.Mot.6; CC.Mot.41.

Plenary consideration is particularly warranted given that *plaintiffs* reject key aspects of the district court's decision and each other's contentions. Plaintiffs disagree about who has standing based on "dilutionary" injuries; the *League* plaintiffs decline to defend the district court's holding that "non-dilutionary" injuries suffice; the *Common Cause* plaintiffs are not sold on all elements of the court's four partisan gerrymandering tests; and the *League* plaintiffs ignore three of the four tests. Plaintiffs' motions thus confirm what is already plain on the face of the district court's 321-page opinion: If there really

is a coherent theory of standing to govern these cases, and if there really is a test capable of separating unconstitutional partisan gerrymandering from the run-of-the-mill consideration of politics, each will have to come from this Court.

I. Plaintiffs Lack Standing.

Plaintiffs' issues with the district court's decision begin at the threshold. According to the district court, at least one plaintiff in all 13 North Carolina congressional districts adequately pled a "dilutionary" injury, and plaintiffs in 12 districts proved such injury, because "hypothetical" maps could distribute likely Democratic and Republican voters more to plaintiffs' liking. JS.App.50-51. Moreover, as a result of purported "non-dilutionary" injuries, the court concluded that numerous plaintiffs have standing to challenge the 2016 Map as an undifferentiated whole. JS.App.74, 83.

Even plaintiffs cannot bring themselves to fully embrace that reasoning. The *League* plaintiffs concede, for example, that the district court was wrong to conclude that plaintiffs from CD3—Richard and Cheryl Taft—have suffered "dilutionary" injuries, LWV.Mot.24, as there was no meaningful difference in anticipated political breakdown under the 2016 Map as compared to plaintiffs' ideal "hypothetical" map, Plan 2-297, *see* Dkt. 130-2 at 11. The *League* plaintiffs also reject the district court's conclusion that plaintiffs suffered "dilutionary" injuries in CD10 and CD11, conceding that "[n]o plaintiffs living in these districts ... were uncracked by the alternative map on which the League relies." LWV.Mot.9. And the

League plaintiffs do not contest the district court's holding that CD5 was not a partisan gerrymander.

That leaves the *League* plaintiffs defending the district court as to only nine districts, and they maintain that at least one unidentified "League member" is suffering "dilutionary" injury in each. LWV.Mot.22. But those members are unidentified for good reason: The district court never addressed the *League* plaintiffs' standing in those nine districts, presumably because it is not even clear who those "League members" are, let alone what they believe their injuries to be. Dkt.129-1.[1] The court instead focused almost exclusively on "dilutionary" injuries purportedly suffered by the *Common Cause* plaintiffs. CC.Mot.36. But most of those plaintiffs are just like the Tafts: They would be in materially identical districts even under "hypothetical" maps. Dkt. 130-2 at 11. Indeed, by plaintiffs' own telling, only three districts would have been likely to switch to Democratic under Plan 2-297. JS.21 n.4.[2]

It is difficult to see how plaintiffs living in districts projected to remain red or blue even under their own preferred map can claim to have suffered

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[1] With the possible exception of CD1, the "League members" are not the named plaintiffs. LWV.Mot.10-13.

[2] The *League* plaintiffs find it "speculati[ve]" that voters could vote for candidates from different parties in successive elections. LWV.Mot.20. The 2018 elections prove otherwise. CD9, for example, had a predicted Republican vote share above 56%, Dkt.130-2 at 11, but an actual Republican vote share of 49.25% in 2018, N.C. State Board of Elections & Ethics Enforcement, *11/06/2018 Unofficial Local Elections Results—Statewide*, https://bit.ly/2JD5HjT (last visited Nov. 19, 2018).

"concrete and particularized injuries." *Gill*, 138 S. Ct. at 1934. Instead, any "injuries" such plaintiffs suffer can be rooted only in a desire to see more Democrats elected to Congress—*i.e.*, noncognizable "generalized partisan preferences." *Id.* at 1933. Indeed, while the *Common Cause* plaintiffs accuse appellants of "[i]gnoring the pleadings," CC.Mot.17, it is telling that the first "concrete[] and particularized injury" alleged in their complaint is that "[t]he 2016 Plan has made it more difficult ... for a Democratic candidate to be elected ... to the House of Representatives," Dkt.12 at 26.

Plaintiffs insist that if they lack standing, then so too must plaintiffs in one-person-one-vote or racial gerrymandering cases. CC.Mot.20. But being placed in a district that is packed with *too many voters* dilutes one's vote in a very concrete and district-specific sense: That vote is worth less than the vote of someone in the district next door. Likewise, being placed in a district on the basis of race subjects one to precisely the kind of race-based decision-making that the Fourteenth Amendment prohibits. There simply is no constitutional analog for the purported injury of being placed in a district that "dilutes" one's ability to help her preferred political party win more seats in the state's congressional delegation.

The *League* plaintiffs, for their part, focus on race-based vote dilution cases. LWV.Mot.21-25. But those cases are not concerned with "vote dilution" in some abstract or inconsequential sense. They assess whether a map "impairs the ability of a protected class to elect its candidate of choice." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994). Thus, even setting aside

the problem that neither Democrats nor Republicans can plausibly claim to be "a protected class," those cases are entirely consistent with the proposition that packing and cracking alone is not enough; there must be a demonstrable impairment of each plaintiff's ability to elect his or her candidate of choice.

Perhaps recognizing that their "dilutionary" injuries cannot get the job done, the *Common Cause* plaintiffs maintain that their "non-dilutionary" injuries give them standing to challenge the entire 2016 Map. CC.Mot.20-23. But they cannot explain why these exceedingly abstract injuries should get them in the door when they would not suffice in any other voting-rights context. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

II. Plaintiffs' Claims Are Nonjusticiable.

Plaintiffs' justiciability arguments fare no better. For decades, both lower courts and litigants in partisan gerrymandering cases have been "wandering in the wilderness," *Vieth v. Jubelirer*, 541 U.S. 267, 303 (2004) (plurality op.), because no majority of this Court has ever agreed upon a standard for adjudicating such claims. That is because no such standards exist, as the Framers neither envisioned federal courts wading into such politically fraught waters nor provided them with the tools to do so successfully. JS.23-28. But at a minimum, there can be no serious dispute that the justiciability question remains unresolved, which is reason enough to set this case for plenary consideration.

The *League* plaintiffs resist that proposition, insisting quite remarkably that this Court has already resolved the question in their favor, and that it would

be "implausible" to hold partisan gerrymandering claims nonjusticiable when racial vote dilution claims are justiciable. LWV.Mot.26-27. That would seem to be news to everyone involved in last Term's partisan gerrymandering cases, where the Court itself reviewed the same body of cases and concluded that they "leave unresolved" both "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929. Moreover, there is nothing remotely "implausible" about reaching different justiciability conclusions in cases involving the inherently suspect consideration of race versus the all-but-inevitable consideration of politics. After all, the Reconstruction-era Amendments were all about prohibiting racial discrimination by state and local governments, while no text embodies a concern with, let alone articulates a limit on, undue partisanship. As five members of this Court emphasized in *Vieth* in rejecting the same false equivalence, "[r]ace is an impermissible classification," while "[p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *see also id.* at 286 (plurality op.) ("segregating voters on the basis of race is not ... lawful").

The *Common Cause* plaintiffs make the equally remarkable assertion that this Court need not concern itself with justiciability because the political question doctrine does not apply to "[c]ases implicating 'the federal judiciary's relationship *to the States*.'" CC.Mot.23 (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)). That radical proposition cannot be squared with a host of settled precedents, including *Coleman v. Miller*, 307 U.S. 433 (1939), and numerous

Guarantee Clause cases that remain good law, or with the views of numerous members of this Court that partisan gerrymandering claims are (or at least may well be) nonjusticiable, *see Vieth*, 541 U.S. at 306 (plurality op.); *id.* at 309 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring). Indeed, even Justices who would find such claims justiciable have never embraced the proposition that nonjusticiablity principles are simply irrelevant here. The claim is also at odds with the relevant constitutional text, which not only underscores that the Constitution sometimes commits powers and responsibilities to the States, but also commits the ultimate control over *congressional* districts to Congress. *See* U.S. Const. art I, §4. More broadly, the notion that this case is not about the separation of powers blinks all reality.

The *Common Cause* plaintiffs insist that there must be judicially manageable standards to police partisan gerrymandering under the First Amendment, the Equal Protection Clause, and the Elections Clauses because there are judicially manageable standards to adjudicate *other* types of claims under (at least some of) those provisions. CC.Mot.24. But none of the standards that have been crafted to deal with very different kinds of claims is equipped to answer the thorny question of "how much is too much." Indeed, the *Common Cause* plaintiffs do not suggest otherwise. Instead, they maintain that the Court does not need to answer that question because districting for partisan advantage is *always* impermissibly "invidious." CC.Mot.25. That position may have the virtue of simplicity, but it suffers from the insuperable vice of having been unanimously

rejected by members of this Court for decades. JS.29-30.

Lastly, plaintiffs contend that this Court need not resolve "the general justiciability of partisan gerrymandering" claims to hold *this* map unconstitutional. LWV.Mot.31; CC.Mot.25-27. That is nonsensical. This Court cannot plausibly declare any map "the worst of the worst" without first deciding what (if anything) makes a partisan gerrymander more or less constitutionally bad. After all, "[n]o test" for resolving a partisan gerrymandering claim "can possibly be successful unless one knows what he is testing *for*." *Vieth*, 541 U.S. at 297 (plurality op.).

In all events, the notion that the 2016 Map "reflects *no* policy, but simply arbitrary and capricious action," LWV.Mot.31, is belied by the reality that "reasonable efforts" to "maintain the current partisan makeup" was but one of *seven* factors guiding the redistricting committee, *five* of which passed unanimously. JS.App.20. Accordingly, this simply is not the mythical case in which all traditional districting criteria were abandoned in blind pursuit of maximum partisan advantage. *See* JS.36-37. To the contrary, just like every other partisan gerrymandering case, this case can be resolved only by first answering the "original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.).

III. This Case Confirms That "Limited And Precise" Partisan Gerrymandering Tests Do Not Exist.

Identifying a judicially manageable test for adjudicating partisan gerrymandering test has

"confounded the Court for decades." *Gill*, 138 S. Ct. at 1933. Apparently plaintiffs have not found that task any easier. Notwithstanding the smorgasbord of tests that the district court offered, plaintiffs cannot agree that even a single one of them cracks the code. The *League* plaintiffs simply ignore three of the four tests the district court crafted, and embrace only the equal-protection-based test (which they maintain coincidentally "also captures the First Amendment injury of viewpoint discrimination," LWV.Mot.32). The *Common Cause* plaintiffs, by contrast, embrace the district court's three *other* tests, but protest that its equal protection test is "too demanding" because it requires something more than "demonstrable invidious intent" (*i.e.*, intentional districting for partisan advantage). CC.Mot.37, 39.

That plaintiffs themselves cannot even agree on how partisan gerrymandering claims should be adjudicated "goes a long way to establishing that there is no constitutionally discernible standard." *Vieth*, 541 U.S. at 292 (plurality op.). But at a minimum, the fact that neither set of plaintiffs is even willing to wholeheartedly defend the district court's reasoning confirms beyond doubt that the decision below cannot be the last word on the subject.

Equal Protection Clause. While the district court posited that *any* intent to district for partisan advantage should suffice under the intent prong of its equal protection test, the court "assume[d]" a "predominant purpose" standard governs. JS.App.118-19, 145-46 (emphasis omitted). Plaintiffs maintain that a predominance standard would work here because the Court has applied it in other

contexts. CC.Mot.30; LWV.Mot.33-34. But that ignores the problem that redistricting is "root-and-branch a matter of politics," which means "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." *Vieth*, 541 U.S. at 285-86 (plurality op.). Not so for racial gerrymandering, which is "much more rarely encountered." *Id.* at 286.

The court's effects prong—which measures whether a representative will "feel a need" to respond to opposing-party constituents, JS.App.152—is even more unwieldy, as it never purports to explain how much "non-responsiveness" is too much or what evidence suffices to prove it.[3] The *League* plaintiffs disavow the need for linedrawing, LWV.Mot.34—a curious position when the task is to identify a "limited and precise" test, *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring). Meanwhile, the *Common Cause* plaintiffs criticize the "effects" prong as "too demanding," and insist that an "invidious-intent requirement" alone can "appropriately limit judicial intervention." CC.Mot.37.

Finally, no plaintiff seriously grapples with the "justification" prong of the test. The test preserves a district drawn with partisan advantage in mind only if the "discriminatory" effects are attributable to a "legitimate state districting interest." JS.App.152-53.

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[3] For example, the court found the effects prong satisfied in CD9, but in the 2018 elections, the Republican candidate won only 49.25% of the vote, while the Democratic candidate won 48.93%. *See* n.2, *supra*. It is unclear why the winner will not "feel a need" to respond to Democrats even in the unlikely event that constituents self-identify as such in seeking help.

But in the district court's view, "the Constitution does not authorize ... partisan gerrymandering," rendering this supposed escape hatch impossible to satisfy. JS.App.118. And even if this "justification" prong is not illusory, it is simply a convoluted and unjustified means of shifting the burden of proof to the defendants.

First Amendment. The First Amendment test fares no better, and the *League* plaintiffs wisely do not endorse it. Unlike in the equal protection context, the district court fully embraced the idea that *any* intent to district for partisan advantage is constitutionally suspect under the First Amendment—a notion that, as Judge Osteen recognized, runs counter to this Court's whole line of partisan gerrymandering cases. JS.App.343-46. The *Common Cause* plaintiffs insist that this test "would not banish all political considerations from the redistricting process," but would ban only "invidious" discrimination. CC.Mot.28-29, 35. But that is a false promise, as they freely admit that they consider *any* degree of districting for partisan advantage "invidious" discrimination. CC.Mot.28.

The "effects" prong likewise provides no constraint, as it requires nothing more than injuries as generic as struggling to "galvanize" participation in elections. JS.App.290. The *Common Cause* plaintiffs applaud the district court's refusal to adopt a "heightened 'effects' showing," maintaining that "'[t]his Court's decisions have prohibited' state action that unjustifiably burdens First Amendment rights, however slight[ly]." CC.Mot.35. That is precisely the limitless reasoning that led the *Vieth* plurality to

recognize that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294 (plurality op.).

Elections Clauses. The *Common Cause* plaintiffs likewise stand alone in defending the district court's Article I tests. Indeed, no other court has ever accepted the proposition that partisan gerrymandering "exceed[s]" the State's districting powers or deprives "the People" of their right to elect representatives. JS.App.35. That is likely because it strains credulity to claim that the very same constitutional text that "clearly contemplates districting by political entities" is the font of the ever-elusive administrable test for adjudicating partisan gerrymandering claims. *Vieth*, 541 U.S. at 285-86 (plurality op.).

Cook v. Gralike, 531 U.S. 510 (2001), does not suggest otherwise. CC.Mot.38-39. While *Gralike* might have been instructive had the General Assembly passed legislation that branded opposing Democrats "tax-and-spend-liberals" on ballots, 531 U.S. at 525, it is hard to see how a case that says nothing about partisan gerrymandering is relevant here. Indeed, just a few Terms after *Gralike*, the *Vieth* plurality emphatically rejected an Elections Clause claim, and only Justice Stevens even mentioned *Gralike*—in footnote 26 of his dissent. JS.35.

* * *

The parties here may disagree on many things, but all agree this case should be set for plenary consideration. And rightly so, as almost every critical feature of partisan gerrymandering cases remains

"unresolved" by this Court. *Gill*, 138 S. Ct. at 1934. The Court should set this case for briefing and argument to put an end to the uncertainty that has plagued this area of the law for a generation.

CONCLUSION

The Court should set this case for plenary consideration.

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(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

APPELLEES' JOINT MOTION FOR DIVIDED ARGUMENT AND ENLARGEMENT OF ARGUMENT TIME

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Pursuant to Supreme Court Rules 21 and 28.3–4, Appellees in these consolidated challenges to North Carolina's 2016 Congressional Plan (hereinafter, "*Common Cause* Appellees" and "*League* Appellees") jointly move for equally divided argument time and to enlarge the total argument time for each side from 30 minutes to at least 40 minutes. Appellees have conferred with counsel of record for Appellants in both cases, and Appellants consent to division of Appellees' argument and take no position on the motion to enlarge argument time, provided both sides' time is enlarged equally.

I. DIVIDED ARGUMENT IS APPROPRIATE.

Divided argument is appropriate because of differences in the cases presented by the two sets of Appellees. To be clear, the differences are not about the ultimate constitutional violations. Appellees agree that partisan gerrymandering "jeopardizes '[t]he ordered working of our Republic,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring)), and violates core constitutional guarantees. Appellees further agree that *any* of the approaches proposed in this case constitutes a "judicially discoverable and manageable" standard, and that the claims asserted here do not "turn on standards that defy judicial application," as true "political questions" do. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962). Appellees also agree that the egregious facts of this case make out a clear constitutional violation under any of the legal theories presented.

At the same time, as this Court recognized last year, partisan gerrymandering presents "an unsettled kind of claim" whose "contours" remain "unresolved."

Gill, 138 S. Ct. at 1934. Absent definitive guidance from this Court, litigants have advanced different theories, relying on different provisions of the Constitution, different threads of this Court's case law, different forms of evidence, and different categories of plaintiffs. As discussed below, this is a case in point. Divided argument will permit the Court to better explore and understand these differences and their ramifications—and, thereby, bring clarity to this "unsettled" area.

First, Appellees press different theories of unconstitutionality. While both sets of Appellees challenge the 2016 Plan under the Equal Protection Clause and First Amendment based on a vote-dilution theory of harm, the *Common Cause* Appellees raise additional theories that the *League* Appellees do not.

In particular, only the *Common Cause* Appellees assert First Amendment claims based on the "associational theory" of harm described in the *Gill* concurrence. 138 S. Ct. at 1934, 1938–39 (Kagan, J., concurring). This theory is "distinct from vote dilution," and "everything about the litigation of [a partisan-gerrymandering] claim—from standing on down to remedy"—may differ depending on whether the plaintiff asserts dilutionary or associational harm. *Ibid.*

Similarly, only the *Common Cause* Appellees assert claims under Article I, §§ 2 and 4. These provisions make clear that state legislatures have "no[] ... power to dictate ... outcomes" of congressional elections or "to favor or disfavor a class of candidates ...." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833–34 (1995). This Article I challenge, therefore, asserts a "structural" violation of the same type this Court has

recognized in other situations where a "government acts in excess of its lawful powers." App–82 (quoting *Bond v. United States*, 564 U.S. 211, 220–22 (2011)). The District Court held that the 2016 Plan violates all of these constitutional provisions and causes each of these types of harm. Counsel for each respective set of Appellees is best positioned to present argument to this Court regarding the distinct claims and theories of injury that they raised and briefed below.[1]

Second, while both sets of Appellees assert vote-dilution claims under the Equal Protection Clause and First Amendment, their proposed tests are different. For example, the *League* Appellees argue that, to prevail on a vote-dilution claim, a plaintiff must prove that (1) a particular district was drawn with partisan intent; and (2) this district belongs to a district plan that is severely and durably asymmetric. The *League* Appellees would also provide the defendant with an opportunity to show that this asymmetry is justified by the jurisdiction's political geography or nonpartisan redistricting objectives, in which case no liability would attach. By contrast, the *Common Cause* Appellees argue that, to prevail on a vote-dilution claim, a plaintiff need only show that invidious partisan intent was the predominant consideration in the drawing of his or her district's boundaries, and that the weight of his or her vote was measurably diminished as a result. Thus, the *Common Cause* Appellees' vote-dilution theory does not require showings of severe or durable plan-wide asymmetry. Especially given the scarcity of precedent in this area, Appellees believe the Court would benefit by

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[1] The plaintiffs-appellees in *Lamone v. Benisek*, No. 18-726, assert "associational theory" claims under the First Amendment, but do not assert claims under Article I.

engaging with both sets of Appellees' respective approaches to vote-dilution claims.

Third, Appellees proffered different forms of empirical evidence. At trial, the *Common Cause* Appellees relied principally on the analyses of Dr. Jonathan C. Mattingly and Dr. Jowei Chen, who employed computer algorithms to generate thousands of alternative districting maps, and then used real-world, precinct-level election data to simulate hypothetical elections under each such map. *Common Cause* Mot. to Affirm at 10–12. On remand, the *Common Cause* Appellees presented Dr. Chen's supplemental analysis, showing where the partisan split of each voter-plaintiff's actual district under the 2016 Plan lies on the continuum of thousands of hypothetical districts in which that voter might have been placed. *Id.* at 13–14. The *Common Cause* Appellees did not rely on any plan-wide measures of partisan asymmetry.

By contrast, at trial, the *League* Appellees presented several plan-wide measures of partisan asymmetry to show the 2016 Plan's extremity: Dr. Simon Jackman's calculations of the efficiency gap, partisan bias, and the mean-median difference. The *League* Appellees also presented Dr. Jackman's "sensitivity testing," which revealed that the 2016 Plan would remain skewed in any plausible electoral environment. The *League* Appellees further relied on Dr. Chen's alternative districting maps, though with their summary statistics reported in efficiency gaps as well as seats. *League* Mot. to Affirm at 13–16. On remand, the *League* Appellees selected a single alternative map generated by Dr. Chen ("Plan 2–297"), and explained how League members cracked or packed by the 2016 Plan are uncracked or unpacked by this map. *Id.* at 9–13.

The District Court found all of these different forms of "empirical evidence" compelling, especially as they "all point[ed] to the same conclusion." App–133. However, the Court may be interested in exploring their significance individually, and each set of Appellees is best positioned to offer argument regarding the analyses that they presented below.

Fourth, while both sets of Appellees include individual North Carolina voters and a nonprofit voting-rights organization, only the *Common Cause* Appellees include an injured political party. Four Justices have emphasized the unique position political parties occupy with respect to partisan gerrymandering, which "weakens [a party's] capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (noting that "what is true for party members may be ... triply true for the party itself"). Only the *Common Cause* Appellees have briefed and developed the arguments involving standing, liability, and remedy for statewide challenges brought on behalf of a political party.[2]

This Court has previously granted divided argument where aligned parties pressed different claims or advocated different doctrinal approaches—including in gerrymandering cases. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 52 (2017) (permitting divided argument between appellants, members of the Wisconsin Elections Commission, and their *amici*, Wisconsin State Senate and Assembly); *Ala. Democratic Conf. v. Alabama*, 135 S. Ct. 434 (2014) (permitting divided argument between challengers to Alabama districting plan where they advanced different analytical frameworks); *LULAC v. Perry*, 126 S. Ct. 1186 (2006)

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[2] The plaintiffs in *Lamone* are all individual voters (some of whom are also party or campaign officials) and do not include a political party.

(permitting divided argument between challengers to Texas districting plan where they "d[id] not join each other as to all claims"); *see also Am. Legion v. Am. Humanist Ass'n*, 2019 U.S. LEXIS 793 (Jan. 22, 2019) (permitting divided argument where co-parties had "distinct interests" and had "pressed different arguments" below). It should do the same here.

II. ENLARGEMENT OF ARGUMENT TIME IS APPROPRIATE.

In addition to divided argument, Appellees request enlargement of the combined argument time for each side from 30 to at least 40 minutes.

This Court has granted additional time where separately filed cases presenting distinct claims are consolidated for argument. *See* Shapiro et al., Supreme Court Practice 780 n.31 (10th ed. 2013). Here, as discussed above, these consolidated cases present distinct claims, theories, and evidence meriting full exploration.

This Court has also granted additional time in cases of "extraordinary public importance and difficulty," including redistricting cases. *Id.* at 790–91; *see, e.g.*, *United States v. Texas*, 136 S. Ct. 1539 (2016) (90 minutes); *Wittman v. Personhuballah*, 136 S. Ct. 1241 (2016) (70 minutes); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (150 minutes); *NFIB v. Sebelius*, 132 S. Ct. 1618 (2012) (six hours); *Citizens United v. FEC*, 557 U.S. 952 (2009) (80 minutes); *LULAC v. Perry*, 126 S. Ct. 827 (2005) (120 minutes); *McConnell v. FEC*, 124 S. Ct. 16 (2003) (four hours); *Bush v. Vera*, 116 S. Ct. 295 (1995) (80 minutes). This is such a case: the issues involved are both unusually "unsettled," *Gill*, 138 S. Ct. at 1934, and exceptionally "urgent," *id.* at 1941 (Kagan, J., concurring).

* * *

For the reasons stated, Appellees respectfully request that the Court grant equally divided argument time to the *Common Cause* and *League* Appellees and enlarge the total argument time for each side from 30 to at least 40 minutes.

Respectfully submitted,

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February 5, 2019

No. 18-422

In the
Supreme Court of the United States

ROBERT A. RUCHO, *et al*
Appellants

v.

COMMON CAUSE , et al
Appellees

On Appeal from the United States District Court
for the Middle District of North Carolina

AMICUS CURIAE BRIEF OF PHILIP P. KALODNER IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE AND CONSENT OF ALL PARTIES TO FILING OF AMICUS CURIAE BRIEF

Philip P. Kalodner is a lawyer who has studied the issue of partisan gerrymandering and the loss of voter power which it and the geographic concentration of voters of one party has caused, and has developed what he believes is a solution which is consistent with, and indeed required by, this Court's prior decisions.

Because to his knowledge no one else has proposed such an analysis and solution, and this Court now has before it the instant matter which provides an opportunity to consider that analysis and solution, he determined to bring it to the Court's attention as an amicus curiae.

Philip Kalodner has no economic interest in the matter and nothing to gain except as a citizen and voter.

He has sought and obtained the written consent of all parties in this matter to his filing an amicus curiae Brief– Appellants Robert A, Rucho et al, Appellants, and Appellees Common Cause et al and League of Women Voters et al, all of whom have filed or will file blanket consents to the filing of amicus curiae briefs.

SUMMARY OF ARGUMENT

The District Court correctly identified Article I, Section 2 of the Constitution (along with Section 4) as a basis for rejection of the Legislature-enacted Congressional districting plan, but (a) incorrectly interpreted it as doing so by prohibiting any districting made with partisan motivation, and (b) unnecessarily cited as bases for its decision the First and Fourteenth Amendments.

Instead, properly read, Article I Section 2, in its requirement that "The House of Representatives shall be composed of members chosen each second year by the people of the several states..." is dispositive of the matter. It requires that to the extent possible each of the "people" must have a meaningful vote in the selection of the members of the House, i.e. a vote which has a real potential effect in determining the members of the House representing the people of the State.

So read, Article 1, Section 2 provides an affirmative directive as to how districting must be performed

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No counsel for a party authored the brief in whole or in part and no counsel for a party or party or anyone else other than this amicus made a monetary contribution to fund its preparation or submission

It does not bar partisanship, but limits it. It makes unnecessary a determination of Legislative intent. And it makes unnecessary reliance on the First and Fourteenth Amendments.

The districting methodology which is required to maximize the power of the people to select their Representatives which is described herein if followed in each State will reduce if not eliminate the need for judicial review. It will address and reduce the loss of voting power which occurs by virtue of the geographic concentration of voters of one party as well as by virtue of extreme partisan gerrymandering. And, finally by its recognition that the Constitution mandates a methodology for Congressional districting, (a) it makes unnecessary the remedy which is increasingly being used of transferring the responsibility for Congressional districting from elected state legislatures directly responsible to the voters to appointed commissions and (b) it avoids the resort by state courts to state constitutional provisions with the inevitable disparity of treatment from state to state.

Finally, the methodology here described as being mandated by the Constitution, will maximize the number of competitive Congressional districts in each State with more than one House seat, thereby shifting the focus from party primaries which have

moved the parties to their respective extremes to general election competition which will in turn lead to a more effective House. By doing so, it will address the shift of power to the Executive and of the responsibility for contentious social issues to this Court which have resulted from a less effective Congress.

ARGUMENT

I ARTICLE I, SECTION 2 OF THE CONSTITUTION REQUIRES THAT EACH OF THE "PEOPLE" VOTING SHOULD HAVE THE MAXIMUM POSSIBLE POWER TO EFFECT THE SELECTION OF THE MEMBERS OF THE HOUSE OF REPRESENTATIVES

In Wesberry v. Sanders, 376 U.S.1, 7-8, (1964) this Court said:

"We hold that construed in its historical content, the command of Art. 1 Section 2 that Representatives be chosen by 'the people of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

(Significantly, in so holding, this Court noted that "We do not reach the arguments that the

Georgia statute (establishing Congressional Districts of unequal population) violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment (footnote 10)

In Wesberry, this Court held that drawing districts of unequal population was "vote-diluting discrimination... accomplished through the device of districts containing widely varied numbers of inhabitants," explaining "to say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People', a principle tenaciously fought for and established at the Constitutional Convention." id.

This Court's continuing commitment to the principle of Wesberry was noted two years ago in Evenwel v. Abbott, 578 U.S._____14-940, 136 S. Ct. 1120, 1124 (2016): "Over the ensuing decades (since Wesberry), the Court has several times elaborated on the scope of the one-person, one-vote rule. States must draw Congressional districts with populations as close to perfect equality as possible."

Another, and indeed more pernicious form of vote-diluting discrimination, in violation of the principle that "one man's vote is to be worth as much

as another's" occurs when in a Congressional district it can be reliably predicted that the candidate of one party will inevitably win; in such a situation, the voters for the inevitably losing other party will have the power of their votes not only diluted, but eliminated, while the voters for the winning party candidate will have the power of their votes diluted to the extent to which they are not needed to succeed in electing their candidate. (An example of such a situation is one where it can be reliably predicted that the candidate of one of the parties will inevitably obtain 70 to 80% of the vote, and the candidate of the other party between 20 and 30% of the vote; the 20-30% voters have had the worth of their votes diluted to 0, i.e. eliminated, while the 70-80% voters have had the worth of their votes diluted in the same manner as suffered by the voters in a district with a population larger than the population in other districts in the same State, the situation addressed in Wesberry.)

Such an elimination of voting power for the overwhelmed minority party voters or dilution of the power of majority party candidates results both from (a) gerrymandering, i.e. districting for partisan advantage or to protect incumbents, and (b) the geographic concentration of voters of one of the parties, whether urban or rural.

In such a situation, the principle of Art 1 Section 2 that, as declared in Wesberry "one man's vote is to be worth as much as another's"is violated; vote-diluting discrimination occurs because a vote is worth more in one district than in another.

Moreover, that Section 2 contains the standard for the drawing of House districts , i.e. the maximization of voter power, is confirmed by the fact that Section 4 of Article I assigns to the states the setting of "The times, places and manner of holding elections for... Representatives" subject to the right of Congress to override such determinations, but not the determination of the standard to be used in drawing districts; such has been already been established and mandated by the Section 2 requirement that districts must be drawn to maximize voter power. Indeed Congress is itself as bound as the States to the requirement of Section 2 so that in any drawing of Congressional districts by it, should it seek to do so pursuant to Article I Section 4, the power of each voter must be maximized to the extent possible.

This Court has never rejected the contention that what it has recognized as the anti-dilution mandate of Article I Section 2 which precludes the creation of Congressional districts with unequal populations is even more relevant to (a) prohibit the

entire elimination of voting power for those supporting a party's candidate who cannot win because of the structuring of the district, and to (b) preclude the dilution of the voting power of those who support the winning party candidate in such a district, dilution which occurs because the percentage of votes cast for such candidate far exceeds the majority of votes required for his election. This Court has never rejected such a contention as here made because the argument has to the best of this amicus's knowledge never been made. Indeed, the view of the four Justices who advocated a determination of non-justicability in Vieth v. Jubelirer, 541 U.S. 267 (2004)-- that Article I Section 2 does not provide a "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting", id, at 305– was made only in response to an argument that Article I Section 2 precludes partisan intent or excessive partisan intent. Here, the contention is instead that Article I Section 2 precludes only elimination or dilution of voting power, and it is the elimination of such dilution which in turn limits partisan considerations.

The only issue is whether and the extent to which it is "practicable" to eliminate voter power elimination or dilution, an issue to which we will

now turn.

II A METHODOLOGY DOES EXIST FOR DRAWING CONGRESSIONAL DISTRICTS WHICH WILL SIGNIFICANTLY INCREASE THE POWER OF VOTERS IN THE ELECTION OF REPRESENTATIVES

Two obvious restraints exist in providing voters in the election of their member of the House of Representatives with less dilution and more power in the exercise of the franchise: (a) the elections to be affected will occur in the future, and the only information we have available is what occurred in the past, and (b) in many, if not most of the States with more than one Congressional district, more candidates for the House of Representatives of one of the parties will inevitably win, no matter how districting is done.

But one central fact on which both those drawing the districts and those opposing such districting agree, and which past history confirms, provides a methodology for dealing with those restraints– past election results can be used to predict to a significant extent future election results, because to a significant degree most voters vote consistently for the candidates of the same political

party. Legislatures drawing districts for partisan advantage rely on past results in drawing districts, and history has proven them largely right in their predictions. And those contesting such districts oppose them as improperly partisan because they also agree that the past can be used to predict the future.

(The simplifying assumption that past voters will be the future voters and that they will act in the same way in their support of a party's candidates for Congress is no more of a stretch than this Court's simplifying assumptions that the number of people in each district will remain the same or grow or diminish in the same ratio as in other districts in the State, and that the equal populations will contain an equal number of voters, assumptions which underlie the requirement of districts with equal population as of the immediately preceding decennial census.)

Using the average of party voting in the past four federal election results as the most available and best predictor of voting in the federal elections in the decade following the redistricting which follows the decennial census, the maximizing of the power of the people in electing Representatives is best served by a two step process:

Voting power is provided all voters , at least to some extent if , as a first step in districting, (a) the

average State-wide percentage of the vote for each party's candidates in the State for the House of Representatives in the past four even year elections is calculated, (b) each such percentage is increased so that the sum of all party percentages equals 100, and c) such revised percentages for each party are multiplied by the number of congressional seats provided the State..

Individual districts can then be created in which it is likely, but by no means inevitable, based upon prior elections that the number of congressmen representing each party in the state would be in accordance with such state-wide party preference as described above.

In creating such individual districts, an additional goal should be to provide voting power to as many voters as possible, i.e. to maximize the number of competitive districts in which either party can possibly win and therefore districts in which every voter has real power.

1. As a first step in achieving both goals to the extent possible, a number of districts should be created in which if past voting patterns were predictive, the candidate of the party with the fewer Congressmen in the State in accordance with the above calculation (the "minority party") would win.. Such would accomplish the first goal, i.e. providing

voting power to all, since in all other districts the likely winner would be the candidate of the party which would have won a majority of congressman in accordance with the above state-wide calculation (the "majority party"), and the state' congressional delegation would be divided in the same manner as if the members of Congress were selected based on the state-wide party preference of voters..

Each district created for estimated victory by the minority party candidate if past election results were predictive, would be one in which the victory of that party candidate would be, based on such past election results, by a minimum of 5% and a maximum of 10%. The minimum is to insure the likelihood of victory for the minority party candidate, while the maximum is to assure that the candidate of the state-wide "majority" party could still win, thereby maximizing to the extent possible the power of all voters in the district. (The 5% minimum and 10% maximum numbers are properly adjusted to reflect the actual range of experience in the district; they are properly adjusted to numbers which based on that experience would achieve the likelihood of victory for the "minority" party candidate while creating a realistic possibility for victory by the " majority" party candidate.)

The past election results employed should be

an average of the prior four federal elections. The state-wide votes for House of Representatives candidates should be employed if all congressional races in the state were contested ones; in any precinct in which the voters in past elections did not have the opportunity to vote for a Congressional candidate in a contested race, the votes for the state-wide candidate at the top of the voting ballot should be employed.

2. As a next step, as many districts as is possible should be created in which, on the same basis of past election results, the party with a majority of state-wide votes for House candidates in the past four even year elections would win by a minimum of 5% and a maximum of 10% (subject to the same adjustment for actual experience), thus producing districts in which the majority part would likely win, but the minority party could potentially win.

The above two steps would result in what are properly described as competitive districts, and would all be districts in which all voters would have the potential power to affect the result.

In States like Pennsylvania in which State-wide the past election results would show one party winning on average by 10% or less, the above two steps would complete the districting. All districts

would accordingly be competitive

3. As a final step in those States where there would remain the task of creating districts in which the State majority party would inevitably win, such districts would be created.

(As a hypothetical example,, in a State with 20 Congressional districts and in which, on average in the past four elections, Republican candidates for Congress received 60% of all votes for Congressional candidates in the State, and the Democratic party candidates 40%, 8 districts would be created in which in those past elections on average, the Democratic candidate would have won by 5 to 10%, and as many districts as possible would be created in which the Republican candidate in those past elections would have won by 5 to 10 %. The balance of the districts, probably 4 ,would be ones in which in those past elections the Republican candidate would have won overwhelmingly. The result would be some 16 districts which would be competitive, i.e. in which all voters would have voting power, while all voters in the State would have had power in the selection of the number of districts in which the candidate of their party preference would be the likely winner)

The districts created in accordance with the above two or three step process would not be as

compact (although they can and should be contiguous) as a plan with non-competitive districts could be, and it would inevitably increase the number of municipalities and counties which would be in more than one Congressional district. To the extent, if any, to which the increase in the geographic spread of a district would include a district population more diverse in its interests, the Congressman representing the district would be required to consider interests more like those of the population of the country as a whole, a clearly desirable goal.

Moreover, it would accomplish the Constitutional mandate that the power of voters to select their Congressmen be maximized, and in doing so it would increase to the maximum extent possible the number of Congressional districts which are competitive; by accomplishing the latter, it would result in many more center left and center right Congressman and fewer far left and far right Congressmen and would therefore make possible a functioning Congress better able to cross party lines, and compromise and thereby enact legislation.

III FOLLOWING THE MANDATE OF ARTICLE I, SECTION 2 THAT THE POWER OF VOTERS SHOULD BE MAXIMIZED LIMITS BUT DOES NOT ELIMINATE PARTISANSHIP AND MAKES UNNECESSARY THE DETERMINATION OF THE INTENT OF THE BODY DISTRICTING AND ITS PARTISAN EFFECT

The methodology described above leaves the state Legislature free to select the Congressional districts in which the minority party will be given the 5 to 10% edge and the districts in which the majority party will be given such an edge, and to determine the percentage edge in each district so long as it is within the permitted 5 to 10% range (or within an experience-justified range, as described above). In States in which there will inevitably be districts in which the majority party will inevitably win, the Legislature will be able to determine where those districts will be and their geographic shape. In all those decisions, partisan considerations will be permitted, as will efforts to protect incumbents.

Because limited partisanship will be permitted within the limit set by the mandate of voting power maximization, the Courts will not be required to determine whether partisan intent has existed, or existed to an unacceptable level in the

drawing of districts, nor will they be required to determine whether there has been an unacceptable partisan effect.

Nor, of course, because the mandate of maximum voting power in the "people" in the selection of members of the House of Representatives is contained in the body of the Constitution will the Courts be required to determine the implication of the First and Fourteenth Amendments in the drawing of Congressional districts, as they may well be still required in consideration of the drawing of state legislative districts.

If, in consideration of the drawing of state legislative districts this Court were to deem applicable the "equal protection" and "privileges and immunities" clauses of the Fourteenth Amendment, the standard should be of the same nature as is established by Section 2 for the election of Congress, i.e. providing voting power to all voters to the extent practicable in the same manner as here proposed for Congress; as in the case of Congress, no inquiry need be made as to the extent of partisan motive because excessive partisanship would be precluded by the affirmative requirement of providing voting power to all.

Finally, it should be noted that were this Court to determine that the drawing of state

legislative districts was non-justiciable under the federal Constitution, and therefore a matter for State courts in applying state constitutions, it would have no effect in Congressional districting as mandated by Article I.

IV MAKING THE PROVIDING OF VOTING POWER TO ALL TO THE EXTENT PRACTICABLE A CRITERIA SECOND ONLY TO THE REQUIREMENT OF EQUAL POPULATION IN EACH DISTRICT WOULD PROPERLY LIMIT BUT NOT ELIMINATE HONORING TRADITIONAL DISTRICTING CONSIDERATIONS

The traditional considerations in Congressional (and State legislative) districting have been that the district be (a) contiguous, (b) compact, c) honor local governmental boundaries, and (d) protect incumbents.

First and foremost it should be noted that the Article I Section 2 Constitutional requirement of equal population, which this Court has already recognized, and its secondary requirement that within such equal population districts voter power should be maximized to the extent practicable which this Brief argues this Court should here recognize, necessarily take precedent, and must be honored

even if, and the extent to which , the result is to limit the use of the traditional criteria.

The requirement that each district must be contiguous can still be met.

But districts drawn to maximize voter power will undoubtedly be less compact, will likely require the crossing of more local government boundaries, and will necessarily limit the protection of incumbents.

As to the argument for geographic compactness as a critical goal, it made sense when the congressional districts contained only 30,000 people as they did when the election of Congress began and when a congressman could visit his constituents only by horseback or horse drawn carriage. It is far less compelling when a district contains, as it now does, 700,000 and when visits can be conducted by auto, telephone and the internet, inter alia. Moreover, it inexplicably reflects a concern for ease of travel to constituents in multi-district states that does not and cannot exist for the far greater travel required of congressman in single district states.

And to the extent to which the argument for compactness is informed by the expectation that 30,000 people will have similar concerns in the consideration of congressional legislation, such is

hardly expected to be true when the population is 700,000 and growing; indeed, the resulting need for the Congressman representing the district to consider more diverse voter interests, more clearly reflecting the interests of the population of the country as a whole, is a clearly desirable goal.

The argument for honoring county and municipal government boundaries, presumably informed by the anticipation that those individual government entities had different and specific interests in federal legislation has no persuasive force when federal legislation does not generally, perhaps almost never, applies differently to such different governmental entities within a state. And, again, whatever sense it made when a congressional district contained 30,000, it hardly makes sense when, because the district contains 700,000, practically all congressional districts contain governmental entitles with different interests. On too many occasions, the argument for a particular districting on the basis that it better honors local government boundaries is being advanced by proponents whose only real interest is their respective partisan advantage.

Finally, the argument that districting may be properly informed by a desire to protect incumbents runs directly afoul of the perception which drives the

recurring campaign for term limits, i.e. that a change in congressional office holders is to be desired for fresh thinking and new energy. Moreover, while districting driven by the need for compactness and the honoring of county and municipal boundaries may only unintentionally lead to creating districts in which the candidates of the same party always win, the protection of incumbents requires the intentional creation of districts in which the incumbents' party inevitably wins, thereby intentionally limiting the power of the voters who prefer a candidate opposing such incumbent. The extent to which the protection of incumbents has informed districting is demonstrated by a recent study which concludes that in only some 72 of the 435 congressional districts is there a better than a 1 in 6 chance that the incumbent or a candidate of the same party will lose. The same study suggests that if districts were drawn to be competitive, i.e. to maximize the power of each voter in the district, there would be 242 competitive districts. FiveThirtyEight: The Atlas of Redistricting, published January 25,2018. https://projects.fivethirtyeight.com

As noted above, under the methodology here suggested for maximizing voter power, the drawer of Congressional districts may still provide some incumbents with absolute protection, i.e. in districts

which are necessarily non-competitive, and many incumbents limited protection, i.e. in districts in which their party has a designed 5 to 10% advantage.

V THE SUBSTANTIAL LIMITATION OF PARTISAN GERRYMANDERING WHICH WOULD BE THE RESULT OF MAXIMIZING THE POWER OF EACH VOTER WOULD AVOID THE ADOPTION OF ALTERNATIVE UNSATISFACTORY SOLUTIONS

As this Court's docket reflects, there is an increasing public concern over partisan gerrymandering in the drawing of Congressional districts..

Absent the adoption by this Court of an affirmative test and methodology for Congressional districting as here proposed, there will likely be continued resort to two alternatives already being employed and another threatened to be employed, none of which will necessarily provide the desired elimination of excessive partisan gerrymandering and each of which has an undesirable effect:

The two which have already been resorted to are (a) the application to State courts employing State Constitutional provisions to strike Legislative

Congressional districting and (b) the replacement of state legislatures by independent Commissions to perform districting. The one being advocated is the substitution of multi-member Congressional districts for single member districts.

Before noting the additional undesirable effects of each, it must be noted than none will work as long as the focus remains on elimination of excessive partisan intent rather than, as here advocated, the establishment of an affirmative test, i.e. the maximization of the power of each voter to the extent practicable. It does not matter who does the districting, whether it be the state legislature, a commission or a state court; excessive partisanship remains a threat unless there is an affirmative standard as here suggested which, by its nature eliminates excessive partisanship. Nor would the use of multi-member districts eliminate the possibility that they would be drawn with excessive partisanship.

And, while not eliminating the possibility of excessive partisanship, each of the proposed alternative solutions presents has at least one undesirable effect:

1. Substituting a commission for the legislature to perform districting places an important legislative function in the hands of those

not answerable to the people in elections.

If, as here argued, the federal Constitution establishes an affirmative standard for Congressional districting, then any commission to which the state transfers the drawing of Congressional districts would be as bound to that standard as would the state legislature.

2. Resort to state courts to apply state constitutional standards to determine whether there has been excessive partisanship in the drawing of federal Congressional districts threatens (a) the possibility, as was the situation recently in Pennsylvania, of a districting which a federal court determined did not violate the federal Constitution but which a state Supreme Court struck down as a violation of the state constitution Agre v. Wolf, 284 F. Supp. 3d 591 (E.D. Pa. 2018), appeal to Supreme Court dismissed as moot 17-339 (2018), League of Women Voters Of Pennsylvania v Commonwealth of Pennsylvania, 178 A3d 737 (Pa. 2018), *cert. denied* sub nom. Turzai v Brandt 17-1700 (2018). , and (b) varying inconsistent standards being applied in determining Congressional districting, with some state courts finding applicable state constitutional standards and others finding none.

If, as here argued, the federal constitution establishes an affirmative standard for

Congressional districting, there is no room for the application of state standards.

3. The use of multi-member congressional districts would eliminate the relationship between a single congressman and the population of a single district.

CONCLUSION

The Court should either (a) set this case for plenary consideration and direct the parties to address the argument here presented that Article I Section 2 of the Constitution mandates the maximization of voter power and that the methodology here proposed satisfies that mandate, or (b) remand the mater to the District Court with instructions to it to consider such mandate and such methodology.

Respectfully submitted,

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No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal From the United States District Court for the Middle District of North Carolina

JOINT APPENDIX
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UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 16-cv-01026

COMMON CAUSE, *et al.*,

v.

ROBERT A. RUCHO, *et al.*

DOCKET ENTRIES

Date Filed	#	Docket Text
08/05/2016	1	**COMPLAINT THREE JUDGE COURT *FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF* against All Defendants (Filing fee $ 400 receipt number 0418-1962481.), filed by COY E. BREWER, JR, ALICE L. BORDSEN, NORTH CAROLINA DEMOCRATIC PARTY, COMMON CAUSE, ROBERT WARREN WOLF, RUSSELL G. WALKER, JR, RICHARD TAFT, LARRY D. HALL, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, JONES P. BYRD, JOHN W. GRESHAM, WILLIAM H. FREEMAN, DOUGLAS BERGER, CYNTHIA S. BOYLAN,**

Date Filed	#	Docket Text
		CHERYL LEE TAFT. (Attachments: # 1 Exhibit A - 2016 Contingent Congressional Plan Committee Adopted Criteria, # 2 Exhibit B - 2016 Congressional Redistricting Plan, # 3 Civil Cover Sheet)(SPEAS, EDWIN) (Entered: 08/05/2016)
		* * *
08/05/2016	4	CORPORATE DISCLOSURE STATEMENT filed pursuant to FRCP 7.1(a) by Plaintiff COMMON CAUSE (SPEAS, EDWIN) (Entered: 08/05/2016)
		* * *
08/05/2016		Case ASSIGNED to CHIEF JUDGE WILLIAM L. OSTEEN, JR and MAGISTRATE JUDGE JOI ELIZABETH PEAKE. Set flag for Magistrate Judge Joi Elizabeth Peake. (Coyne, Michelle) (Entered: 08/05/2016)
08/08/2016	8	Summons Issued as to All Defendants. (Attachments: # 1 Summons to David R. Lewis, # 2 Summons to Philip E. Berger, # 3 Summons to Timothy K. Moore, # 4 Summons to A. Grant Whitney, Jr., # 5 Summons to Patrick L.

Date Filed	#	Docket Text
		McCrory, # 6 Summons to The North Carolina State Board of Elections, # 7 Summons to the State of North Carolina) (Garland, Leah) (Entered: 08/08/2016)
08/08/2016	9	Notice of Right to Consent. Counsel shall serve the attached form on all parties. (Garland, Leah) (Entered: 08/08/2016)
08/10/2016	10	WAIVER OF SERVICE of SUMMONS by COY E. BREWER, JR, ALICE L. BORDSEN, NORTH CAROLINA DEMOCRATIC PARTY, COMMON CAUSE, ROBERT WARREN WOLF, RUSSELL G. WALKER, JR, RICHARD TAFT, LARRY D. HALL, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, JONES P. BYRD, JOHN W. GRESHAM, WILLIAM H. FREEMAN, DOUGLAS BERGER, CYNTHIA S. BOYLAN, CHERYL LEE TAFT. PHILIP E. BERGER waiver sent on 8/9/2016, answer due 10/11/2016; DAVID R. LEWIS waiver sent on 8/9/2016, answer

Date Filed	#	Docket Text
		due 10/11/2016; TIMOTHY K. MOORE waiver sent on 8/9/2016, answer due 10/11/2016; ROBERT A. RUCHO waiver sent on 8/9/2016, answer due 10/11/2016; STATE OF NORTH CAROLINA waiver sent on 8/9/2016, answer due 10/11/2016; THE NORTH CAROLINA STATE BOARD OF ELECTIONS waiver sent on 8/9/2016, answer due 10/11/2016; A. GRANT WHITNEY, JR waiver sent on 8/9/2016, answer due 10/11/2016. (SPEAS, EDWIN) (Entered: 08/10/2016)
08/15/2016	11	WAIVER OF SERVICE of SUMMONS by COY E. BREWER, JR, ALICE L. BORDSEN, NORTH CAROLINA DEMOCRATIC PARTY, COMMON CAUSE, ROBERT WARREN WOLF, RUSSELL G. WALKER, JR, RICHARD TAFT, LARRY D. HALL, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, JONES P. BYRD, JOHN W. GRESHAM, WILLIAM H. FREEMAN,

Date Filed	#	Docket Text
		DOUGLAS BERGER, CYNTHIA S. BOYLAN, CHERYL LEE TAFT. PATRICK L. McCRORY waiver sent on 8/11/2016, answer due 10/11/2016. (SPEAS, EDWIN) (Entered: 08/15/2016)
09/07/2016	12	Consent AMENDED COMPLAINT - *FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF - THREE JUDGE PANEL* against defendant PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, filed by COY E. BREWER, JR, ALICE L. BORDSEN, NORTH CAROLINA DEMOCRATIC PARTY, COMMON CAUSE, ROBERT WARREN WOLF, RUSSELL G. WALKER, JR, RICHARD TAFT, LARRY D. HALL, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, JONES P. BYRD, JOHN W. GRESHAM,

Date Filed	#	Docket Text
		WILLIAM H. FREEMAN, DOUGLAS BERGER, CYNTHIA S. BOYLAN, CHERYL LEE TAFT, MORTON LURIE. (Attachments: # 1 Exhibit A - 2016 Contingent Congressional Plan Committee Adopted Criteria, # 2 Exhibit B - 2016 Congressional Redistricting Plan)(SPEAS, EDWIN) (Entered: 09/07/2016)
		* * *
09/15/2016	22	MOTION for Extension of Time to File Answer re 12 Amended Complaint,,, by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. (Attachments: # 1 Text of Proposed Order)(PETERS, ALEXANDER) (Entered: 09/15/2016)
09/15/2016		ORDER granting 22 Motion for Extension of Time to Answer for PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE

Date Filed	#	Docket Text
		OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR. Answer due by 10/31/2016. Signed by John Brubaker, Clerk of Court, on 09/15/2016. (Brubaker, John) (Entered: 09/15/2016)
		* * *
10/18/2016	26	RESPONSE in Opposition re (17 in 1:16-cv-01164-WO-JEP) MOTION for Extension of Time to File Answer re (1) Complaint,, filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Email Correspondence, # 2 Exhibit Harris v McCrory Order) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-

Date Filed	#	Docket Text
		WO-JEP(EARLS, ANITA) (Entered: 10/18/2016)
10/25/2016	27	**ORDER designating the Honorable James A. Wynn, United States Circuit Judge for the Fourth Circuit, the Honorable William L. Osteen, Jr., Chief United States District Judge for the Middle District of North Carolina, and the Honorable W. Earl Britt, Senior United States District Judge the Eastern District of North Carolina, to serve in the hearing and determination of this matter, constituting a district court of three judges as provided by law. Signed on 10/25/2016 by ROGER L. GREGORY, Chief Judge, U.S. Court of Appeals for the Fourth Circuit. (Garland, Leah) (Entered: 10/25/2016)**
10/31/2016	28	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH

Date Filed	#	Docket Text
		CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. Responses due by 11/25/2016 (FARR, THOMAS) (Entered: 10/31/2016)
10/31/2016	29	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR re 28 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 10/31/2016)
11/10/2016	30	Rule 26(f) Report (Individual). by DOUGLAS BERGER, ALICE L. BORDSEN,

Date Filed	#	Docket Text
		CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL g. WALKER, JR. ROBERT WARREN WOLF. Responses due by 12/5/2016 (SPEAS, EDWIN) (Entered: 11/10/2016)
11/10/2016	31	MEMORANDUM filed by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT

Date Filed	#	Docket Text
		WARREN WOLF re 30 Rule 26(f) Report (Individual). - *Memorandum in Support of Plaintiffs' Rule 26(f) Report* filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (SPEAS, EDWIN) (Entered: 11/10/2016)
11/14/2016	32	Rule 26(f) Report (Individual). Responses due by 12/8/2016 by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR.(FARR, THOMAS) (Entered: 11/14/2016)

Date Filed	#	Docket Text
11/23/2016	33	RESPONSE in Opposition re 28 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 12/12/2016. (Attachments: # 1 Appendix A - Shapiro v. McManus, No. 1:13-CV-03233-JKB, 2016 WL 4445320 (D. Md. Aug. 24, 2016), # 2 Appendix B - Whitford v. Gill, No. 15- CV-421, 2016 U.S. Dist. LEXIS 160811 (W.D. Wis. Nov. 21, 2016))(SPEAS, EDWIN) (Entered: 11/23/2016)
12/07/2016	34	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE,

Date Filed	#	Docket Text
		PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, to Response to 28 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 12/07/2016)
12/14/2016		Motions Submitted: 28 Motion to Dismiss for Failure to State a Claim, 30 Rule 26(f) Report (Individual), 32 Rule 26(f) Report (Individual), to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 12/14/2016)
12/14/2016	35	MOTION for Pre-Trial Conference by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER,

Date Filed	#	Docket Text
		JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Text of Proposed Order)(SPEAS, EDWIN) (Entered: 12/14/2016)
12/15/2016		Motion Referred: re: 35 MOTION for Pre-Trial Conference, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 12/15/2016)
12/19/2016	36	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 12/19/2016; that Plaintiffs' Motion to Schedule Pre-Trial Conference in case number 1:16CV1026 (Doc. 35) is hereby GRANTED. FURTHER ORDERED that the parties in 1:16CV1164 shall meet and confer as required by

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		LR 16.1(b) and thereafter file an appropriate Rule 26(f) report(s), on or before January 4, 2017. Upon the filing of the Rule 26(f) reports, the Clerk is directed to promptly set a hearing on an initial pretrial conference as required by LR 16.1(c) for each of these cases. The Clerk may confer with all counsel to determine a date upon which all counsel may be available in anticipation of the filing of the pretrial reports. Nevertheless, the pretrial conference will be set at the direction of the court. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 12/19/2016)
1/13/2017	37	NOTICE of Hearing: Pretrial Conference set for 2/6/2017 02:00 PM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (Welch, Kelly) (Entered: 01/13/2017)
02/01/2017	38	AMENDED Rule 26(f) Report (Individual) by DOUGLAS BERGER, ALICE L.

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		BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF.(SPEAS, EDWIN) (Entered: 02/01/2017)
02/02/2017		Motion Submitted: 38 Rule 26(f) Report (Individual), to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 02/02/2017)
02/2/2017	39	Joint MOTION to Consolidate Cases. Case to be consolidated with 1:16-cv- 01164-WO-JEP (*Joint Consent Motion*) by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL,

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		MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Response to Motion due by 2/23/2017 (Attachments: # 1 Text of Proposed Order)(SPEAS, EDWIN) (Entered: 02/02/2017)
02/02/2017	40	MEMORANDUM filed by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF re 39 Joint MOTION to Consolidate Cases. Case to be consolidated with

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		1:16-cv-01164- WO-JEP (*Joint Consent Motion*) filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (SPEAS, EDWIN) (Entered: 02/02/2017)
02/06/2017		Motion Submitted: 39 Joint MOTION to Consolidate Case with 1:16cv1164, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 02/06/2017)
02/06/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., in G-1: Pretrial Conference held on 2/6/2017. Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe and Caroline

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		Mackie appeared on behalf of Plaintiffs Common Cause, et al. Attorneys Anita Earls and Gerald Hebert appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al. Attorneys Thomas Farr and James Bernier appeared on behalf of the Defendants. For reasons stated on the record, the Court orally grants 39 Joint Consent Motion to Consolidate Cases (1:16CV1026 & 1:16CV1164) for purposes of discovery and trial; Parties conferred and agreed upon scheduling order deadlines as to both cases; Parties to submit a proposed Joint Rule 26(f) Report for the Court's consideration; Court tentatively set this matter for trial on June 26, 2017. (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 02/06/2017)
02/07/2017	41	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 02/07/2017; that the following actions are

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		consolidated for purposes of discovery and trial: *League of Women Voters v. Rucho*, No. 1:16-cv-1164, and *Common Cause v. Rucho*, No. 1:16-cv-1026. All notices, requests, responses, motions and other filings related to both actions must be served on all counsel in each action and bear the case caption for each action that has been consolidated pursuant to this order. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 02/07/2017)
2/14/2017	42	JOINT 26(F) REPORT by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT

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		WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) Modified on 2/15/2017 to properly set out correct event. (Garland, Leah) (Entered: 02/14/2017)
02/15/2017	43	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA

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		DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF - *Common Cause's Preliminary Outline of Legal Standards (filed per Court's request at the February 6, 2017 status conference)* Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 02/15/2017)
		* * *
02/21/2017	45	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiff's Amended Complaint* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Response to Motion due by 3/14/2017 (FARR, THOMAS) (Entered: 02/21/2017)
02/21/2017	46	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE

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		OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR re 45 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Plaintiff's Amended Complaint* filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 02/21/2017)
03/01/2017	47	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 03/01/2017 approving without modification 42 RULE 26F (JOINT) in case 1:16-cv-01026-WO-JEP and 42 RULE 26F (JOINT) in case 1:16-cv-01164-WO-JEP. Discovery shall be established as Standard. Mediation is not required under LR 16.4 in this case. The parties state that they do not wish to reference the case to a Magistrate Judge or appointment of a master. Trial

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		is expected to take five (5) days and a jury trial has not been demanded. Plaintiff's Amended Pleadings due by 2/10/2017. Defendant's Amended Pleadings due by 2/10/2017. Discovery due by 4/28/2017. Joinder of Parties for Plaintiff due by 2/10/2017. Joinder of Parties for Defendant due by 2/10/2017. Motions due by 5/12/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP (Garland, Leah) (Entered: 03/01/2017)
		* * *
03/03/2017	49	ANSWER to Amended Complaint by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16- cv-01164-WO-JEP(FARR, THOMAS) (Entered: 03/03/2017)
03/03/2017	50	MEMORANDUM OPINION signed by JUDGE JAMES A. WYNN, JR., CHIEF JUDGE

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		WILLIAM L. OSTEEN, JR, and JUDGE W. EARL BRITT on 03/03/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP(Garland, Leah) Modified on 5/22/2017 to correct misspelling. (Garland, Leah) (Entered: 03/03/2017)
03/03/2017	51	ORDER signed JUDGE JAMES A. WYNN, JR, CHIEF JUDGE WILLIAM L. OSTEEN, JR, and JUDGE W. EARL BRITT on 03/03/2017, that the Defendants' Motion to Dismiss in Case No. 1:16-CV-1026 is DENIED; and it is further ORDERED that the Defendants' Motion to Dismiss First Amended Complaint Filed by League Of Women Voters Of North Carolina ("LWVNC") Plaintiffs in Case No. 1:16-CV-1164 is DENIED; and it is further ORDERED that the Defendants' Motion to Dismiss in Case No. 1:16-CV-1164 (Doc. 30) is DENIED, as moot. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP (Garland, Leah) (Entered: 03/03/2017)
		* * *

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05/23/2017	54	NOTICE of Trial Calendar: Bench Trial set for 6/26/2017 09:30 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Welch, Kelly) (Entered: 05/23/2017)
05/30/2017	55	FINAL PRETRIAL DISCLOSURES by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Attachment 1 Deposition Designations, # 2 Exhibit COLLINS, WILLIAM designations, # 3 Exhibit EVANS, ELIZABETH designations, # 4 Exhibit

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		FELDMAN, ELLIOTT designations, # 5 Exhibit FOX, FAULKNER designations, # 6 Exhibit LOVE, ANNETTE designations, # 7 Exhibit PALMER, MARIA designations, # 8 Exhibit PECK, GUNTHER designations, # 9 Exhibit PHELPS, ERSLA M designations, # 10 Exhibit QUINN, III, JOHN J designations, # 11 Exhibit SARVER, AARON J designations, # 12 Exhibit SUMPTER, JANIE S designations, # 13 Exhibit TROTTER KLENZ, MARY designations, # 14 Exhibit WILLIAMS, WILLIS designations, # 15 Exhibit LEWIS, REPRESENTATIVE DAVID I designations, # 16 Exhibit LEWIS, REPRESENTATIVE DAVID II designations, # 17 Exhibit HOFELLER, THOMAS B I designations, # 18 Exhibit HOFELLER, THOMAS B II designations, # 19 Exhibit RUCHO, SENATOR ROBERT A designations, # 20 Exhibit GIMPEL, JAMES G designations, # 21 Exhibit

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		HOOD III, M.V. designations, # 22 Exhibit TRENDE, SEAN designations) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	56	FINAL PRETRIAL DISCLOSURES by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	57	(See Amended Document 67) PRETRIAL DISCLOSURES by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM

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		H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Exhibit A - Deposition Designations, # 2 Exhibit B - Joint Plaintiffs' Exhibit List, # 3 Exhibit C - Common Cause Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) Modified on 6/14/2017 (Welch, Kelly). (Entered: 05/30/2017)
05/30/2017	58	*Exhibit List* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER,

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		JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Attachment 1 Joint Plaintiffs' Exhibit List, # 2 Exhibit Attachment 2 LWVNC Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	59	FINAL PRETRIAL DISCLOSURES by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit 1 - Designations of Deposition Testimony, # 2 Exhibit 2 - Exhibit List (Expect to Offer), # 3 Exhibit 3 - Exhibit List (May Offer)) Associated

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		Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP (MCKNIGHT, MICHAEL) (Entered: 05/30/2017)
		* * *
06/05/2017	61	Proposed Findings of Fact and Conclusions of Law by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 06/05/2017)
		* * *
06/05/2017	63	Proposed Findings of Fact and Conclusions of Law by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE

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		OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(GREENWOOD, RUTH) (Entered: 06/05/2017)
06/05/2017	64	TRIAL BRIEF by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (GREENWOOD, RUTH) (Entered: 06/05/2017)
06/05/2017	65	Proposed Findings of Fact and Conclusions of Law by

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		DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/05/2017)
06/08/2017	66	NOTICE OF HEARING: Final Pretrial Conference set for 6/19/2017 09:30 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 06/08/2017)
06/09/2017		TEXT ORDER - The parties have submitted a number of questions about trial issues to

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		the Clerk. The majority of those questions and any other pre-trial issues will be addressed at a pre-trial conference scheduled for June 19, 2017. However, in light of the upcoming trial date, two issues will be addressed in this order. First, the parties asked whether there is a pre-trial deadline for filing evidentiary motions and responses. Any pre-trial motions to exclude expert testimony shall be filed on or before Monday, June 19, 2017, at 5:00 p.m. Responses shall be filed on or before 12:00 noon on Thursday, June 22, 2017. A motion to exclude expert testimony shall include as an exhibit the expert report of the challenged witness along with any rebuttal expert reports. The filing of any other motion in limine or evidentiary motion will be addressed during the pre-trial conference. Second, the League Plaintiffs filed their transcript designations along with their pre-trial disclosures. The Common Cause Plaintiffs and Defendants should file their transcript designations at the

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		earliest possible time. [Issued by CHIEF JUDGE WILLIAM L. OSTEEN, JR., on 06/09/2017.] Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP. (Cable, Frances) (Entered: 06/09/2017)
06/13/2017	67	AMENDED DOCUMENT (Amended Rule 26(a)(3)(A) Pretrial Disclosures) by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Amendment to (56 in 1:16-cv-01164-WO-JEP) Pretrial Disclosures,, . Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)

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06/13/2017	68	DESIGNATION OF DEPOSITION TRANSCRIPT by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)
06/13/2017	69	OBJECTION - Other re (59 in 1:16-cv-01026-WO-JEP, 58 in 1:16-cv-01164- WO-JEP) Final Pretrial Disclosures,, by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK,

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		ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Objections to Defendants' Exhibits, # 2 Exhibit Counter-Designations to Defendants Deposition Designations, # 3 Exhibit Collins Counter-Designations, # 4 Exhibit Feldman Counter-Designations, # 5 Exhibit Love Counter-Designations, # 6 Exhibit Palmer Counter-Designations, # 7 Exhibit Sumpter Counter-Designations, # 8 Exhibit Klenz Counter-Designations) Associated Cases: 1:16-cv-01164-WOJEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 06/13/2017)
06/13/2017	70	OBJECTION - Other re (58 in 1:16-cv-01164-WO-JEP, 59 in 1:16-cv-01026- WO-JEP) Final Pretrial Disclosures,, by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE,

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		WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)
06/13/2017	71	OBJECTION - Other re (57 in 1:16-cv-01026-WO-JEP, 56 in 1:16-cv-01164- WO-JEP) Pretrial Disclosures,, (58 in 1:16-cv-01026-WO-JEP, 57 in 1:16-cv- 01164-WO-JEP) Exhibit List, (55 in 1:16-cv-01164-WO-JEP, 56 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures, (54 in 1:16-cv-01164-WO-JEP, 55 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures,,,,, by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE

Date Filed	#	Docket Text
		BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit 1 - Defendants' Objections to Plaintiffs' Joint Exhibits, # 2 Exhibit 2 - Defendants' Objections to Plaintiff LWV's Proposed Exhibits, # 3 Exhibit 3 - Defendants' Objections to Plaintiff Common Cause's Proposed Exhibits, # 4 Exhibit 4 - Defendants' Objections and Counter- Designations of Plaintiffs Designations of Deposition Testimony) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 06/13/2017)
06/19/2017	72	MOTION in Limine *to exclude testimony of Sean P. Trende at trial* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL

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		FAULKNER FOX, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Response to Motion due by 6/22/2017 Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 06/19/2017)
06/19/2017	73	BRIEF re (71 in 1:16-cv-01164-WO-JEP) MOTION in Limine *to exclude testimony of Sean P. Trende at trial* . (Attachments: # 1 Exhibit 1 - Expert Report of Sean P. Trende, dated April 3, 2017, # 2 Exhibit 2 - Deposition of Sean P. Trende, dated May 5, 2017, # 3 Exhibit 3 - Curriculum Vitae of Sean P. Trende, # 4 Exhibit 4 Expert Report of Dr. Simon Jackman, dated April 18, 2017, # 5 Exhibit 5 - Bernard Grofman & Gary King, The Future of Partisan Symmetry as a Judicial Test for, # 6 Exhibit 6 Rebuttal Report of Dr. Simon Jackman, dated April 17, 2017, # 7 Exhibit 7 Deposition of

Date Filed	#	Docket Text
		James G. Gimpel, dated April 27, 2017, # 8 Exhibit 8 Curriculum Vitae of Dr. Simon Jackman, # 9 Exhibit 9 Curriculum Vitae of Dr. Jowei Chen, # 10 Exhibit 10 Curriculum Vitae of Dr. Jonathan Rodden, # 11 Exhibit 11 American Political Science Association, APSR Submission Guidelines, updated August 26, 2016, # 12 Exhibit 12 Trial Transcript, Whitford v. Nichol, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) (No. 1:15-cv-421-bbc), # 13 Exhibit 13 Expert Report of Simon Jackman, dated July 7, 2015, Whitford v. Nichol, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 1:15-cv-421-bbc), # 14 Exhibit 14 Almanac of American Politics 2014, at 1233 (Michael Barone et al. eds., 2014), # 15 Exhibit 15 Michael D. McDonald & Robin E. Best, Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases, 14 Election L.J. 312 (2015), # 16 Exhibit 16 - Samuel S. H. Wang, Three Tests for Practical Evaluation of Partisan Gerrymandering, 68 Stan. L.

Date Filed	#	Docket Text
		Rev. 1263 (2016)) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (GREENWOOD, RUTH) (Entered: 06/19/2017)
06/19/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., in G-1: Pretrial Conference held on 6/19/2017. Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven Epstein, Anita Earls, Anabelle Harless and Ruth Greenwood appeared on behalf of Plaintiffs. Attorneys Phillip Strach, Michael McKnight and James Bernier, Jr., appeared on behalf of Defendant. On the Court's own motion, the trial in this matter is continued to a date to be determined. Deadline for filing any Motions in Limine remains as today by 5:00 p.m. Responses due within fourteen days. Stipulations, Revised Joint Exhibit list and any motions with respect to expert witness testimony are to be filed one (1) week prior to the new trial date. Parties agree that the estimated trial time remains as

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		five (5) days. (Court Reporter Jane Calhoun.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(Welch, Kelly) (Entered: 06/19/2017)
06/26/2017	74	MOTION to Stay by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Response to Motion due by 7/17/2017 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(STRACH, PHILLIP) (Entered: 06/26/2017)
06/26/2017	75	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO re (74 in 1:16-cv-01026-WO-JEP, 73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS,

Date Filed	#	Docket Text
		TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 06/26/2017)
07/03/2017	76	RESPONSE in Opposition re (71 in 1:16-cv-01164-WO-JEP, 72 in 1:16-cv- 01026-WO-JEP) MOTION in Limine *to exclude testimony of Sean P. Trende* at trial filed by WILLIS WILLIAMS, ELIZABETH TORRES EVANS, GUNTHER PECK, WILLIAM COLLINS, AARON SARVER, JOHN QUINN, III, ANNETTE LOVE, ELLIOTT FELDMAN, CAROL FAULKNER FOX, MARIA PALMER, ERSLA PHELPS, JANIE SMITH SUMPTER filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE

Date Filed	#	Docket Text
		STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Replies due by 7/17/2017 (Attachments: # 1 Exhibit 1 - Chart of 1992-2016 Congressional Plans - Divided Counties and VTDs) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (STRACH, PHILLIP) (Entered: 07/03/2017)
07/17/2017	77	REPLY, filed by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS, to Response to (71 in 1:16-cv-01164-WO-JEP, 72 in 1:16-cv-01026-WO-JEP) MOTION in Limine *to exclude testimony of Sean P. Trende at trial* filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE

Date Filed	#	Docket Text
		OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 07/17/2017)
07/17/2018	78	RESPONSE in Opposition re (74 in 1:16-cv-01026-WO-JEP) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies due by 7/31/2017 Associated

Date Filed	#	Docket Text
		Cases: 1:16-cv- 01164-WO-JEP, 1:16-cv-01026-WO-JEP(HARLESS, ANNABELLE) (Entered: 07/17/2017)
07/17/2018	79	RESPONSE in Opposition re (74 in 1:16-cv-01026-WO-JEP, 73 in 1:16-cv- 01164-WO-JEP) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 7/31/2017 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP(SPEAS, EDWIN) (Entered: 07/17/2017)

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07/31/2017	80	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, to Response to (73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 07/31/2017)
		* * *
08/11/2017		Motions Submitted: (#74 in 1:16cv1026, #73 in 1:16cv1164) MOTION to Stay, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 08/11/2017)
08/23/2017	83	NOTICE OF HEARING: Hearing on Legislative Defendants' Motion to Stay set for 8/29/2017 11:30 AM in Raleigh, Courtroom #2 before

Date Filed	#	Docket Text
		SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. & CHIEF JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 08/23/2017)
08/28/2017	84	Suggestion of Subsequently Decided Authority by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. (Attachments: # 1 Exhibit Benisek et al v. Lamone et al. (D. Md. Aug. 24, 2017)) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16- cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 08/28/2017)
08/29/2017		Minute Entry for proceedings held before SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR., & (CHIEF JUDGE WILLIAM L. OSTEEN, JR. - participated via telephone conference call) in Raleigh, Courtroom 2: Motion

Date Filed	#	Docket Text
		Hearing held on 8/29/2017 re: (Doc. #74 in 1:16cv1026, Doc. #73 in 1:16cv1164) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS. Attorneys Edwin Speas, Jr., Emmet Bondurant, Steven Epstein, Annabelle Harless & Anita Earls appeared on behalf of Plaintiffs. Attorneys Alexander Peters, James Bernier, Jr., Michael McKnight & Phillip Strach appeared on behalf of Defendants. The court heard from counsel for the defendants regarding the basis for this motion. The court heard arguments from counsel for the Common Cause plaintiffs and counsel for the League of Women Voters plaintiffs. The Court addressed the reason for the delay of trial previously scheduled for June, 2017. After hearing closing arguments from the parties, the court takes this matter under advisement. (Court Reporter Amy Condon, EDNC.) Associated Cases:

Date Filed	#	Docket Text
		1:16cv1026, 1:16cv1164 (Welch, Kelly) (Entered: 08/29/2017)
08/29/2017	85	ORDER denying (74) Motion to Stay in case 1:16-cv-01026-WO-JEP and denying (73) Motion to Stay in case 1:16-cv-01164-WO-JEP. A written opinion will follow. Signed by JUDGE W. EARL BRITT on 8/29/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Marsh, Keah) (Entered: 08/29/2017)
09/01/2017	86	Transcript of Motion Hearing Proceedings held on 08/29/2017, before Judge WILLIAM L. OSTEEN, JR., Judge W. EARL BRITT, and Judge JAMES A. WYNN, JR. * * * Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP. Court Reporter: Amy M. Condon, Raleigh, NC (Taylor, Abby) (Entered: 09/01/2017)
09/08/2017	87	MEMORANDUM OPINION - Circuit Judge Wynn, Jr., wrote the opinion in which Senior District Judge Britt joined. Chief District Judge Osteen, Jr.

Date Filed	#	Docket Text
		concurred. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP (Garland, Leah) (Entered: 09/08/2017)
09/11/2017	88	NOTICE OF HEARING: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT (Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP) (Welch, Kelly) (Entered: 09/11/2017)
09/11/2017	89	NOTICE of Trial Calendar: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Welch, Kelly) (Entered: 09/11/2017)
09/11/2017		Set/Reset Deadlines/Hearings: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN

Date Filed	#	Docket Text
		JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Welch, Kelly) (Entered: 09/11/2017)
10/04/2017	90	FINAL PRETRIAL ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 10/04/2017 as set out herein. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Taylor, Abby) (Entered: 10/04/2017)
10/09/2017	91	Proposed Exhibit List *Amended* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit LWV Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-

Date Filed	#	Docket Text
		WO-JEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	92	MOTION to Bifurcate *Trial Testimony of Jowei Chen* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Response to Motion due by 10/30/2017 (Attachments: # 1 Text of Proposed Order) Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	93	MEMORANDUM filed by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN

Date Filed	#	Docket Text
		QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS re (92 in 1:16-cv-01026-WO-JEP) MOTION to Bifurcate *Trial Testimony of Jowei Chen* filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	94	Proposed Exhibit List *Amended* by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE,

Date Filed	#	Docket Text
		MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Ex A - Joint Joint Trial Exhibit List, # 2 Ex B - Joint Plaintiffs' Trial Exhibit List, # 3 Ex C - Common Cause Plfs' Trial Exhibit List) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/09/2017)
10/09/2017	95	Proposed Exhibit List *Amended* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: #

Date Filed	#	Docket Text
		1 Exhibit Defendants Amended Trial Exhibits List) Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/09/2017)
10/10/2017		Motions Submitted: (91 in 1:16cv1164, 92 in 1:16cv1026) MOTION to Bifurcate Trial Testimony of Jowei Chen to CHIEF JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16cv1026, 1:16cv1164(Kemp, Donita) (Entered: 10/10/2017)
10/10/2017	96	AMENDED DOCUMENT by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Amendment to (58 in 1:16-cv- 01164-WO-JEP, 59 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures,, *Defendants' Corrected*

Date Filed	#	Docket Text
		Designations of Deposition Testimony. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/10/2017)
10/11/2017	97	RESPONSE in Support re 92 MOTION to Bifurcate *Trial Testimony of Jowei Chen*, 93 Memorandum,, filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 10/25/2017 (BONDURANT, EMMET) (Entered: 10/11/2017)
10/13/2017	98	STATEMENT (*League Plaintiffs' Opening Statement*) by Plaintiffs WILLIAM COLLINS, ELLIOTT

Date Filed	#	Docket Text
		FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 10/13/2017)
10/13/2017	99	STATEMENT re (89 in 1:16-cv-01164-WO-JEP, 90 in 1:16-cv-01026-WOJEP) Final Pretrial Order (*Opening Statement on Behalf of the Common Cause Plaintiffs*) by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA

Date Filed	#	Docket Text
		DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/13/2017)
10/13/2017	100	STATEMENT by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 10/13/2017)
10/13/2017	101	NOTICE by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR *of Filing of*

Date Filed	#	Docket Text
		Combined Deposition Designations and Counter-Designations (Attachments: # 1 Exhibit 1 - Annette Love Deposition, # 2 Exhibit 2- Larry Hall Deposition, # 3 Exhibit 3 - Gunther Peck Deposition, # 4 Exhibit 4 - Faulkner Fox Deposition, # 5 Exhibit 5 - William Collins Deposition, # 6 Exhibit 6 - Willis Williams Deposition, # 7 Exhibit 7 - Elizabeth Evans Deposition, # 8 Exhibit 8 - Douglas Berger Deposition, # 9 Exhibit 9 Ersla Phelps Depositions, # 10 Exhibit 10 - Richard Taft Deposition, # 11 Exhibit 11 - Cheryl Taft Deposition, # 12 Exhibit 12 - Morton Lurie Deposition, # 13 Exhibit 13 - Maria Palmer Deposition, # 14 Exhibit 14 - William Freeman Deposition, # 15 Exhibit 15 - Alice Bordsen Deposition, # 16 Exhibit 16 Merlzer Morgan Deposition, # 17 Exhibit 17 - Cynthia Boylan Deposition, # 18 Exhibit 18 - Coy Brewer Deposition, # 19 Exhibit 19 - John McNeill Deposition, # 20 Exhibit 20 - Elliott Feldman Deposition, # 21 Exhibit 21 - Robert Wolf

Date Filed	#	Docket Text
		Deposition, # 22 Exhibit 22 - John Quinn Deposition, # 23 Exhibit 23 - Aaron Sarver Deposition, # 24 Exhibit 24 - Jones Byrd Deposition, # 25 Exhibit 25 - John Gresham Deposition, # 26 Exhibit 26 - Janie Sumpter Deposition, # 27 Exhibit 27 - Russell Walker Deposition, # 28 Exhibit 28 - Mary Klenz Deposition, # 29 Exhibit 29 - Bob Phillips Deposition, # 30 Exhibit 30 - Wayne Goodwin Deposition, # 31 Exhibit 31 - William Gilkeson Deposition, # 32 Exhibit 32 - Robert Rucho Deposition, # 33 Exhibit 33 - David Lewis Deposition, # 34 Exhibit 34 - Thomas Hofeller Deposition, # 35 Exhibit 35 - James Gimpel Deposition, # 36 Exhibit 36 - M.V. Hood Deposition, # 37 Exhibit 37 - Sean Trende Deposition) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/13/2017)
10/15/2017	102	Proposed Exhibit List *Second Amended* by WILLIAM

Date Filed	#	Docket Text
		COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(HARLESS, ANNABELLE) (Entered: 10/15/2017)
10/16/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 1) held on 10/16/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein, Peter Nelson and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless,

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		Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants. For the reasons stated on the record the Court grants League of Women Voters Motion to Bifurcate Examination of Dr. Jowei Chen (Doc. #92 in case no. 1:16cv1026 & Doc. #91 in case no. 1:16cv1164;) The parties conferred and agreed that all depositions and all deposition exhibits come in the record as addressed in open court; Court accepts the stipulation of the parties. Plaintiffs presented evidence; Trial continued to October 17, 2017 at 9:00 a.m. in Greensboro, Courtroom 1. (See exhibit/witness list)(Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 10/16/2017)

Date Filed	#	Docket Text
10/17/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 2) held on 10/17/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein, Peter Nelson and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants; Plaintiff Common Cause continued with evidence and rested; Plaintiff League of Women Voters of NC presented evidence; Parties agreed not to call witnesses re: exhibits 4022, 4023 & 4024, and will submit a stipulation in writing at the end of the day; Defendant agreed to

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		withdraw its objections relating to those exhibits on the condition that Dr. Hoffler submit a declaration to give his rebuttal. Trial continued to Wednesday, October 18, 2017 at 10:00 a.m. in Greensboro, Courtroom 1. (See exhibit/witness list) (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 10/17/2017)
10/18/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 3) held on 10/18/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe and Steven B. Epstein appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of

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		North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants; Counsel for League of Women Voters of North Carolina produced additional exhibits; Parties to submit a written list to finalize all exhibits not objected to; Both Plaintiffs rest their case in chief; Defendants presented evidence; Trial continued to October 19, 2017 at 8:30 a.m. in Greensboro, Courtroom 1. (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 10/18/2017)
10/18/2017	103	Proposed Exhibit List *Final* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS,

Date Filed	#	Docket Text
		WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (HARLESS, ANNABELLE) (Entered: 10/18/2017)
10/19/2017	104	Proposed Exhibit List *Final* by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Ex A - Final Joint Joint Trial Exhibit List, # 2 Ex B - Final Joint Plaintiffs' Trial Exhibit List, # 3 Ex C - Final Common Cause Plfs' Trial Exhibit List) Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/19/2017)

Date Filed	#	Docket Text
10/19/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 4) held on 10/19/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants. Defendants presented evidence; Defendant rests; Evidence concluded; Court admits all stipulated exhibits; Closing Arguments presented by Plaintiffs and Defendants; Post Trial Briefs due 11/6/2017; Court takes matter under advisement. (See

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		Exhibit/Witness list) (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(Welch, Kelly) (Entered: 10/21/2017)
10/24/2017	105	Transcript of Bench Trial Volume I of IV held on 10/16/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-

Date Filed	#	Docket Text
		cv-01164-WO-JEP(Armstrong, Joe) (Entered: 10/24/2017)
10/24/2017	106	Transcript of Bench Trial Volume Ii of IV held on 10/17/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Armstrong, Joe) (Entered: 10/24/2017)
10/24/2017	107	Transcript of Bench Trial Volume III of IV held on 10/18/2017 before Judge

Date Filed	#	Docket Text
		William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Armstrong, Joe) (Main Document 107 replaced on 10/27/2017) (Contreras, Jamie). (Entered: 10/24/2017)
10/26/2017	108	Transcript of Bench Trial Volume IV of IV held on 10/19/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court

Date Filed	#	Docket Text
		Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/20/2017. Redacted Transcript Deadline set for 11/30/2017. Release of Transcript Restriction set for 1/29/2018. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Armstrong, Joe) (Entered: 10/26/2017)
10/26/2017	109	Marked Exhibit List *Final Amended* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE

Date Filed	#	Docket Text
		STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit Defendants' Final Amended Exhibit List, # 2 Exhibit 5001 (Redacted Declaration of Dr. Thomas Hofeller), # 3 Exhibit 5116 (Second Declaration of Dr. Thomas Hofeller in Response to Declaration of Timothy Stallmann)) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (MCKNIGHT, MICHAEL) (Entered: 10/26/2017)
10/27/2017	110	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT

Date Filed	#	Docket Text
		WARREN WOLF - *Common Cause Plaintiffs Notice of Filing of Deposition Transcripts* (Attachments: # 1 Attachment 1 - Deposition transcript of Thomas B. Hofeller, taken January 24, 2017, # 2 Attachment 2 - Deposition transcript of Thomas B. Hofeller, taken February 10, 2017, # 3 Attachment 3 - Deposition transcript of Rep. David Lewis, taken January 26, 2017, # 4 Attachment 4 - Deposition transcript of Rep. David Lewis, taken April 28, 2017, # 5 Attachment 5 - Deposition transcript of Sen. Robert A. Rucho, taken January 25, 2017, # 6 Attachment 6 - Deposition transcript of Bob Phillips, taken April 14, 2017, # 7 Attachment 7 - Deposition transcript of George Wayne Goodwin, taken April 17, 2017, # 8 Attachment 8 - Deposition transcript of Coy E. Brewer, Jr., taken April 18, 2017, # 9 Attachment 9 - Deposition transcript of John Morrison McNeill, taken April 5, 2017, # 10 Attachment 10 - Deposition transcript of Jones P. Byrd,

Date Filed	#	Docket Text
		taken April 20, 2017) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/27/2017)
11/02/2017	111	NOTICE by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR *of Filing of Deposition Transcript* (Attachments: # 1 Exhibit Complete Deposition Transcript of William Gilkeson) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 11/02/2017)
11/06/2017	112	Proposed Findings of Fact and Conclusions of Law by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF

Date Filed	#	Docket Text
		NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(GREENWOOD, RUTH) (Entered: 11/06/2017)
11/06/2017	113	TRIAL BRIEF (*Post-Trial*) by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(GREENWOOD, RUTH) (Entered: 11/06/2017)
11/06/2017	114	Proposed Findings of Fact and Conclusions of Law by PHILIP E. BERGER, DAVID R. LEWIS,

Date Filed	#	Docket Text
		TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 11/06/2017)
11/06/2017	115	TRIAL BRIEF by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 11/06/2017)
11/06/2017	116	TRIAL BRIEF (*Post-Trial*) by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA

Date Filed	#	Docket Text
		DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 11/06/2017)
11/06/2017	117	Proposed Findings of Fact and Conclusions of Law by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 11/06/2017)
01/09/2018	118	MEMORANDUM OPINION. Circuit Judge Wynn wrote the majority opinion in which

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		Senior District Judge Britt concurred. District Judge Osteen, Jr., wrote a separate opinion concurring in part and dissenting in part. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Daniel, J) (Entered: 01/09/2018)
01/11/2018	119	Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Response to Motion due by 2/1/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 01/11/2018)
01/11/2018	120	ORDER entered by THREE JUDGE COURT PANEL on 01/11/2018. Legislative Defendants have filed a motion to stay (the "Motion") this Court's January 9, 2018, Memorandum Opinion, ECF No. 118 (the "Order"), invalidating North Carolina's

Date Filed	#	Docket Text
		2016 congressional redistricting plan as a partisan gerrymander. Leg. Defs.' Emerg. Mot. to Stay Pending S. Ct. Rev. & Request for Exp. Rul'g, Jan. 11, 2018, ECF No. 119 . Plaintiffs and State Defendants are directed to file any response to the Motion on or before 5 p.m. on January 16, 2018. Defendants' obligations under the Order remain in effect during the pendency of this Motion. Associated Cases: 1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 01/11/2018)
01/11/2018		Reset Response Deadline re: (119 in 1:16-cv-01026-WO-JEP, 117 in 1:16-cv- 01164-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling*: Responses due by 1/16/2018. (See 120 Order in 16CV1026, 119 Order in 16CV1164) Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 01/11/2018)
01/11/2018	121	NOTICE OF APPEAL TO THE SUPREME COURT re (118 in

Date Filed	#	Docket Text
		1:16-cv- 01026-WO-JEP, 116 in 1:16-cv-01164-WO-JEP) Memorandum and Opinion, Filing fee $ 5. (STRACH, PHILLIP) Modified on 1/12/2018 to set out that Appeal is to the Supreme Court. (Garland, Leah) (Entered: 01/11/2018)
		* * *
01/12/2018	122	RESPONSE in Opposition re (117 in 1:16-cv-01164-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS - ***PLAINTIFFS JOINT BRIEF IN OPPOSITION TO LEGISLATIVE DEFENDANTS EMERGENCY MOTION TO STAY PENDING SUPREME COURT REVIEW AND REQUEST FOR EXPEDITED RULING*** filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W.

Date Filed	#	Docket Text
		GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies due by 1/26/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(SPEAS, EDWIN) (Entered: 01/12/2018)
01/16/2018	123	MEMORANDUM OPINION AND ORDER DENYING LEGISLATIVE DEFENDANTS' EMERGENCY MOTION TO STAY signed by JUDGE JAMES A. WYNN, JR.,

Date Filed	#	Docket Text
		JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 01/16/2018, as set out herein. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 01/16/2018)
01/16/2018	124	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN

Date Filed	#	Docket Text
		QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS *Regarding Special Master Submission* Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(RIGGS, ALLISON) (Entered: 01/16/2018)
06/27/2018	125	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 06/27/2018, that parties are invited to submit briefing to this Court by 5:00 p.m. on July 11, 2018, addressing four issues as set out. In addressing these questions, the parties should include citations to the record to support their arguments. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 06/27/2018)
		* * *
07/11/2018	128	RESPONSE *of the State Defendants to the June 27, 2018 Order* filed by STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A.

Date Filed	#	Docket Text
		GRANT WHITNEY, JR. Replies due by 7/25/2018 (BERNIER, JAMES) (Entered: 07/11/2018)
07/11/2018	129	*LWV Plaintiffs'* BRIEF re (124 in 1:16-cv-01164-WO-JEP) Order, . (Attachments: # 1 Appendix 1 - Salinger Declaration, # 2 Appendix 2 - Supplemental Chen Declaration - Part 1, # 3 Appendix 2- Supplemental Chen Declaration - Part 2, # 4 Appendix 2 - Supplemental Chen Declaration - Part 3, # 5 Appendix 2- Supplemental Chen Declaration - Part 4, # 6 Appendix 2- Supplemental Chen Declaration - Part 5, # 7 Appendix 2 - Supplemental Chen Declaration - Part 6, # 8 Appendix 2 - Supplemental Chen Declaration - Part 7, # 9 Appendix 2 - Supplemental Chen Declaration - Part 8, # 10 Appendix 2 - Supplemental Chen Declaration - Part 9, # 11 Appendix 2 - Supplemental Chen Declaration - Part 10, # 12 Appendix 2 - Supplemental Chen Declaration - Part 11, # 13 Appendix 2 - Supplemental Chen Declaration - Part 12, # 14 Appendix 2 -

Date Filed	#	Docket Text
		Supplemental Chen Declaration - Part 13, # 15 Appendix 2 - Supplemental Chen Declaration - Part 14, # 16 Appendix 3 - Additional Proposed FoF/CoLs) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(RIGGS, ALLISON) (Entered: 07/11/2018)
07/11/2018	130	RESPONSE re 125 Order, - *Brief of the Common Cause Plaintiffs in Response to Order of June 27, 2018* filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 7/25/2018 (Attachments: # 1 Exhibit A - Proposed Supplemental Findings of Fact

Date Filed	#	Docket Text
		Relevant to District-Specific Claims of the Common Cause Plaintiffs, # 2 Exhibit B - Declaration of Dr. Jowei Chen)(SPEAS, EDWIN) (Entered: 07/11/2018)
07/11/2018	131	RESPONSE re (124 in 1:16-cv-01164-WO-JEP, 125 in 1:16-cv-01026-WOJEP) Order, *by the Legislative Defendants* filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Replies due by 7/25/2018 Associated Cases: 1:16-cv-01026-WOJEP, 1:13-cv-00949-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 07/11/2018)
07/12/2018		CASE REFERRED re: (Doc. 130 in 1:16cv1026) Response, (Doc. 131 in 1:16cv1026) Response, (Doc. 129 in 1:16cv1026) Brief, (Doc. 128 in 1:16cv1026) Response, to JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16cv1164, 1:16cv1026 (Welch, Kelly) (Entered: 07/12/2018)

Date Filed	#	Docket Text
07/13/2018	132	SUPREME COURT ORDER: The judgment is vacated, and the case is remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill V. Whitford*, 585 U.S.____ (2018). (Entered at the Supreme Court on June 25, 2018) (Supreme Court case number: 17-1295) (Attachments: # 1 Envelope - Front and Back) (Garland, Leah) (Entered: 07/13/2018)
07/16/2018	133	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 07/16/2018, that Plaintiffs shall (1) provide Defendants with any previously undisclosed data or evidence underlying the declarations on or before July 19, 2018, and (2) make Dr. Chen and Mr. Salinger available for deposition by Legislative Defendants regarding the statements and analyses included in their declarations at a mutually agreeable time prior to or on July 31, 2018. FURTHER ORDERED that the

Date Filed	#	Docket Text
		parties submit briefing to this Court on or before August 7, 2018, addressing whether based on the existing record, the proffered declarations by Dr. Chen and Mr. Salinger, and any additional deposition testimony by Dr. Chen and Mr. Salinger any, some, or all Plaintiffs have standing to assert a vote dilution claim under the Equal Protection Clause. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 07/16/2018)
07/17/2018	134	RESPONSE re (133 in 1:16-cv-01164-WO-JEP) Order,,, filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Replies due by 7/31/2018 Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 07/17/2018)
07/18/2018	135	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR.,

Date Filed	#	Docket Text
		JUDGE W. EARL BRITT on 07/18/2018, to the extent, Legislative Defendants maintain this court is without jurisdiction until July 20, 2018, the parties may consider this order as continually entered until that date. Plaintiffs have until 5:00 p.m. on July 20, 2018 to turn over to Defendants any previously undisclosed data or evidence underlying the declarations. The remaining deadlines established in the continuing July 16 Order remain in effect, all of which post-date July 20, 2018, and provide the parties with ample time to depose Dr. Chen and Mr. Salinger regarding the statements and analyses included in their proffered declarations and prepare additional briefing based on those declarations and depositions. Associated Cases: 1:16- cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 07/18/2018)
07/24/2018	136	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S.

Date Filed	#	Docket Text
		BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF re 130 Response,, *Notice of Filing of Clarification to the July 11, 2018 Supplemental Declaration of Jowei Chen (DE# 130-01)* (Attachments: # 1 Exhibit A - clarification to the July 11, 2018 Supplemental Declaration of Jowei Chen)(SPEAS, EDWIN) (Entered: 07/24/2018)
07/25/2018		CASE REFERRED re: 136 Notice of Filing, to JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 07/25/2018)
07/30/2018	137	SUPREME COURT JUDGMENT: It is ordered and adjudged by this Court that the judgment of the above court is

Date Filed	#	Docket Text
		vacated with costs, and the case is remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill v. Whitford*, 585 U.S. ___ (2018). (Signed at the Supreme Court on June 25, 2018) (Supreme Court case number: 17-1295) (Attachments: # 1 Envelope - Front and Back)(Garland, Leah) (Entered: 07/30/2018)
08/07/2018	138	*Brief of the Common Cause Plaintiffs in Response to Order of July 16, 2018* - BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv-01164-WO-JEP) Order,,, . (Attachments: # 1 Exhibit A - Deposition of Dr. Jowei Chen) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 08/07/2018)
08/07/2018	139	*LWV Plaintiffs'* BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv- 01164-WO-JEP) Order,,, by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF

Date Filed	#	Docket Text
		NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Appendix 1 - Salinger Dep. Excerpt) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(RIGGS, ALLISON) (Entered: 08/07/2018)
08/07/2018	140	BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv-01164-WO-JEP) Order,,, by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE,

Date Filed	#	Docket Text
		ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. (Attachments: # 1 Exhibit A - Salinger Deposition Transcript, # 2 Exhibit B - Chen Deposition Transcript, # 3 Exhibit Chen Deposition Exhibit 14, # 4 Exhibit Chen Deposition Exhibit 15, # 5 Exhibit C - Trende Report, # 6 Exhibit D - Hood Report) Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 08/07/2018)
08/09/2018	141	Corrected document re (139 in 1:16-cv-01164-WO-JEP, 140 in 1:16-cv- 01026-WO-JEP) Brief,,. (Attachments: # 1 Exhibit -1, # 2 Exhibit -2, # 3 Exhibit -3, # 4 Exhibit -4, # 5 Exhibit -5, # 6 Exhibit -6) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(STRACH, PHILLIP) (Entered: 08/09/2018)

Date Filed	#	Docket Text
08/27/2018	142	**MEMORANDUM OPINION.** WYNN, Circuit Judge, wrote the opinion, in which BRITT, Senior District Judge, concurred. OSTEEN, JR., District Judge, concurs in part and dissents in part. Associated Cases: 1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP(Marsh, Keah) (Entered: 08/27/2018)
08/29/2018	143	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA,

Date Filed	#	Docket Text
		ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS re (141 in 1:16-cv- 01164-WO-JEP) Memorandum and Opinion, *of Consultation re: Special Master* Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (RIGGS, ALLISON) (Entered: 08/29/2018)
08/31/2018	144	*Memorandum Regarding Remedies from the Common Cause and League of Women Voters Plaintiffs* - BRIEF re (141 in 1:16-cv-01164-WO-JEP) Memorandum and Opinion, by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY,

Date Filed	#	Docket Text
		CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT

Date Filed	#	Docket Text
		FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit A - Second Declaration of Kim Westbrook Strach from Covington v. North Carolina, # 2 Exhibit B - N.C. Election Board's Response to Petitions for Writ of Supersedeas or Prohibition in Cooper v. Berger, No. 367P18 (N.C. Aug. 29, 2018), # 3 Exhibit C - Judgment in Covington v. North Carolina) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 08/31/2018)
08/31/2018	145	NOTICE OF APPEAL TO THE SUPREME COURT re: (141 in 1:16-cv- 01164-WO-JEP, 142 in 1:16-cv-01026-WO-JEP) Memorandum and Opinion, Filing fee $ 5, receipt number

Date Filed	#	Docket Text
		0418-2418982. (STRACH, PHILLIP) (Entered: 08/31/2018)
08/31/2018	146	Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Response to Motion due by 9/21/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(STRACH, PHILLIP) (Entered: 08/31/2018)
08/31/2018	147	MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO STAY (146 in 1:16-cv-01026-WO-JEP, 145 in 1:16-cv-01164-WO-JEP) AND IN RESPONSE TO THE COURT'S ORDER OF AUGUST 27, 2018 (141 in 1:16-cv-01164-WO-JEP, 142 in 1:16-cv-01026-WO-JEP) filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, Replies due by 9/14/2018 (Attachments: # 1 Exhibit 1 - Wall Street

Date Filed	#	Docket Text
		Journal Article, # 2 Exhibit 2 - Declaration of Carter Wrenn, # 3 Exhibit 3 - Campaign Finance Summary for N.C. Congressional Candidates Through Second Quarter Reports, # 4 Exhibit 4 - State Board of Elections Memo of August 29, 2018, # 5 Exhibit 5 - Second Declaration of Kim Strach in Covington v. State of North Carolina, # 6 Exhibit 6 - Shaw v. Hunt Order of July 30, 1996) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) Modified on 9/4/2018 to edit title of document (Welch, Kelly). (Entered: 08/31/2018)
08/31/2018	148	STATE DEFENDANTS' BRIEF ON POSSIBLE REMEDIES filed by Defendants PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(BERNIER, JAMES) (Entered: 08/31/2018)

Date Filed	#	Docket Text
09/04/2018	149	COMMON CAUSE PLAINTIFFS' BRIEF IN RESPONSE TO LEGISLATIVE DEFENDANTS' EMERGENCY MOTION TO STAY PENDING SUPREME COURT REVIEW AND REQUEST FOR EXPEDITED RULING (146 in 1:16-cv-01026-WO-JEP, 145 in 1:16-cv- 01164-WO-JEP) filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 9/18/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 09/04/2018)
09/04/2018	150	**ORDER** signed by JUDGE JAMES A. WYNN, JR., JUDGE

Date Filed	#	Docket Text
		WILLIAM L. OSTEEN, JR., JUDGE W. EARL BRITT on 09/04/2018 as set out herein. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 09/04/2018)
09/05/2018	151	RESPONSE in Opposition re (146 in 1:16-cv-01026-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies due by 9/12/2018 Associated Cases: 1:16-cv- 01164-WO-JEP, 1:16-cv-01026-WO-

Date Filed	#	Docket Text
		JEP(GREENWOOD, RUTH) (Entered: 09/05/2018)
09/05/2018	152	RESPONSE re (149 in 1:16-cv-01164-WO-JEP, 150 in 1:16-cv-01026-WOJEP) Order - *Response of the Common Cause Plaintiffs to the Court's Order of September 4, 2018* filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 9/19/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 09/05/2018)
09/05/2018	153	RESPONSE filed by Defendants PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE

Date Filed	#	Docket Text
		NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR re (145 in 1:16-cv-01164-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Replies due by 9/19/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (BERNIER, JAMES) (Entered: 09/05/2018)
09/05/2018		CASE REFERRED re: (Documents 151, 152 & 153 in 1:16cv1026 and Documents 150, 151 & 152 in 1:16cv1164)

Date Filed	#	Docket Text
		Responses to the Court's Order dated September 4, 2018, to JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 09/05/2018)
09/05/2018	154	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, to Response to (74 in 1:16-cv-01026-WO-JEP, 73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (STRACH, PHILLIP) (Entered: 09/05/2018)
09/12/2018	155	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., JUDGE W. EARL BRITT on 09/12/2018 granting 146 Motion to Stay (145 Motion to Stay in

Date Filed	#	Docket Text
		case 1:16-cv-01164). Associated Cases: 1:16- cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 09/12/2018)
10/09/2018	156	**SUPREME COURT NOTICE** re 145 Notice of Appeal - Supreme Court. An appeal in the above-entitled case was filed in this Court October 1, 2018 and placed on the docket October 3, 2018, as No. 18-422. (Attachments: # 1 Envelope - Front and Back) (Garland, Leah) (Entered: 10/10/2018)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 16-cv-01164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,

v.

ROBERT A. RUCHO, *et al.*

DOCKET ENTRIES

Date Filed	#	Docket Text
09/22/2016	1	**COMPLAINT EQUITABLE RELIEF SOUGHT THREE JUDGE PANEL REQUESTED** against PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR (Filing fee $ 400 receipt number 0418-1991932.)(Related Case # 1:16-cv-1026), filed by JANIE SMITH SUMPTER, GUNTHER PECK, WILLIAM THOMAS COLLINS, LEAGUE OF WOMEN VOTERS OF NORTH

Date Filed	#	Docket Text
		CAROLINA, WILLIS WILLIAMS, MARIA TERESA UNGER PALMER, ELLIOTT FELDMAN, JOHN QUINN, ELIZABETH TORRES EVANS, ERSLA PHELPS, CAROL FAULKNER FOX, AARON SARVER, ANNETTE LOVE. (Attachments: # 1 Exhibit Exhibit A Adopted Criteria, # 2 Exhibit Exhibit B Feb. 16 Transcript, # 3 Exhibit Exhibit C Feb. 17 Transcript)(EARLS, ANITA) Modified on 10/13/2016 (Powell, Gloria). Modified on 10/13/2016 to reflect Request for Three-Judge Court. (Powell, Gloria). (Entered: 09/22/2016)
09/22/2016	2	Corporate Disclosure Statement by LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA. (EARLS, ANITA) (Entered: 09/22/2016)
		* * *
09/22/2016	4	Additional Attachments to Main Document *Civil Cover Sheet*. (EARLS, ANITA) (Entered: 09/22/2016)
		* * *
09/23/2016	6	Summons Issued as to All Defendants. (Attachments: # 1

Date Filed	#	Docket Text
		SBOE, # 2 WHITNEY, # 3 LEWIS, # 4 MOORE, # 5 BERGER, # 6 STATE OF NC)(Coyne, Michelle) (Entered: 09/23/2016)
09/23/2016	7	Notice of Right to Consent. Counsel shall serve the attached form on all parties. (Attachments: # 1 CONSENT FORM)(Coyne, Michelle) (Entered: 09/23/2016)
09/23/2016		Case ASSIGNED to CHIEF JUDGE WILLIAM L. OSTEEN, JR and MAGISTRATE JUDGE JOI ELIZABETH PEAKE. Set flag for Magistrate Judge Joi Elizabeth Peake. (Coyne, Michelle) (Entered: 09/23/2016)
		* * *
10/12/2016	17	MOTION for Extension of Time to File Answer re 1 Complaint,, by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Text of Proposed Order) (PETERS,

Date Filed	#	Docket Text
		ALEXANDER) (Entered: 10/12/2016)
		* * *
10/13/2016		Motion Referred: re: 17 MOTION for Extension of Time to File Answer re 1 Complaint, to MAG/JUDGE JOI ELIZABETH PEAKE. (Welch, Kelly) (Entered: 10/13/2016)
		* * *
10/18/2016	26	RESPONSE in Opposition re (17 in 1:16-cv-01164-WO-JEP) MOTION for Extension of Time to File Answer re (1) Complaint,, filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Email Correspondence, # 2 Exhibit Harris v McCrory Order) Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-

Date Filed	#	Docket Text
		WO-JEP(EARLS, ANITA) (Entered: 10/18/2016)
		* * *
10/26/2016		Motion Submitted: 17 MOTION for Extension of Time to File Answer re 1 Complaint, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 10/26/2016)
10/27/2016	28	ORDER designating the Honorable James A. Wynn, United States Circuit Judge for the Fourth Circuit, the Honorable William L. Osteen, Jr., Chief Judge for the Middle District of North Carolina, and the Honorable W. Earl Britt, Senior United States District Judge for the Eastern District of North Carolina, to serve in the hearing and determination of this matter, constituting a district court of three judges as provided by law. Signed on 10/27/2016 by ROGER L. GREGORY, Chief Judge, U.S. Court of Appeals for the Fourth Circuit. (Daniel, J) (Entered: 10/28/2016)
10/28/2016	29	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR. on 10/28/2016, that

Date Filed	#	Docket Text
		Defendants' motion for extension (Doc. 17) is **GRANTED**. Defendants have up to and including November 28, 2016, within which to answer or other respond to Plaintiffs' complaint. (Daniel, J) (Entered: 10/28/2016)
11/28/2016	30	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Responses due by 12/22/2016 (FARR, THOMAS) (Entered: 11/28/2016)
11/28/2016	31	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR re 30 MOTION TO DISMISS FOR FAILURE

Date Filed	#	Docket Text
		TO STATE A CLAIM filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 11/28/2016)
12/19/2016	32	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 12/19/2016; that Plaintiffs' Motion to Schedule Pre-Trial Conference in case number 1:16CV1026 (Doc. 35) is hereby GRANTED. FURTHER ORDERED that the parties in 1:16CV1164 shall meet and confer as required by LR 16.1(b) and thereafter file an appropriate Rule 26(f) report(s), on or before January 4, 2017. Upon the filing of the Rule 26(f) reports, the Clerk is directed to promptly set a hearing on an initial pretrial conference as required by LR 16.1(c) for each of these cases. The Clerk may confer with all counsel to determine a date upon which all counsel may be available in

Date Filed	#	Docket Text
		anticipation of the filing of the pretrial reports. Nevertheless, the pretrial conference will be set at the direction of the court. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 12/19/2016)
12/19/2016	33	Rule 26(f) Report (Individual). Response to Motion due by 1/4/2017 by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS.(EARLS, ANITA) (Entered: 12/19/2016)
12/19/2016	34	RESPONSE in Opposition re 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA,

Date Filed	#	Docket Text
		ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (EARLS, ANITA) (Entered: 12/19/2016)
01/03/2017	35	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR, to Response to 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 01/03/2017)
01/04/2017	36	Rule 26(f) Report (Individual). by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K.

Date Filed	#	Docket Text
		MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 01/04/2017)
01/13/2017	37	NOTICE of Hearing: Pretrial Conference set for 2/6/2017 02:00 PM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP (Welch, Kelly) (Entered: 01/13/2017)
02/01/2017	38	AMENDED Rule 26(f) Report (Individual) by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (EARLS, ANITA) Modified on 2/2/2017 to

Date Filed	#	Docket Text
		edit event type to reflect as a motion (Welch, Kelly). (Entered: 02/01/2017)
02/02/2017	39	MOTION to Consolidate Cases. Case to be consolidated with 1:16-cv-1026 by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Response to Motion due by 2/23/2017 (Attachments: # 1 Proposed Order) (EARLS, ANITA) (Entered: 02/02/2017)
02/02/2017		Motions Submitted: 30 Motion to Dismiss for Failure to State a Claim, 36 Defendants' Rule 26(f) Report (Individual), 38 Plaintiffs' AMENDED Rule 26(f) Report (Individual), 39 Motion to Consolidate Cases, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 02/02/2017)

Date Filed	#	Docket Text
02/06/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., in G-1: Pretrial Conference held on 2/6/2017. Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al. Attorneys Anita Earls and Gerald Hebert appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al. Attorneys Thomas Farr and James Bernier appeared on behalf of the Defendants. For reasons stated on the record, the Court orally grants 39 Joint Consent Motion to Consolidate Cases (1:16CV1026 & 1:16CV1164) for purposes of discovery and trial; Parties conferred and agreed upon scheduling order deadlines as to both cases; Parties to submit a proposed Joint Rule 26(f) Report for the Court's consideration; Court tentatively set this matter for trial on June 26, 2017. (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-

Date Filed	#	Docket Text
		WO-JEP(Welch, Kelly) (Entered: 02/06/2017)
02/07/2017	40	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 02/07/2017; that the following actions are consolidated for purposes of discovery and trial: *League of Women Voters v. Rucho*, No. 1:16-cv-1164, and *Common Cause v. Rucho*, No. 1:16-cv-1026. All notices, requests, responses, motions and other filings related to both actions must be served on all counsel in each action and bear the case caption for each action that has been consolidated pursuant to this order. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 02/07/2017)
02/10/2017	41	AMENDED COMPLAINT against All Defendants, filed by JANIE SMITH SUMPTER, GUNTHER PECK, WILLIAM COLLINS, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, WILLIS WILLIAMS, MARIA PALMER, ELLIOTT FELDMAN, JOHN QUINN, III, ELIZABETH

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		TORRES EVANS, ERSLA PHELPS, CAROL FAULKNER FOX, AARON SARVER, ANNETTE LOVE. (Attachments: # 1 Exhibit "A" Adopted Criteria, # 2 Exhibit "B" February 16, 2016 Joint Redistricting Committee Hearing Transcript, # 3 Exhibit "C" February 17, 2016 Joint Redistricting Committee Hearing Transcript) (EARLS, ANITA) (Entered: 02/10/2017)
02/14/2017	42	JOINT 26(F) REPORT by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE

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		OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) Modified on 2/15/2017 to properly set out correct event. (Garland, Leah) (Entered: 02/14/2017)
02/15/2017	43	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF - *Common*

Date Filed	#	Docket Text
		Cause's Preliminary Outline of Legal Standards (filed per Court's request at the February 6, 2017 status conference) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 02/15/2017)
		* * *
02/21/2017	45	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM Plaintiffs' Amended Complaint by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Response to Motion due by 3/14/2017 (FARR, THOMAS) (Entered: 02/21/2017)
02/21/2017	46	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT

Date Filed	#	Docket Text
		WHITNEY, JR re 41 Amended Complaint,, 45 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM Plaintiffs' Amended Complaint filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (FARR, THOMAS) (Entered: 02/21/2017)
03/01/2017	47	ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 03/01/2017 approving without modification 42 RULE 26F (JOINT) in case 1:16-cv-01026-WO-JEP and 42 RULE 26F (JOINT) in case 1:16-cv-01164-WO-JEP. Discovery shall be established as Standard. Mediation is not required under LR 16.4 in this case. The parties state that they do not wish to reference the case to a Magistrate Judge or appointment of a master. Trial is expected to take five (5) days and a jury trial has not been demanded. Plaintiff's Amended

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		Pleadings due by 2/10/2017. Defendant's Amended Pleadings due by 2/10/2017. Discovery due by 4/28/2017. Joinder of Parties for Plaintiff due by 2/10/2017. Joinder of Parties for Defendant due by 2/10/2017. Motions due by 5/12/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 03/01/2017)
		* * *
03/03/2017	49	ANSWER to Amended Complaint by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(FARR, THOMAS) (Entered: 03/03/2017)
03/03/2017	50	MEMORANDUM OPINION signed by JUDGE JAMES A. WYNN, JR., CHIEF JUDGE WILLIAM L. OSTEEN, JR, and JUDGE W. EARL BRITT on

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		03/03/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) Modified on 5/22/2017 to correct misspelling. (Garland, Leah) (Entered: 03/03/2017)
03/03/2017	51	ORDER signed JUDGE JAMES A. WYNN, JR, CHIEF JUDGE WILLIAM L. OSTEEN, JR, and JUDGE W. EARL BRITT on 03/03/2017, that the Defendants' Motion to Dismiss in Case No. 1:16-CV-1026 is DENIED; and it is further ORDERED that the Defendants' Motion to Dismiss First Amended Complaint Filed by League Of Women Voters Of North Carolina ("LWVNC") Plaintiffs in Case No. 1:16-CV-1164 is DENIED; and it is further ORDERED that the Defendants' Motion to Dismiss in Case No. 1:16-CV- 1164 (Doc. 30) is DENIED, as moot. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16- cv-01164-WO-JEP (Garland, Leah) (Entered: 03/03/2017)
		* * *
05/23/2017	53	NOTICE of Trial Calendar: Bench Trial set for 6/26/2017

Date Filed	#	Docket Text
		09:30 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT. Associated Cases: 1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP (Welch, Kelly) (Entered: 05/23/2017)
05/30/2017	54	FINAL PRETRIAL DISCLOSURES by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Attachment 1 Deposition Designations, # 2 Exhibit COLLINS, WILLIAM designations, # 3 Exhibit EVANS, ELIZABETH designations, # 4 Exhibit FELDMAN, ELLIOTT designations, # 5 Exhibit FOX, FAULKNER designations, # 6

Date Filed	#	Docket Text
		Exhibit LOVE, ANNETTE designations, # 7 Exhibit PALMER, MARIA designations, # 8 Exhibit PECK, GUNTHER designations, # 9 Exhibit PHELPS, ERSLA M designations, # 10 Exhibit QUINN, III, JOHN J designations, # 11 Exhibit SARVER, AARON J designations, # 12 Exhibit SUMPTER, JANIE S designations, # 13 Exhibit TROTTER KLENZ, MARY designations, # 14 Exhibit WILLIAMS, WILLIS designations, # 15 Exhibit LEWIS, REPRESENTATIVE DAVID I designations, # 16 Exhibit LEWIS, REPRESENTATIVE DAVID II designations, # 17 Exhibit HOFELLER, THOMAS B I designations, # 18 Exhibit HOFELLER, THOMAS B II designations, # 19 Exhibit RUCHO, SENATOR ROBERT A designations, # 20 Exhibit GIMPEL, JAMES G designations, # 21 Exhibit HOOD III, M.V. designations, # 22 Exhibit TRENDE, SEAN designations) Associated Cases:

Date Filed	#	Docket Text
		1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	55	FINAL PRETRIAL DISCLOSURES by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	56	(See Amended Document 66) PRETRIAL DISCLOSURES by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A.

Date Filed	#	Docket Text
		MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Exhibit A - Deposition Designations, # 2 Exhibit B - Joint Plaintiffs' Exhibit List, # 3 Exhibit C - Common Cause Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 05/30/2017)
05/30/2017	57	*Exhibit List* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit Attachment 1 Joint Plaintiffs' Exhibit List, # 2 Exhibit

Date Filed	#	Docket Text
		Attachment 2 LWVNC Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 05/30/2017)
05/30/2017	58	FINAL PRETRIAL DISCLOSURES by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit 1 - Designations of Deposition Testimony, # 2 Exhibit 2 - Exhibit List (Expect to Offer), # 3 Exhibit 3 - Exhibit List (May Offer)) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 05/30/2017)
		* * *

Date Filed	#	Docket Text
06/05/2017	60	Proposed Findings of Fact and Conclusions of Law by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, PATRICK L. McCRORY, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP(STRACH, PHILLIP) (Entered: 06/05/2017)
		* * *
06/05/2017	62	Proposed Findings of Fact and Conclusions of Law by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER,

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		JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 06/05/2017)
06/05/2017	63	TRIAL BRIEF by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(GREENWOOD, RUTH) (Entered: 06/05/2017)
06/05/2017	64	Proposed Findings of Fact and Conclusions of Law by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W.

Date Filed	#	Docket Text
		GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/05/2017)
06/08/2017	65	NOTICE OF HEARING: Final Pretrial Conference set for 6/19/2017 09:30 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 06/08/2017)
06/09/2017		TEXT ORDER - The parties have submitted a number of questions about trial issues to the Clerk. The majority of those questions and any other pre-trial issues will be addressed at a pre-trial conference scheduled for June 19, 2017. However, in light of the upcoming trial date,

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		two issues will be addressed in this order. First, the parties asked whether there is a pre-trial deadline for filing evidentiary motions and responses. Any pre-trial motions to exclude expert testimony shall be filed on or before Monday, June 19, 2017, at 5:00 p.m. Responses shall be filed on or before 12:00 noon on Thursday, June 22, 2017. A motion to exclude expert testimony shall include as an exhibit the expert report of the challenged witness along with any rebuttal expert reports. The filing of any other motion in limine or evidentiary motion will be addressed during the pre-trial conference. Second, the League Plaintiffs filed their transcript designations along with their pre-trial disclosures. The Common Cause Plaintiffs and Defendants should file their transcript designations at the earliest possible time. [Issued by CHIEF JUDGE WILLIAM L. OSTEEN, JR., on 06/09/2017.] Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-

Date Filed	#	Docket Text
		WO-JEP. (Cable, Frances) (Entered: 06/09/2017)
06/13/2017	66	AMENDED DOCUMENT (Amended Rule 26(a)(3)(A) Pretrial Disclosures) by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Amendment to (56 in 1:16-cv-01164-WO-JEP) Pretrial Disclosures,, . Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)
06/13/2017	67	DESIGNATION OF DEPOSITION TRANSCRIPT by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E.

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		BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)
06/13/2017	68	OBJECTION - Other re (59 in 1:16-cv-01026-WO-JEP, 58 in 1:16-cv-01164-WO-JEP) Final Pretrial Disclosures,, by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit

Date Filed	#	Docket Text
		Objections to Defendants' Exhibits, # 2 Exhibit Counter-Designations to Defendants Deposition Designations, # 3 Exhibit Collins Counter-Designations, # 4 Exhibit Feldman Counter-Designations, # 5 Exhibit Love Counter-Designations, # 6 Exhibit Palmer Counter-Designations, # 7 Exhibit Sumpter Counter-Designations, # 8 Exhibit Klenz Counter-Designations) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(EARLS, ANITA) (Entered: 06/13/2017)
06/13/2017	69	OBJECTION - Other re (58 in 1:16-cv-01164-WO-JEP, 59 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures,, by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY,

Date Filed	#	Docket Text
		CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 06/13/2017)
06/13/2017	70	OBJECTION - Other re (57 in 1:16-cv-01026-WO-JEP, 56 in 1:16-cv-01164-WO-JEP) Pretrial Disclosures,, (58 in 1:16-cv-01026-WO-JEP, 57 in 1:16-cv-01164-WO-JEP) Exhibit List, (55 in 1:16-cv-01164-WO-JEP, 56 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures, (54 in 1:16-cv-01164-WO-JEP, 55 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures,,,,, by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH

Date Filed	#	Docket Text
		CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit 1 - Defendants' Objections to Plaintiffs' Joint Exhibits, # 2 Exhibit 2 - Defendants' Objections to Plaintiff LWV's Proposed Exhibits, # 3 Exhibit 3 - Defendants' Objections to Plaintiff Common Cause's Proposed Exhibits, # 4 Exhibit 4 - Defendants' Objections and Counter- Designations of Plaintiffs Designations of Deposition Testimony) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 06/13/2017)
06/19/2017	71	MOTION in Limine *to exclude testimony of Sean P. Trende at trial* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Response to Motion due by 6/22/2017

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		Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 06/19/2017)
06/19/2017	72	BRIEF re (71 in 1:16-cv-01164-WO-JEP) MOTION in Limine *to exclude testimony* of Sean P. Trende at trial . (Attachments: # 1 Exhibit 1 - Expert Report of Sean P. Trende, dated April 3, 2017, # 2 Exhibit 2 - Deposition of Sean P. Trende, dated May 5, 2017, # 3 Exhibit 3 - Curriculum Vitae of Sean P. Trende, # 4 Exhibit 4 Expert Report of Dr. Simon Jackman, dated April 18, 2017, # 5 Exhibit 5 - Bernard Grofman & Gary King, The Future of Partisan Symmetry as a Judicial Test for, # 6 Exhibit 6 Rebuttal Report of Dr. Simon Jackman, dated April 17, 2017, # 7 Exhibit 7 Deposition of James G. Gimpel, dated April 27, 2017, # 8 Exhibit 8 Curriculum Vitae of Dr. Simon Jackman, # 9 Exhibit 9 Curriculum Vitae of Dr. Jowei Chen, # 10 Exhibit 10 Curriculum Vitae of Dr. Jonathan Rodden, # 11 Exhibit 11 American Political Science Association, APSR Submission

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		Guidelines, updated August 26, 2016, # 12 Exhibit 12 Trial Transcript, Whitford v. Nichol, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) (No. 1:15-cv-421-bbc), # 13 Exhibit 13 Expert Report of Simon Jackman, dated July 7, 2015, Whitford v. Nichol, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 1:15-cv-421-bbc), # 14 Exhibit 14 Almanac of American Politics 2014, at 1233 (Michael Barone et al. eds., 2014), # 15 Exhibit 15 Michael D. McDonald & Robin E. Best, Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases, 14 Election L.J. 312 (2015), # 16 Exhibit 16 - Samuel S. H. Wang, Three Tests for Practical Evaluation of Partisan Gerrymandering, 68 Stan. L. Rev. 1263 (2016)) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026- WO-JEP(GREENWOOD, RUTH) (Entered: 06/19/2017)
06/19/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., in G-1: Pretrial Conference held on 6/19/2017. Attorneys Edwin

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		Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven Epstein, Anita Earls, Anabelle Harless and Ruth Greenwood appeared on behalf of Plaintiffs. Attorneys Phillip Strach, Michael McKnight and James Bernier, Jr., appeared on behalf of Defendant. On the Court's own motion, the trial in this matter is continued to a date to be determined. Deadline for filing any Motions in Limine remains as today by 5:00 p.m. Responses due within fourteen days. Stipulations, Revised Joint Exhibit list and any motions with respect to expert witness testimony are to be filed one (1) week prior to the new trial date. Parties agree that the estimated trial time remains as five (5) days. (Court Reporter Jane Calhoun.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 06/19/2017)
06/26/2017	73	MOTION to Stay by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE,

Date Filed	#	Docket Text
		ROBERT A. RUCHO. Response to Motion due by 7/17/2017 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 06/26/2017)
06/26/2017	74	MEMORANDUM filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO re (74 in 1:16-cv-01026-WOJEP, 73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 06/26/2017)
07/03/2017	75	RESPONSE in Opposition re (71 in 1:16-cv-01164-WO-JEP, 72 in 1:16-cv-01026-WOJEP) MOTION in Limine to *exclude testimony of Sean P. Trende at*

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		trial filed by WILLIS WILLIAMS, ELIZABETH TORRES EVANS, GUNTHER PECK, WILLIAM COLLINS, AARON SARVER, JOHN QUINN, III, ANNETTE LOVE, ELLIOTT FELDMAN, CAROL FAULKNER FOX, MARIA PALMER, ERSLA PHELPS, JANIE SMITH SUMPTER filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Replies due by 7/17/2017 (Attachments: # 1 Exhibit 1 - Chart of 1992-2016 Congressional Plans - Divided Counties and VTDs) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(STRACH, PHILLIP) (Entered: 07/03/2017)

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07/17/2017	76	REPLY, filed by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS, to Response to (71 in 1:16-cv-01164-WO-JEP, 72 in 1:16-cv-01026-WO-JEP) MOTION in Limine *to exclude testimony of Sean P. Trende at trial* filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-

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		WOJEP(GREENWOOD, RUTH) (Entered: 07/17/2017)
07/17/2017	77	RESPONSE in Opposition re (74 in 1:16-cv-01026-WO-JEP) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies due by 7/31/2017 Associated Cases: 1:16-cv-01164-WO-JEP, 1:16- cv-01026-WO-JEP(HARLESS, ANNABELLE) (Entered: 07/17/2017)
07/17/2017	78	RESPONSE in Opposition re (74 in 1:16-cv-01026-WO-JEP, 73 in 1:16-cv-01164-WOJEP) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS

Date Filed	#	Docket Text
		filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 7/31/2017 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 07/17/2017)
07/31/2017	79	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, to Response to (73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP

Date Filed	#	Docket Text
		E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(STRACH, PHILLIP) (Entered: 07/31/2017)
		* * *
08/11/2017		Motions Submitted: (#74 in 1:16cv1026, #73 in 1:16cv1164) MOTION to Stay, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 08/11/2017)
08/23/2017	82	NOTICE OF HEARING: Hearing on Legislative Defendants' Motion to Stay set for 8/29/2017 11:30 AM in **Raleigh, Courtroom #2** before SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. & CHIEF JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(Welch, Kelly) (Entered: 08/23/2017)
08/28/2017	83	Suggestion of Subsequently Decided Authority by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE,

Date Filed	#	Docket Text
		ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. (Attachments: # 1 Exhibit Benisek et al v. Lamone et al. (D. Md. Aug. 24, 2017)) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 08/28/2017)
08/29/2017		Minute Entry for proceedings held before SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR., & (CHIEF JUDGE WILLIAM L. OSTEEN, JR. - participated via telephone conference call) in Raleigh, Courtroom 2: Motion Hearing held on 8/29/2017 re: (Doc. #74 in 1:16cv1026, Doc. #73 in 1:16cv1164) MOTION to Stay filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS. Attorneys Edwin Speas, Jr., Emmet Bondurant, Steven Epstein, Annabelle Harless & Anita Earls appeared on behalf of Plaintiffs. Attorneys Alexander Peters, James Bernier, Jr., Michael McKnight & Phillip Strach

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		appeared on behalf of Defendants. The court heard from counsel for the defendants regarding the basis for this motion. The court heard arguments from counsel for the Common Cause plaintiffs and counsel for the League of Women Voters plaintiffs. The Court addressed the reason for the delay of trial previously scheduled for June, 2017. After hearing closing arguments from the parties, the court takes this matter under advisement. (Court Reporter Amy Condon, EDNC.) Associated Cases: 1:16cv1026, 1:16cv1164 (Welch, Kelly) (Entered: 08/29/2017)
08/29/2017	84	ORDER denying (74) Motion to Stay in case 1:16-cv-01026-WO-JEP and denying (73) Motion to Stay in case 1:16-cv-01164-WO-JEP. A written opinion will follow. Signed by JUDGE W. EARL BRITT on 8/29/2017. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Marsh, Keah) (Entered: 08/29/2017)
09/01/2017	85	Transcript of Motion Hearing Proceedings held on 08/29/2017,

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		before Judge WILLIAM L. OSTEEN, JR., Judge W. EARL BRITT, and Judge JAMES A. WYNN, JR. * * * Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP. Court Reporter: Amy M. Condon, Raleigh, NC (Taylor, Abby) (Entered: 09/01/2017)
09/08/2017	86	MEMORANDUM OPINION - Circuit Judge Wynn, Jr., wrote the opinion in which Senior District Judge Britt joined. Chief District Judge Osteen, Jr. concurred. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 09/08/2017)
09/11/2017	87	NOTICE OF HEARING: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT (Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP) (Welch, Kelly) (Entered: 09/11/2017)

Date Filed	#	Docket Text
09/11/2017	88	NOTICE of Trial Calendar: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 09/11/2017)
09/11/2017		Set/Reset Deadlines/Hearings: Bench Trial set for 10/16/2017 09:00 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., CIRCUIT JUDGE JAMES A. WYNN, JR., SENIOR JUDGE W. EARL BRITT. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Welch, Kelly) (Entered: 09/11/2017)
10/04/2017	89	FINAL PRETRIAL ORDER signed by CHIEF JUDGE WILLIAM L. OSTEEN, JR on 10/04/2017 as set out herein. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Taylor, Abby) (Entered: 10/04/2017)

Date Filed	#	Docket Text
10/09/2017	90	Proposed Exhibit List *Amended* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit LWV Plaintiffs' Exhibit List) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	91	MOTION to Bifurcate *Trial Testimony of Jowei Chen* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Response

Date Filed	#	Docket Text
		to Motion due by 10/30/2017 (Attachments: # 1 Text of Proposed Order) Associated Cases: 1:16-cv-01164- WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	92	MEMORANDUM filed by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS re (92 in 1:16-cv-01026-WOJEP) MOTION to Bifurcate *Trial Testimony of Jowei Chen* filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER,

Date Filed	#	Docket Text
		ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 10/09/2017)
10/09/2017	93	Proposed Exhibit List *Amended* by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Ex A - Joint Joint Trial Exhibit List, # 2 Ex B - Joint Plaintiffs' Trial Exhibit List, # 3 Ex C - Common Cause Plfs' Trial Exhibit List) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16- cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/09/2017)

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10/09/2017	94	Proposed Exhibit List *Amended* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit Defendants Amended Trial Exhibits List) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/09/2017)
10/10/2017		Motions Submitted: (91 in 1:16cv1164, 92 in 1:16cv1026) MOTION to Bifurcate Trial Testimony of Jowei Chen to CHIEF JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16cv1026, 1:16cv1164(Kemp, Donita) (Entered: 10/10/2017)
10/10/2017	95	AMENDED DOCUMENT by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE,

Date Filed	#	Docket Text
		ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Amendment to (58 in 1:16-cv-01164-WO-JEP, 59 in 1:16-cv-01026-WO-JEP) Final Pretrial Disclosures,, *Defendants' Corrected Designations of Deposition Testimony*. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/10/2017)
10/13/2017	96	STATEMENT (*League Plaintiffs' Opening Statement*) by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER,

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		JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(EARLS, ANITA) (Entered: 10/13/2017)
10/13/2017	97	STATEMENT re (89 in 1:16-cv-01164-WO-JEP, 90 in 1:16-cv-01026-WO-JEP) Final Pretrial Order *(Opening Statement on Behalf of the Common Cause Plaintiffs)* by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(SPEAS, EDWIN) (Entered: 10/13/2017)

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10/13/2017	98	STATEMENT by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(STRACH, PHILLIP) (Entered: 10/13/2017)
10/13/2017	99	NOTICE by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR *of Filing of Combined Deposition Designations and Counter-Designations* (Attachments: # 1 Exhibit 1 - Annette Love Deposition, # 2 Exhibit 2- Larry Hall Deposition, # 3 Exhibit 3 - Gunther Peck Deposition, # 4 Exhibit 4 - Faulkner Fox Deposition, # 5 Exhibit 5 -

Date Filed	#	Docket Text
		William Collins Deposition, # 6 Exhibit 6 - Willis Williams Deposition, # 7 Exhibit 7 - Elizabeth Evans Deposition, # 8 Exhibit 8 - Douglas Berger Deposition, # 9 Exhibit 9 Ersla Phelps Depositions, # 10 Exhibit 10 - Richard Taft Deposition, # 11 Exhibit 11 - Cheryl Taft Deposition, # 12 Exhibit 12 - Morton Lurie Deposition, # 13 Exhibit 13 - Maria Palmer Deposition, # 14 Exhibit 14 - William Freeman Deposition, # 15 Exhibit 15 - Alice Bordsen Deposition, # 16 Exhibit 16 Merlzer Morgan Deposition, # 17 Exhibit 17 - Cynthia Boylan Deposition, # 18 Exhibit 18 - Coy Brewer Deposition, # 19 Exhibit 19 - John McNeill Deposition, # 20 Exhibit 20 - Elliott Feldman Deposition, # 21 Exhibit 21 - Robert Wolf Deposition, # 22 Exhibit 22 - John Quinn Deposition, # 23 Exhibit 23 - Aaron Sarver Deposition, # 24 Exhibit 24 - Jones Byrd Deposition, # 25 Exhibit 25 - John Gresham Deposition, # 26 Exhibit 26 - Janie Sumpter Deposition, # 27 Exhibit 27 - Russell Walker

Date Filed	#	Docket Text
		Deposition, # 28 Exhibit 28 - Mary Klenz Deposition, # 29 Exhibit 29 - Bob Phillips Deposition, # 30 Exhibit 30 - Wayne Goodwin Deposition, # 31 Exhibit 31 - William Gilkeson Deposition, # 32 Exhibit 32 - Robert Rucho Deposition, # 33 Exhibit 33 - David Lewis Deposition, # 34 Exhibit 34 - Thomas Hofeller Deposition, # 35 Exhibit 35 - James Gimpel Deposition, # 36 Exhibit 36 - M.V. Hood Deposition, # 37 Exhibit 37 - Sean Trende Deposition) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/13/2017)
10/15/2017	100	Proposed Exhibit List *Second Amended* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER,

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		ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(HARLESS, ANNABELLE) (Entered: 10/15/2017)
10/16/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 1) held on 10/16/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein, Peter Nelson and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants. For the reasons stated on the record the Court grants League of

Date Filed	#	Docket Text
		Women Voters Motion to Bifurcate Examination of Dr. Jowei Chen (Doc. #92 in case no. 1:16cv1026 & Doc. #91 in case no. 1:16cv1164;) The parties conferred and agreed that all depositions and all deposition exhibits come in the record as addressed in open court; Court accepts the stipulation of the parties. Plaintiffs presented evidence; Trial continued to October 17, 2017 at 9:00 a.m. in Greensboro, Courtroom 1. (See exhibit/witness list) (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(Welch, Kelly) (Entered: 10/16/2017)
10/17/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 2) held on 10/17/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein, Peter Nelson and Caroline Mackie appeared on behalf of Plaintiffs Common

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		Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants; Plaintiff Common Cause continued with evidence and rested; Plaintiff League of Women Voters of NC presented evidence; Parties agreed not to call witnesses re: exhibits 4022, 4023 & 4024, and will submit a stipulation in writing at the end of the day; Defendant agreed to withdraw its objections relating to those exhibits on the condition that Dr. Hoffler submit a declaration to give his rebuttal. Trial continued to Wednesday, October 18, 2017 at 10:00 a.m. in Greensboro, Courtroom 1. (See exhibit/witness list) (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-

Date Filed	#	Docket Text
		WO-JEP(Welch, Kelly) (Entered: 10/17/2017)
10/18/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 3) held on 10/18/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe and Steven B. Epstein appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls, Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants; Counsel for League of Women Voters of North Carolina produced additional exhibits; Parties to submit a written list to finalize all exhibits not objected to; Both Plaintiffs rest their case in chief; Defendants presented evidence; Trial

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		continued to October 19, 2017 at 8:30 a.m. in Greensboro, Courtroom 1. (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(Welch, Kelly) (Entered: 10/18/2017)
10/18/2017	101	Proposed Exhibit List *Final* by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv- 01026-WO-JEP(HARLESS, ANNABELLE) (Entered: 10/18/2017)
10/19/2017	102	Proposed Exhibit List *Final* by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W.

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		GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. (Attachments: # 1 Ex A - Final Joint Joint Trial Exhibit List, # 2 Ex B - Final Joint Plaintiffs' Trial Exhibit List, # 3 Ex C - Final Common Cause Plfs' Trial Exhibit List) Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/19/2017)
10/19/2017		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., SENIOR JUDGE W. EARL BRITT, CIRCUIT JUDGE JAMES A. WYNN, JR. Bench Trial (Day 4) held on 10/19/2017: Attorneys Edwin Speas, Jr., Emmet Bondurant, Benjamin Thorpe, Steven B. Epstein and Caroline Mackie appeared on behalf of Plaintiffs Common Cause, et al.; Attorneys Anita Earls,

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		Annabelle Harless, Allison Riggs, Ruth Greenwood and Nicholas Stephanopoulos appeared on behalf of Plaintiffs League of Women Voters of North Carolina, et al.; Attorneys Phillip Strach, Michael McKnight, Alexander Peters and James Bernier appeared on behalf of the Defendants. Defendants presented evidence; Defendant rests; Evidence concluded; Court admits all stipulated exhibits; Closing Arguments presented by Plaintiffs and Defendants; Post Trial Briefs due 11/6/2017; Court takes matter under advisement. (See Exhibit/Witness list) (Court Reporter Joseph Armstrong.) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(Welch, Kelly) (Entered: 10/21/2017)
10/24/2017	103	Transcript of Bench Trial Volume I of IV held on 10/16/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number

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		336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(Armstrong, Joe) (Entered: 10/24/2017)
10/24/2017	104	Transcript of Bench Trial Volume II of IV held on 10/17/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After

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		that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(Armstrong, Joe) (Entered: 10/24/2017)
10/24/2017	105	Transcript of Bench Trial Volume III of IV held on 10/18/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/17/2017. Redacted Transcript Deadline set for 11/27/2017. Release of

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		Transcript Restriction set for 1/25/2018. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(Armstrong, Joe) (Entered: 10/24/2017)
10/26/2017	106	Transcript of Bench Trial Volume IV of IV held on 10/19/2017 before Judge William L. Osteen, Jr., Judge W. Earl Britt, and Judge James A. Wynn, Jr. Court Reporter/Transcriber J. Armstrong, Telephone number 336-332-6034. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. * * * Redaction Request due 11/20/2017. Redacted Transcript Deadline set for 11/30/2017. Release of Transcript Restriction set for 1/29/2018. Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP (Armstrong, Joe) (Entered: 10/26/2017)

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10/26/2017	107	Marked Exhibit List *Final Amended* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. (Attachments: # 1 Exhibit Defendants' Final Amended Exhibit List, # 2 Exhibit 5001 (Redacted Declaration of Dr. Thomas Hofeller), # 3 Exhibit 5116 (Second Declaration of Dr. Thomas Hofeller in Response to Declaration of Timothy Stallmann)) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 10/26/2017)
10/27/2017	108	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD,

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		COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF - *Common Cause Plaintiffs Notice of Filing of Deposition Transcripts* (Attachments: # 1 Attachment 1 - Deposition transcript of Thomas B. Hofeller, taken January 24, 2017, # 2 Attachment 2 - Deposition transcript of Thomas B. Hofeller, taken February 10, 2017, # 3 Attachment 3 - Deposition transcript of Rep. David Lewis, taken January 26, 2017, # 4 Attachment 4 - Deposition transcript of Rep. David Lewis, taken April 28, 2017, # 5 Attachment 5 - Deposition transcript of Sen. Robert A. Rucho, taken January 25, 2017, # 6 Attachment 6 - Deposition transcript of Bob Phillips, taken April 14, 2017,

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		# 7 Attachment 7 - Deposition transcript of George Wayne Goodwin, taken April 17, 2017, # 8 Attachment 8 - Deposition transcript of Coy E. Brewer, Jr., taken April 18, 2017, # 9 Attachment 9 - Deposition transcript of John Morrison McNeill, taken April 5, 2017, # 10 Attachment 10 - Deposition transcript of Jones P. Byrd, taken April 20, 2017) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(SPEAS, EDWIN) (Entered: 10/27/2017)
11/02/2017	109	NOTICE by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR *of Filing of Deposition Transcript* (Attachments: # 1 Exhibit Complete Deposition Transcript

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		of William Gilkeson) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(MCKNIGHT, MICHAEL) (Entered: 11/02/2017)
11/06/2017	110	Proposed Findings of Fact and Conclusions of Law by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 11/06/2017)
11/06/2017	111	TRIAL BRIEF (*Post-Trial*) by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN

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		QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 11/06/2017)
11/06/2017	112	Proposed Findings of Fact and Conclusions of Law by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 11/06/2017)
11/06/2017	113	TRIAL BRIEF by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP(STRACH, PHILLIP) (Entered: 11/06/2017)

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11/06/2017	114	TRIAL BRIEF *(Post-Trial)* by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 11/06/2017)
11/06/2017	115	Proposed Findings of Fact and Conclusions of Law by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA

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		DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 11/06/2017)
01/09/2018	116	MEMORANDUM OPINION. Circuit Judge Wynn wrote the majority opinion in which Senior District Judge Britt concurred. District Judge Osteen, Jr., wrote a separate opinion concurring in part and dissenting in part. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Daniel, J) (Entered: 01/09/2018)
01/11/2018	117	Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Response to Motion due by 2/1/2018 Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-

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		JEP(STRACH, PHILLIP) (Entered: 01/11/2018)
		* * *
01/11/2018	119	ORDER entered by THREE JUDGE COURT PANEL on 01/11/2018. Legislative Defendants have filed a motion to stay (the "Motion") this Court's January 9, 2018, Memorandum Opinion, ECF No. 118 (the "Order"), invalidating North Carolina's 2016 congressional redistricting plan as a partisan gerrymander. Leg. Defs.' Emerg. Mot. to Stay Pending S. Ct. Rev. & Request for Exp. Rul'g, Jan. 11, 2018, ECF No. 119 . Plaintiffs and State Defendants are directed to file any response to the Motion on or before 5 p.m. on January 16, 2018. Defendants' obligations under the Order remain in effect during the pendency of this Motion. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(Garland, Leah) (Entered: 01/11/2018)
01/11/2018		Reset Response Deadline re: (119 in 1:16-cv-01026-WO-JEP, 117 in 1:16-cv-01164-WO-JEP)

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		Emergency MOTION to *Stay Pending Supreme Court Review and Request for Expedited Ruling*: Responses due by 1/16/2018. (See 120 Order in 16CV1026, 119 Order in 16CV1164) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 01/11/2018)
01/11/2018	120	NOTICE OF APPEAL TO THE SUPREME COURT re (118 in 1:16-cv-01026-WO-JEP, 116 in 1:16-cv-01164-WO-JEP) Memorandum and Opinion, Filing fee $ 5. (STRACH, PHILLIP) Modified on 1/12/2018 to set out that Appeal is to the Supreme Court. (Garland, Leah) (Entered: 01/11/2018)
01/12/2018	121	RESPONSE in Opposition re (117 in 1:16-cv-01164-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS - *PLAINTIFFS JOINT BRIEF IN OPPOSITION TO LEGISLATIVE DEFENDANTS*

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		EMERGENCY MOTION TO STAY PENDING SUPREME COURT REVIEW AND REQUEST FOR EXPEDITED RULING filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies

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		due by 1/26/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 01/12/2018)
01/16/2018	122	MEMORANDUM OPINION AND ORDER DENYING LEGISLATIVE DEFENDANTS' EMERGENCY MOTION TO STAY signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 01/16/2018, as set out herein. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP (Garland, Leah) (Entered: 01/16/2018)
01/16/2018	123	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G.

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		WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS *Regarding Special Master Submission* Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(RIGGS, ALLISON) (Entered: 01/16/2018)
06/27/2018	124	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 06/27/2018, that parties are invited to submit briefing to this Court by 5:00 p.m. on July 11, 2018, addressing four issues as set out. In addressing these questions, the parties should include citations to the record to support their arguments. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-

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		WOJEP(Garland, Leah) (Entered: 06/27/2018)
		* * *
07/11/2018	129	*LWV Plaintiffs'* BRIEF re (124 in 1:16-cv-01164-WO-JEP) Order, . (Attachments: # 1 Appendix 1 - Salinger Declaration, # 2 Appendix 2 - Supplemental Chen Declaration - Part 1, # 3 Appendix 2- Supplemental Chen Declaration - Part 2, # 4 Appendix 2 - Supplemental Chen Declaration - Part 3, # 5 Appendix 2- Supplemental Chen Declaration - Part 4, # 6 Appendix 2- Supplemental Chen Declaration - Part 5, # 7 Appendix 2 - Supplemental Chen Declaration - Part 6, # 8 Appendix 2 - Supplemental Chen Declaration - Part 7, # 9 Appendix 2 - Supplemental Chen Declaration - Part 8, # 10 Appendix 2 - Supplemental Chen Declaration - Part 9, # 11 Appendix 2 - Supplemental Chen Declaration - Part 10, # 12 Appendix 2 - Supplemental Chen Declaration - Part 11, # 13 Appendix 2 - Supplemental Chen Declaration - Part 12, # 14 Appendix 2 -

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		Supplemental Chen Declaration - Part 13, # 15 Appendix 2 - Supplemental Chen Declaration - Part 14, # 16 Appendix 3 - Additional Proposed FoF/CoLs) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(RIGGS, ALLISON) (Entered: 07/11/2018)
07/11/2018	130	RESPONSE *of the State Defendants to the June 27, 2018 Order* filed by THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Replies due by 7/25/2018 (BERNIER, JAMES) (Entered: 07/11/2018)
07/11/2018	131	RESPONSE re (124 in 1:16-cv-01164-WO-JEP, 125 in 1:16-cv-01026-WO-JEP) Order, *by the Legislative Defendants* filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Replies due by 7/25/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:13-cv-00949-WO-JEP, 1:16-

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		cv-01164- WO-JEP(STRACH, PHILLIP) (Entered: 07/11/2018)
07/12/2018		CASE REFERRED re: (Doc. 130 in 1:16cv1026) Response, (Doc. 131 in 1:16cv1026) Response, (Doc. 129 in 1:16cv1026) Brief, (Doc. 128 in 1:16cv1026) Response, to JUDGE WILLIAM L. OSTEEN, JR. Associated Cases: 1:16cv1164, 1:16cv1026 (Welch, Kelly) (Entered: 07/12/2018)
07/13/2018	132	SUPREME COURT ORDER: The judgment is vacated, and the case is remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill V. Whitford*, 585 U.S.____(2018). (Entered at the Supreme Court on June 25, 2018) (Supreme Court case number: 17-1295) (Attachments: # 1 Envelope - Front and Back) (Garland, Leah) (Entered: 07/13/2018)
07/16/2018	133	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., and JUDGE W. EARL BRITT on 07/16/2018, that Plaintiffs shall (1) provide Defendants with any

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		previously undisclosed data or evidence underlying the declarations on or before July 19, 2018, and (2) make Dr. Chen and Mr. Salinger available for deposition by Legislative Defendants regarding the statements and analyses included in their declarations at a mutually agreeable time prior to or on July 31, 2018. FURTHER ORDERED that the parties submit briefing to this Court on or before August 7, 2018, addressing whether based on the existing record, the proffered declarations by Dr. Chen and Mr. Salinger, and any additional deposition testimony by Dr. Chen and Mr. Salinger any, some, or all Plaintiffs have standing to assert a vote dilution claim under the Equal Protection Clause. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(Garland, Leah) (Entered: 07/16/2018)
07/17/2018	134	RESPONSE re (133 in 1:16-cv-01164-WO-JEP) Order,,, filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO,

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		PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Replies due by 7/31/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(STRACH, PHILLIP) (Entered: 07/17/2018)
07/18/2018	135	ORDER signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., JUDGE W. EARL BRITT on 07/18/2018, to the extent, Legislative Defendants maintain this court is without jurisdiction until July 20, 2018, the parties may consider this order as continually entered until that date. Plaintiffs have until 5:00 p.m. on July 20, 2018 to turn over to Defendants any previously undisclosed data or evidence underlying the declarations. The remaining deadlines established in the continuing July 16 Order remain in effect, all of which post-date July 20, 2018, and provide the parties with ample time to depose Dr. Chen and Mr. Salinger regarding the statements and analyses included in their proffered

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		declarations and prepare additional briefing based on those declarations and depositions. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(Garland, Leah) (Entered: 07/18/2018)
07/30/2018	136	SUPREME COURT JUDGMENT: It is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill v. Whitford*, 585 U.S. ___(2018). (Signed at the Supreme Court on June 25, 2018) (Supreme Court case number: 17-1295) (Attachments: # 1 Envelope - Front and Back)(Garland, Leah) (Entered: 07/30/2018)
08/07/2018	137	***Brief of the Common Cause Plaintiffs in Response to Order of July 16, 2018*** - BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv-01164-WO-JEP) Order,,, . (Attachments: # 1 Exhibit A - Deposition of Dr. Jowei Chen) Associated Cases:

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		1:16-cv-01026-WOJEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 08/07/2018)
08/07/2018	138	*LWV Plaintiffs'* BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv-01164-WOJEP) Order,,, by Plaintiffs WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Appendix 1 - Salinger Dep. Excerpt)

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		Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WOJEP(RIGGS, ALLISON) (Entered: 08/07/2018)
08/07/2018	139	BRIEF re (133 in 1:16-cv-01026-WO-JEP, 133 in 1:16-cv-01164-WO-JEP) Order,,, by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. (Attachments: # 1 Exhibit A - Salinger Deposition Transcript, # 2 Exhibit B - Chen Deposition Transcript, # 3 Exhibit Chen Deposition Exhibit 14, # 4 Exhibit Chen Deposition Exhibit 15, # 5 Exhibit C - Trende Report, # 6 Exhibit D - Hood Report) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP(STRACH, PHILLIP) (Entered: 08/07/2018)

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08/09/2018	140	Corrected document re (139 in 1:16-cv-01164-WO-JEP, 140 in 1:16-cv-01026-WO-JEP) Brief,,. (Attachments: # 1 Exhibit -1, # 2 Exhibit -2, # 3 Exhibit -3, # 4 Exhibit -4, # 5 Exhibit -5, # 6 Exhibit -6) Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026- WO-JEP(STRACH, PHILLIP) (Entered: 08/09/2018)
08/27/2018	141	**MEMORANDUM OPINION.** WYNN, Circuit Judge, wrote the opinion, in which BRITT, Senior District Judge, concurred. OSTEEN, JR., District Judge, concurs in part and dissents in part. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WOJEP(Marsh, Keah) (Entered: 08/27/2018)
08/29/2018	142	NOTICE by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA

Date Filed	#	Docket Text
		DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS re (141 in 1:16-cv-01164-WO-JEP) Memorandum and Opinion, *of Consultation re: Special Master* Associated Cases: 1:16-cv-01164-WO-JEP, 1:16-cv-01026-WO-JEP(RIGGS, ALLISON) (Entered: 08/29/2018)
08/31/2018	143	***Memorandum Regarding Remedies from the Common Cause and League of Women Voters Plaintiffs*** - BRIEF re (141 in 1:16-cv-01164-WO-JEP) Memorandum and Opinion, by Plaintiffs DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E.

Date Filed	#	Docket Text
		BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A.

Date Filed	#	Docket Text
		MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. (Attachments: # 1 Exhibit A - Second Declaration of Kim Westbrook Strach from Covington v. North Carolina, # 2 Exhibit B - N.C. Election Board's Response to Petitions for Writ of Supersedeas or Prohibition in Cooper v. Berger, No. 367P18 (N.C. Aug. 29, 2018), # 3 Exhibit C - Judgment in Covington v. North Carolina) Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-

Date Filed	#	Docket Text
		WO-JEP(SPEAS, EDWIN) (Entered: 08/31/2018)
08/31/2018	144	NOTICE OF APPEAL TO THE SUPREME COURT re: (141 in 1:16-cv-01164-WOJEP, 142 in 1:16-cv-01026-WO-JEP) Memorandum and Opinion, Filing fee $ 5, receipt number 0418-2418982. (STRACH, PHILLIP) (Entered: 08/31/2018)
08/31/2018	145	Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Response to Motion due by 9/21/2018 Associated Cases: 1:16-cv- 01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 08/31/2018)
08/31/2018	146	MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO STAY (146 in 1:16- cv-01026-WO-JEP, 145 in 1:16-cv-01164-WO-JEP) AND IN RESPONSE TO THE COURT'S ORDER OF AUGUST 27, 2018 (141 in 1:16-

Date Filed	#	Docket Text
		cv-01164-WO-JEP, 142 in 1:16-cv-01026-WO-JEP) filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, Replies due by 9/14/2018 (Attachments: # 1 Exhibit 1 - Wall Street Journal Article, # 2 Exhibit 2 - Declaration of Carter Wrenn, # 3 Exhibit 3 - Campaign Finance Summary for N.C. Congressional Candidates Through Second Quarter Reports, # 4 Exhibit 4 - State Board of Elections Memo of August 29, 2018, # 5 Exhibit 5 - Second Declaration of Kim Strach in Covington v. State of North Carolina, # 6 Exhibit 6 - Shaw v. Hunt Order of July 30, 1996) Associated Cases: 1:16-cv-01026- WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) Modified on 9/4/2018 to edit title of document (Welch, Kelly). (Entered: 08/31/2018)
08/31/2018	147	STATE DEFENDANTS' BRIEF ON POSSIBLE REMEDIES filed by Defendants PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A.

Date Filed	#	Docket Text
		GRANT WHITNEY, JR, Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(BERNIER, JAMES) (Entered: 08/31/2018)
09/04/2018	148	COMMON CAUSE PLAINTIFFS' BRIEF IN RESPONSE TO LEGISLATIVE DEFENDANTS' EMERGENCY MOTION TO STAY PENDING SUPREME COURT REVIEW AND REQUEST FOR EXPEDITED RULING (146 in 1:16-cv-01026-WOJEP, 145 in 1:16-cv-01164-WO-JEP) filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 9/18/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-

Date Filed	#	Docket Text
		cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 09/04/2018)
09/04/2018	149	**ORDER** signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., JUDGE W. EARL BRITT on 09/04/2018 as set out herein. Associated Cases: 1:16- cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP (Garland, Leah) (Entered: 09/04/2018)
09/05/2018	150	RESPONSE in Opposition re (146 in 1:16-cv-01026-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, WILLIS WILLIAMS. Replies

Date Filed	#	Docket Text
		due by 9/12/2018 Associated Cases: 1:16-cv-01164-WO-JEP, 1:16- cv-01026-WO-JEP(GREENWOOD, RUTH) (Entered: 09/05/2018)
09/05/2018	151	RESPONSE re (149 in 1:16-cv-01164-WO-JEP, 150 in 1:16-cv-01026-WO-JEP) Order - *Response of the Common Cause Plaintiffs to the Court's Order of September 4, 2018* filed by DOUGLAS BERGER, ALICE L. BORDSEN, CYNTHIA S. BOYLAN, COY E. BREWER, JR, JONES P. BYRD, COMMON CAUSE, WILLIAM H. FREEMAN, JOHN W. GRESHAM, LARRY D. HALL, MORTON LURIE, MELZER A. MORGAN, JR, JOHN MORRISON McNEILL, NORTH CAROLINA DEMOCRATIC PARTY, CHERYL LEE TAFT, RICHARD TAFT, RUSSELL G. WALKER, JR, ROBERT WARREN WOLF. Replies due by 9/19/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(SPEAS, EDWIN) (Entered: 09/05/2018)

Date Filed	#	Docket Text
09/05/2018	152	RESPONSE filed by Defendants PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR re (145 in 1:16-cv-01164-WO-JEP) Emergency MOTION to Stay *Pending Supreme Court Review and Request for Expedited Ruling* filed by TIMOTHY K. MOORE, PHILIP E. BERGER, ROBERT A. RUCHO, DAVID R. LEWIS filed by PATRICK MCCRORY, STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR, THE STATE OF NORTH CAROLINA, A. GRANT WHITNEY, JR. Replies due by 9/19/2018 Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164- WO-JEP(BERNIER, JAMES) (Entered: 09/05/2018)
09/05/2018		CASE REFERRED re: (Documents 151, 152 & 153 in

Date Filed	#	Docket Text
		1:16cv1026 and Documents 150, 151 & 152 in 1:16cv1164) Responses to the Court's Order dated September 4, 2018, to JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 09/05/2018)
09/05/2018	153	REPLY, filed by Defendants PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, to Response to (74 in 1:16-cv-01026-WO-JEP, 73 in 1:16-cv-01164-WO-JEP) MOTION to Stay filed by PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO, PHILIP E. BERGER, DAVID R. LEWIS, TIMOTHY K. MOORE, ROBERT A. RUCHO. Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv-01164-WO-JEP(STRACH, PHILLIP) (Entered: 09/05/2018)
09/12/2018	154	**ORDER** signed by JUDGE JAMES A. WYNN, JR., JUDGE WILLIAM L. OSTEEN, JR., JUDGE W. EARL BRITT on

Date Filed	#	Docket Text
		09/12/2018 granting 146 Motion to Stay (145 Motion to Stay in case 1:16-cv-01164). Associated Cases: 1:16-cv-01026-WO-JEP, 1:16-cv- 01164-WO-JEP (Garland, Leah) (Entered: 09/12/2018)

First Amended Complaint for Declaratory Judgment and Injunctive Relief
***Common Cause v. Rucho*, No. 16-cv-01026, (M.D.N.C. Sept. 7, 2016) (ECF 12)**

Plaintiffs, with Defendants' consent, amend their Complaint as follows:

INTRODUCTION

1. This is an action to declare the North Carolina 2016 Congressional Redistricting Plan (N.C. Sess. Law 2016-1) ("the 2016 Plan") as a whole, and each of the thirteen congressional districts created by that Plan, to be unconstitutional partisan gerrymanders that violate the First Amendment (Count I), the Equal Protection Clause of the Fourteenth Amendment (Count II), and Article I, section 2 of the Constitution of the United States (Count III), and also to declare that in adopting the 2016 Plan the legislature exceeded the authority granted by Article I, section 4 of the U.S. Constitution, which provides that state legislatures "determine the times, places and manner of election" of members of the U.S. House of Representatives (Count IV).

THE PARTIES

2. The plaintiffs are:

(a) Common Cause, on its own behalf and on behalf of its members who are citizens of North Carolina and are registered Democratic voters, whose votes in congressional elections have been diluted or nullified as a result of the unconstitutional gerrymander by the 2016 Plan of North Carolina's thirteen congressional districts. Common Cause is a non-profit corporation organized and existing under

the laws of the District of Columbia. It is a nonpartisan democracy organization with over 450,000 members and local organizations in 35 states, including North Carolina. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform." Jonathan Winburn, The Realities of Redistricting p. 205 (2008).

(b) Gerrymandering is not a partisan issue that favors one party or another. Gerrymanders have been used by both Democrats and Republicans to entrench their power almost since the founding of this Nation. Whether done by Democrats or Republicans, partisan gerrymanders are antithetical to our democracy. Common Cause is at the forefront of efforts to combat gerrymandering, no matter what party is responsible, in the belief that when election districts are created in a fair and neutral way, the People will be able to elect representatives who truly represent them. To that end, Common Cause has organized and led the coalitions that secured passage of ballot initiatives that created independent redistricting commissions in Arizona and California and campaigned for ratification of an amendment to the Florida Constitution prohibiting partisan gerrymandering. Common Cause is the sponsor of the annual Gerrymander Standards Writing Competition. In this case, Common Cause is opposing a Republican gerrymander in North Carolina, but at the same time Common Cause is opposing a Democratic gerrymander in Maryland, where it has appeared as

amicus curiae in the Supreme Court in *Shapiro v. McManus*, ___ U.S. ___, 136 S. Ct. 450 (2015), and in the district court on remand, 1:13-cv-03233-JKB (D. Md.). For Common Cause, these are issues of principle, not of party, and it is committed to eliminating the harm caused to its members and all citizens by these practices.

(c) The North Carolina Democratic Party ("NCDP") is a political party as defined in N.C. Gen. Stat. § 163-96. Its purposes are (i) to bring people together to develop public policies and positions favorable to NCDP members and the public generally, (ii) to identify candidates who will support and defend those policies and positions, and (iii) to persuade voters to cast their ballots for those candidates. These purposes are essential to the functioning of our democracy. Defendants' unlawful partisan gerrymander was adopted to discriminate against the NCDP and its members because of their beliefs and association and to suppress or nullify the capacity of the NCDP to achieve its essential purposes for its members.

(d) Larry D. Hall is a registered Democratic voter residing at 1526 Southwood Drive in the City of Durham in Durham County, North Carolina. He practices law in Durham and is a Democratic member of the North Carolina House of Representatives. Defendants assigned Representative Hall to Congressional District ("CD") 1 for the 2016 election. Together with all other Democratic voters, Representative Hall has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and

association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 1.

(e) Douglas Berger is a registered Democratic voter residing at 125 Hunters Lane in the City of Youngsville in Franklin County, North Carolina. He is a lawyer and former member of the North Carolina Senate. Defendants assigned Mr. Berger to CD 2 for the 2016 election. Together with all other Democratic voters, Mr. Berger has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 2.

(f) Dr. and Mrs. Richard and Cheryl Lee Taft are registered Democratic voters residing at 303 Kenilworth Road in the City of Greenville in Pitt County, North Carolina. He is a retired physician, and she is a landscape architect. Defendants assigned Dr. and Mrs. Taft to CD 3 for the 2016 election. Together with all other Democratic voters, Dr. and Mrs. Taft have been harmed by Defendants' unlawful gerrymandering because it treats them unequally based on their political beliefs and association. Their votes for the U.S. House of Representatives will be diluted or nullified as a result of their placement in CD 3.

(g) Alice L. Bordsen is a registered Democratic voter residing at 706 Copperline Drive #202 in the Town of Chapel Hill in Orange County, North Carolina. She is a lawyer and former Democratic member of the North Carolina House of

Representatives. Defendants assigned Ms. Bordsen to CD 4 for the 2016 election. Together with all other Democratic voters, Ms. Bordsen has been harmed by Defendants' unlawful gerrymandering because it treats her unequally based on her political beliefs and association. Her vote for the U.S. House of Representatives will be diluted or nullified as a result of her placement in CD 4.

(h) Morton Lurie is a registered Republican voter residing at 4112 Landfall Court in the City of Raleigh in Wake County, North Carolina. He is retired. Defendants assigned Mr. Lurie to CD 4 for the 2016 election. Together with all other Republican voters assigned to CD 4, Mr. Laurie has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U. S. House of Representatives will be diluted or nullified as a result of his placement in CD 4.

(i) William H. Freeman is a registered Democratic voter residing at 112 Westhaven Circle in the City of Winston-Salem in Forsyth County, North Carolina. He practices law in Winston-Salem and is a retired Superior Court Judge. Defendants assigned Judge Freeman to CD 5 for the 2016 election. Together with all other Democratic voters, Judge Freeman has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 5.

(j) Melzer A. Morgan, Jr. is a registered Democratic voter residing at 1607 Courtland Avenue

in the City of Reidsville in Rockingham County, North Carolina. He is a retired Superior Court Judge. Judge Morgan was assigned to CD 6 for the 2016 election. Together with all other Democratic voters, Judge Morgan has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 6.

(k) Cynthia S. Boylan is a registered Democratic voter residing at 612 Forest Hills Drive in the City of Wilmington in New Hanover County, North Carolina. She is a retired member of the North Carolina Department of Justice. Defendants assigned Ms. Boylan to CD 7 for the 2016 election. Together with all other Democratic voters, Ms. Boylan has been harmed by Defendants' unlawful gerrymandering because it treats her unequally based on her political beliefs and association. Her vote for the U.S. House of Representatives will be diluted or nullified as a result of her placement in CD 7.

(l) Coy E. Brewer, Jr. is a registered Democratic voter residing at 909 Calamint Lane in the City of Fayetteville in Cumberland County, North Carolina. He practices law in Fayetteville and is a retired Superior Court Judge. Judge Brewer was assigned to CD 8 for the 2016 election. Together with all other Democratic voters, Judge Brewer has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 8.

(m) John Morrison McNeill is a registered Democratic voter residing at 225 East 3rd Ave. in the Town of Red Springs in Robeson County, North Carolina. He currently serves as Mayor of Red Springs. Defendants assigned Mr. McNeill to CD 9 for the 2016 election. Together with all other Democratic voters, Mr. McNeill has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 9.

(n) Robert Warren Wolf is a registered Democratic voter residing at 238 Knollwood Drive in the Town of Forest City in Rutherford County, North Carolina. He practices law in Forest City. Defendants assigned Mr. Wolf to CD 10 for the 2016 election. Together with all other Democratic voters, Mr. Wolf has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 10.

(o) Jones P. Byrd is a registered Democratic voter residing at 89 Edgelawn Drive in the City of Asheville in Buncombe County, North Carolina. He practices law in Asheville and is former Chair of the Buncombe County Board of Elections. Defendants assigned Mr. Byrd to CD 11 for the 2016 election. Together with all other Democratic voters, Mr. Byrd has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of

Representatives will be diluted or nullified as a result of his placement in CD 11.

(p) John W. Gresham is a registered Democratic voter residing at 717 E. Kingston Ave. in the City of Charlotte in Mecklenburg County, North Carolina. He practices law in Charlotte. Defendants assigned Mr. Gresham to CD 12 for the 2016 election. Together with all other Democratic voters, Mr. Gresham has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 12.

(q) Russell G. Walker, Jr. is a registered Democratic voter residing at 104 Jordan Ridge Way in the City of Jamestown in Guilford County, North Carolina. He is a retired Superior Court Judge. Defendants assigned Judge Walker to CD 13 for the 2016 election. Together with all other Democratic voters, Judge Walker has been harmed by Defendants' unlawful gerrymandering because it treats him unequally based on his political beliefs and association. His vote for the U.S. House of Representatives will be diluted or nullified as a result of his placement in CD 13.

3. The defendants are:

(a) Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting;

(b) David R. Lewis, in his official capacity as Chairman of the North Carolina House of

Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting;

(c) Philip E. Berger, in his official capacity as the President Pro Tempore of the North Carolina Senate;

(d) Timothy K. Moore, in his official capacity as the Speaker of the North Carolina House of Representatives;

(e) A. Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of the North Carolina State Board of Elections;

(f) The North Carolina State Board of Elections, which is the agency that is charged with the responsibility for the administration of the election laws of the State of North Carolina and with the "general supervision over the primaries and elections in the State," N.C. Gen. Stat. § 163-22(a), including elections of the thirteen members of the United States House of Representatives from North Carolina;

(g) The State of North Carolina, a sovereign state of the United States. Its legislative power is vested in the General Assembly. N.C. Const. Art. II, § 1. That power is "derived from the people" and must be exercised "solely for the good of the whole." *Id.* Art. 1 § 2. Among the rights granted North Carolinians is the right "to assemble together ... to instruct their representatives" and the right "to apply to the General Assembly for the redress of grievances." *Id.* § 12.

JURISDICTION AND VENUE

4. This case arises under the Constitution of the United States, the issues are justiciable and well within the established subject-matter jurisdiction of

this Court under 28 U.S.C. §§ 1331, 1343, 1357, 2201 and 42 U.S.C. § 1983, and must be heard and determined by a district court of three judges under 28 U.S.C. § 2284. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b).

STATEMENT OF FACTS

5. From 2002 until 2012, North Carolina was represented in Congress by thirteen representatives elected from districts established under a reapportionment plan adopted by the North Carolina General Assembly in 2001 (the "2001 Plan") to conform to the one-person, one-vote requirements of Article I, § 2 of the U.S. Constitution. *See Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964).

6. Five congressional general elections were conducted under the 2001 plan, beginning in 2002 and ending in 2010. The following chart reflects the number and percent of votes cast in favor of Democratic and Republican candidates for Congress in those elections, as well as the number and percent of Democratic and Republican candidates actually elected to Congress under the 2001 plan:

	North Carolina State-wide Votes in U.S. House Elections				Representatives Elected to U.S. House for North Carolina			
Year	Number of Democratic ("DEM") Votes	DEM Votes as % of Total Votes	Number of Republican ("GOP") Votes	GOP Votes as % of Total Votes	Number of DEM Repre-sentatives ("Reps")	DEM Reps. as % of Total Reps.	Number of GOP Reps.	GOP Reps. as % of Total Reps.
2002	970,716	45%	1,209,033	54%	6	46%	7	54%
2004	1,669,864	49%	1,743,131	51%	6	46%	7	54%
2006	1,026,915	53%	913,893	47%	7	54%	6	46%
2008	2,293,971	54%	1,901,317	45%	8	62.5%	5	38.5%
2010	1,204,635	45%	1,440,913	54%	7	54%	6	46%

7. In 2011, the Republican party gained control of both houses of the North Carolina General Assembly and enacted a new congressional redistricting plan (the "2011 Plan") that resulted in the election of nine Republicans and four Democrats to Congress in 2012 and ten Republicans and three Democrats in 2014.

8. The 2011 Plan dramatically altered the composition of the North Carolina delegation elected to Congress in the 2012 and 2014 general elections:

	North Carolina State-wide Votes in U.S. House Elections				Representatives Elected to U.S. House for North Carolina			
Year	Number of Democratic ("DEM") Votes	DEM Votes as % of Total Votes	Number of Republican ("GOP") Votes	GOP Votes as % of Total Votes	Number of DEM Repre-sentatives ("Reps")	DEM Reps. as % of Total Reps.	Number of GOP Reps.	GOP Reps. as % of Total Reps.
2012	2,218,357	51%	2,137,167	49%	4	31%	9	69%
2014	1,361,695	44%	1,596,942	55%	3	23%	10	77%

9. On February 5, 2016, the 2011 North Carolina Congressional Redistricting Plan was declared unconstitutional by a three-judge district court in *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016), *appeal docketed*, No. 15-1262 (U.S. Apr. 11, 2016). The court held that both the First Congressional District and the Twelfth Congressional District were the product of unconstitutional racial gerrymanders that violated the Equal Protection Clause of the Fourteenth Amendment and enjoined the State from conducting the 2016 primary and general elections under the 2011 Plan. *Id.* at *17, *21.

10. In response to the ruling of the court in *Harris*, the Republican leadership in both the North Carolina House and Senate appointed a Joint Select Committee

on Redistricting (the "Joint Committee") to draft a new congressional redistricting plan. The Joint Committee was composed of 25 Republicans and 12 Democrats. It was co-chaired by the same two Republican legislators, Representative David Lewis and Senator Robert Rucho, who had co-chaired the Joint Committee responsible for drafting the unconstitutional 2011 Congressional Redistricting Plan.

11. The Joint Committee met on February 16, 2016, to consider the adoption of a set of written redistricting criteria that was drafted by the two Republican co-chairs of the Committee, defendants Representative Lewis and Senator Rucho.

12. At the Joint Committee hearing, Representative Lewis explained the written criteria. He said that, **"to the extent possible, the map drawers [would be instructed to] create a map which is perhaps likely to elect ten Republicans and three Democrats."** February 16, 2016 North Carolina Joint Select Committee on Congressional Redistricting (2015) Hearing Transcript ("Tr."), available at https://redistricting.lls.edu/files/NC%20Harris%20160217%20Transcript.pdf, at 48 (emphasis added). Representative Lewis freely **"acknowledge[d] ... that this would be a political gerrymander,"** which, he claimed, "is not against the law." *Id.* (emphasis added).

13. Representative Lewis went on to **"propose that we draw the maps to give a partisan advantage to ten Republicans and three Democrats because I do not believe it's possible**

to draw a map with 11 Republicans and two Democrats." Tr. 50 (emphasis added).

14. Representative Lewis emphasized that by adopting the written criteria, "we [the Joint Committee] **want to make clear that we...are going to use political data in drawing this map. It is to gain partisan advantage on the map. ... I want that criteria to be clearly stated and understood."** Tr. 53-4 (emphasis added).

15. Representative Lewis said that race would not be considered in drawing the new congressional district map, and emphasized that the only information other than population that would be used to draw the lines of the new congressional districts to maintain the existing 10-3 Republican partisan advantage would be "political data." Tr. 54. He specifically said that the Joint Committee would use **"political data, which was the earlier criteria adopted by th[e] committee [in 2011]. ... [A]s you draw the lines, if you're trying to give a partisan advantage, you would draw the lines so that more of the whole VTDs [Voter Tabulation Districts] voted for the Republican on the ballot than they did the Democrat."** Tr. 57 (emphasis added).

16. The Joint Committee voted to adopt the written criteria that Representative Lewis and Senator Rucho proposed by a strict party-line vote. A true and correct copy of the 2016 Contingent Congressional Plan Committee Adopted Criteria is attached as Exhibit A and is incorporated herein by reference (and hereinafter referred to as the "2016 Adopted Criteria").

17. The 2016 Adopted Criteria expressly instructed the mapmakers to make a "reasonable effort" to draw a new North Carolina congressional district map that would maintain the existing 10-3 Republican "Partisan Advantage":

Partisan Advantage

> The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. **The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.**

Exhibit A (emphasis added).

18. The 2016 Adopted Criteria also gave the mapmakers specific instructions that, other than population, they should use only "political data" to redraw the lines of North Carolina's thirteen congressional districts. The "political data" reflected whether the people in each Voter Tabulation District had voted in favor of Democratic or Republican candidates for certain state-wide elections since 2008 (excluding, however, the 2008 and 2012 presidential elections):

Political Data

> **The only data other than population data to be used to construct congressional districts *shall be election results in statewide contests since January 1, 2008*, not including the last**

> **two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting districts ("VTDs") should be split when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.**

Id. (emphasis added)

19. It took mapmakers only one day, using the "political data" specified in the 2016 Adopted Criteria, to draft a new congressional redistricting plan that would preserve and maintain the Republican Party's 10-3 partisan advantage. That plan was presented to and approved by the Joint Committee on February 17, 2016.

20. The next day, February 18, 2016, the new 2016 Plan was introduced in the North Carolina Senate and was passed that same day in a straight party-line vote of 32 Republicans voting for the Plan and 15 Democrats voting against it.

21. The new 2016 Plan was introduced in the House of Representatives on the following day, February 19, 2016, and was passed and thus enacted into law by another straight party-line vote, with 65 Republicans voting for the Plan and 43 Democrats opposing it.

22. A true and correct copy of the final 2016 Congressional Redistricting Plan as enacted by the

North Carolina General Assembly is attached hereto as Exhibit B and is incorporated herein by reference.

23. As of the date of enactment of the 2016 Plan, there were 2,634,903 registered Democrats, 1,976,873 registered Republicans, and 1,844,264 unaffiliated registered voters in North Carolina. *N.C. Voter Statistics Results, Reporting Period: 2/20/2016*, North Carolina State Board of Elections, http://enr.ncsbe.gov/voter_stats/results.aspx?date=02-20-2016. In other words, Defendants enacted a plan designed to give Republicans a 10-3 seat majority when Republicans comprised only 30% of the registered voters.

24. A statistical analysis of the 2016 Plan will confirm that the gerrymander of North Carolina's thirteen congressional districts to perpetuate the 10-3 partisan advantage in favor of the Republican Party and Republican candidates is intentional and is not the product of chance or the neutral application of legitimate redistricting principles. Hundreds of alternative plans can be drawn based on traditional redistricting principles that would have been far less partisan than the 2016 Plan, and that would have created districts more likely to result in the election of a congressional delegation more representative of the support of Democratic and Republican candidates by the voters of North Carolina. The statistical likelihood that the 10-3 partisan advantage in favor of the Republican Party and Republican candidates created by the 2016 Plan is the result of chance is virtually nonexistent.

COUNT ONE

25. The facts alleged above in paragraphs 1-24 are hereby incorporated by reference as allegations of Count One of the complaint.

26. The 2016 North Carolina Congressional Redistricting Plan as a whole and each of the thirteen individual districts created by that Plan violate the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States, are invalid, and should be enjoined. *See Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 1501 n.1 (1996) (applying the First Amendment to the states).

27. The First Amendment "has its fullest and most urgent application ... to the conduct of campaigns for political office," *McCutcheon v. FEC*, 572 U.S. __, 134 S. Ct. 1434, 1441(2014). It protects the right of voters to join or support a political party, and to vote for the candidate of their choice, which are the "core of those activities protected by the First Amendment" without which a representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356, 96 S. Ct. 2673, 2681 (1976) (plurality opinion).

28. "Partisan gerrymanders . . . are incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. __, 135 S. Ct. 2652, 2658 (2015) (alterations adopted); *see Vieth v. Jubelirer*, 541 U.S. 267, 292, 124 S. Ct. 1769, 1785 (2004) (Scalia, J., plurality opinion); *Vieth*, 541 U.S. at 316, 124 S. Ct. at 1798 (Kennedy, J., concurring); *Vieth*, 541 U.S. at 324, 124 S. Ct. at 1803 (Stevens, J., concurring in part and dissenting in

part); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. __, 136 S. Ct. 1301, 1310 (2016) ("assuming, without deciding, that partisanship is an illegitimate redistricting factor"); *N.C. State Conference of the NAACP v. McCrory*, No. 16-1468, 2016 U.S. App. LEXIS 13797, at *33 n.6 (4th Cir. July 29, 2016) ("Of course, state legislators also cannot impermissibly dilute or deny the votes of opponent political parties...as this same General Assembly was found to have done earlier this year.") (internal citations omitted) (citing *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, No. 16-1270, 2016 WL 3568147 (4th Cir. July 1, 2016)).

29. The 2016 Plan violates the First Amendment by favoring some voters (e.g., Republican supporters of the party in power) and by burdening or penalizing other voters (e.g., Democratic voters) based on the content of the voters' political expression or beliefs, their political party memberships or affiliations, or their voting histories in favor of a political party or its candidates. *See Vieth*, 541 U.S. at 314-16, 124 S. Ct. at 1797–98 (Kennedy, J., concurring); *see also id.* at 324, 124 S. Ct. at 1803 (Stevens, J., concurring in part and dissenting in part); *LULAC v. Perry*, 548 U.S. 399, 461-62, 126 S. Ct. 2594, 2634-35 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part).

30. The Republican majority in the North Carolina General Assembly also violated the First Amendment by using the partisan "political data" specified in the 2016 Adopted Criteria to draft and enact the 2016 Congressional Redistricting Plan to perpetuate and maintain the Republicans' 10-3

advantage in the North Carolina congressional delegation by intentionally favoring Republican voters over Democratic voters based on their political beliefs, party affiliations, and voting histories when assigning citizens to CDs 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12, and by intentionally favoring Democratic voters over Republican voters when assigning citizens to CDs 1, 4, and 13.

31. The 2016 Plan impinges on "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles, those burdens ... are unconstitutional absent a compelling [state] interest." *Vieth*, 541 U.S. at 314, 124 S. Ct. at 1797 (Kennedy, J., concurring) (citation omitted); *see also id.* at 324, 124 S. Ct. at 1803 (Stevens, J., concurring in part and dissenting in part); *LULAC*, 548 U.S. at 461-62, 126 S. Ct. at 2634-35 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part).

32. The 2016 Plan also violates the First Amendment duty of state governments and state officials to *govern impartially* and maintain a position of *strict political neutrality* in the adoption of laws that distribute political representation and power among the people through the apportionment of congressional and state legislative districts.

33. The First Amendment duty to govern impartially was violated when the majority party in the North Carolina General Assembly used its control of the congressional redistricting process for partisan

advantage—to maximize and entrench its hold on political power by gerrymandering the districts in its favor, making it more difficult for the NCDP and its members to elect the candidates of their choice to Congress.

34. The purpose and the effect of the 2016 Plan was to give the Republican Party and Republican candidates for Congress in North Carolina a partisan advantage over the NCDP and Democratic candidates. The 2016 Plan enhances the effectiveness of the votes of as many Republican voters as possible by creating ten districts with safe Republican majorities, in which votes cast by Democratic voters are diluted or nullified and have no effect on the outcome of the general congressional election in those districts, and by creating three districts with safe Democratic majorities in which votes cast by Republican voters are diluted or nullified and have no effect on the outcome of the general congressional election in those districts.

35. The purpose and effect of the 2016 Plan was also to burden and penalize both the NCDP and Democratic voters by: (i) packing as many Democratic voters as possible into the First, Fourth, and Twelfth Congressional Districts, where the excess votes of Democratic voters beyond those necessary to elect a Democratic candidate of their choice would be essentially wasted; and (ii) diluting or nullifying the votes of the remaining Democratic voters who reside outside of these three districts by dispersing (or "cracking") all remaining Democratic voters among the other ten districts which were safe Republican majorities, where their (the Democrats') votes in favor

of Democratic candidates cannot affect the outcome of the general election. These actions denied the NCDP and its voters a fair opportunity to elect a Democratic candidate of their choice in any of these ten Republican-dominated districts.

36. Although the 2016 Plan only divided thirteen counties, any one of thousands of alternative plans could have been enacted by the General Assembly that also would have only divided thirteen counties without creating a disproportionate 10-3 partisan advantage in favor of the Republican Party and its candidates.

37. The 2016 Plan as a whole, and each of its thirteen individual districts, were gerrymandered based on the content of the political beliefs, political affiliations, and voting histories of the voters in each district and are, both individually and collectively, subject to strict scrutiny.

38. The 2016 Plan is not justified by any *legitimate* state interest of such compelling and paramount importance that justifies burdening or penalizing the First Amendment rights of Democratic voters and the NCDP.

COUNT TWO

39. The facts alleged in paragraphs 1-24 are hereby incorporated by reference as allegations of Count Two of the complaint.

40. The 2016 North Carolina Congressional Redistricting Plan and each of the thirteen individual districts created by that Plan deprive the NCDP and Democratic voters of equal protection of the laws in violation of the Fourteenth Amendment, are invalid, and their enforcement should be enjoined.

41. "The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307, 124 S. Ct. at 1793 (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66, 84 S. Ct. 1362, 1383 (1964)).

42. The right to vote is "fundamental," and once that right "is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 530 (2000) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 1081 (1966)); *see also Raleigh Wake Citizens Ass'n*, 2016 WL 3568147, at *1.

43. The desire on the part of the party in power to gain a partisan advantage and to "harm a politically [weak or] unpopular group" by gerrymandering congressional districts is not "a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826 (1973) (emphasis added); *see also City of Cleburne v. Cleburne Living Ctrs.*, 473 U.S. 432, 446-47, 105 S. Ct. 3249, 3258 (1985).

44. The admitted, primary, and predominant objective of the 2016 Plan was to deprive the NCDP and Democratic voters of fair and effective representation and to perpetuate the Republican majority's ten-three (10-3) partisan advantage created by the 2011 Plan (and thereby entrench the Republican Party's majority in the U.S. Congress). The 2016 Plan achieves this objective by drawing congressional districts that discriminate in favor of the Republican Party and Republican voters and against the NCDP and Democratic voters by

systematically making it more difficult for the NCDP and Democratic voters to elect a candidate of their choice in ten of North Carolina's thirteen congressional districts.

45. The 2016 Plan as a whole, and each of the thirteen individual districts, are subject to strict scrutiny. They cannot be justified by any legitimate state interest of compelling importance that could not be achieved by a more carefully drawn plan or that made it necessary to discriminate against the NCDP and Democratic voters.

COUNT THREE

46. The facts alleged in paragraphs 1-24 are hereby incorporated by reference as allegations of Count Three of the complaint.

47. The 2016 Congressional Redistricting Plan and each of the thirteen individual districts created by that Plan violate Article I, § 2 of the U.S. Constitution, are therefore invalid, and should be enjoined.

48. In the Great Compromise, the Framers of the U.S. Constitution agreed to allow the state legislatures to elect members of the Senate from their respective states, U.S. Const., Art. I, § 3, on the condition that members of the House of Representatives be elected by a popular vote of the people in each state, whose qualifications to vote as "electors" were to be the same as the qualifications to vote for the most numerous house of each state's legislature. *Id.* § 2.

49. Instead of allowing the "people of the several states" in each district to make that decision for themselves in an open and fair election that has not

been rigged by the state legislature, the 2016 Plan violates Article I, § 2 by allowing the majority party in a state legislature to choose the members of the House of Representatives elected to represent each district.

COUNT FOUR

50. The facts alleged in paragraphs 1-24 above are hereby incorporated by reference as allegations of Count Four of the complaint.

51. The 2016 Congressional Redistricting Plan and each of the thirteen individual districts created by that Plan are invalid because they were adopted in excess of the authority granted to the North Carolina General Assembly by Article I, § 4 of the U.S. Constitution to determine "the Times, Places and Manner of holding Elections" of members of the House of Representatives, which is the sole source of a state's authority to draw congressional district lines.

52. The authority granted by the Constitution to the legislatures of the states to "prescribe" the "Times, Places and Manner" of elections of members of the House of Representatives is not unlimited. It only allows the legislatures to adopt *procedural rules* for the conduct of congressional elections, and does not include the power to *dictate or control the electoral outcomes of those elections. See Cook v. Gralike,* 531 U.S. 510, 523, 121 S. Ct. 1029, 1038 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-10, 115 S. Ct. 1842, 1857-58 (1995).

53. The 2016 Plan is a naked attempt by the majority party in a state legislature to dictate and control the outcome of the general election for members of the House of Representatives by drawing the district lines to virtually guarantee the election of

the majority party's candidates in ten of the thirteen districts. The 2016 Plan makes it more difficult, if not impossible, for Democratic candidates to be elected from those districts and, conversely, to limit the number of Democrats elected to Congress by putting supermajorities of Democratic voters in the three remaining districts (the First, Fourth and Twelfth Congressional Districts).

54. The Republican majority exceeded its constitutional authority by gerrymandering North Carolina's thirteen congressional districts for partisan purposes to give the Republican Party a 10-3 seat advantage over the NCDP, and the 2016 North Carolina Congressional Redistricting Plan is thus *ultra vires* and should be enjoined.

INJURY AND IRREPARABLE HARM

55. The defendants' violations of the Constitution have caused a direct, concrete, and particularized injury to Common Cause and its Democratic members in North Carolina, to the Democratic Party, to Democratic voters in North Carolina, to the individual Democratic-voter plaintiffs and to the individual Republican-voter plaintiff. Their injuries include, *inter alia*, the following:

(a) The 2016 Plan has made it more difficult, if not impossible, for a Democratic candidate to be elected in the general election to the House of Representatives from each of the ten districts that have been gerrymandered to have safe Republican majorities;

(b) The 2016 Plan has injured the Democratic-voter plaintiffs and other Democratic voters who reside in congressional districts that formerly had Democratic majorities during the 2002-2010 election

cycles. The 2016 Plan dilutes or nullifies the effectiveness of their votes and deprives them of the opportunity to elect the candidate of their choice by cracking and disbursing them among one of the ten districts with safe Republican majorities in which their votes in favor of a Democratic candidate no longer matter and cannot affect the outcome of the general election;

(c) The 2016 plan also has injured Democratic voters who have been packed into three districts gerrymandered to contain large Democratic supermajorities, where their votes in favor of the Democratic candidate in the general election in excess of the majority required to enable them to elect the Democratic candidate of their choice have been and will be largely wasted and have no more effect than if they had not voted.

(d) The 2016 plan has further injured Republican voters assigned to CDs 1, 4 and 13 by diluting or nullifying the effectiveness of their votes and depriving them of the opportunity to elect the candidate of their choice.

PRAYER FOR RELIEF

Wherefore the plaintiffs respectfully pray that:

(a) a three-judge district court be convened to hear and determine the plaintiffs' claims that the 2016 North Carolina Congressional Redistricting statute, N.C. Sess. Law. 2016-1, adopted on February 19, 2016, is unconstitutional;

(b) the Court grant a declaratory judgment pursuant to 28 U.S.C. § 2201 that the 2016 North Carolina Congressional Redistricting statute, and

each of the thirteen districts created by that statute, are unconstitutional partisan gerrymanders;

(c) the Court enter a preliminary and a permanent injunction prohibiting the defendants from enforcing or attempting to enforce the 2016 North Carolina Congressional Redistricting statute, or from conducting primary or general elections for members of the House of Representatives under its provisions;

(d) the Court enjoin the North Carolina General Assembly from creating any future legislative districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party membership, registration, affiliations or political activities, or voting histories;

(e) the Court also enjoin the North Carolina General Assembly from using "political data" in any future redistricting process to burden or penalize an identifiable group, a political party, or individual voters based on their political beliefs, political-party membership, registration, affiliations or political activities, or voting histories;

(f) the Court award plaintiffs their reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and

(g) the Court grant plaintiffs such other and further relief as may be just and equitable.

Respectfully submitted, this 7th day of September, 2016.

/s/Emmet J. Bondurant
Emmet J. Bondurant

* * *

Amended Complaint

League of Women Voters of North Carolina v. Rucho, No. 16-cv-1164 (M.D.N.C. Feb. 10, 2017) (ECF 41)

Plaintiffs, complaining of Defendants, allege:

INTRODUCTION

1. Plaintiffs seek a declaratory judgment that the North Carolina Congressional Plan adopted in February 2016 (the "2016 Plan") violates the First and Fourteenth Amendments of the United States Constitution and an order permanently enjoining the holding of elections under the 2016 Plan. As explained in greater detail below, the Plan is, by any measure, one of the worst partisan gerrymanders in modern American history. In the 2016 election, the Plan enabled Republican candidates to win ***ten of thirteen*** seats even though the statewide congressional vote was closely divided. Moreover, the Plan will continue to produce a Republican supermajority of seats even if Democratic candidates earn a majority of the statewide vote—and, indeed, even if the largest Democratic wave in a generation occurs.

2. The 2016 Plan's dramatic pro-Republican tilt is deliberate. Its designers were instructed to draw a map that was "likely to elect ten Republicans and three Democrats." One of the Plan's architects also freely admitted that "this would be a political gerrymander," and that he advocated a ten-three seat division only "because [he did] not believe it's possible to draw a map with 11 Republicans and two Democrats."

3. The 2016 Plan's pro-Republican tilt cannot be justified by the State's political geography or legitimate redistricting objectives. The map used by

North Carolina in the 2000s abided by all federal and state legal requirements, but, unlike the 2016 Plan, did not favor either party. Additionally, when hundreds of congressional maps are drawn using a computer algorithm—all at least matching the 2016 Plan in terms of compliance with traditional redistricting criteria—***none*** of them are as biased as the 2016 Plan.

4. This kind of partisan gerrymandering is both unconstitutional and profoundly undemocratic. It is unconstitutional because it treats voters unequally, diluting the electoral influence of one party's supporters in violation of the Equal Protection Clause; and because it burdens voters' freedom of speech and freedom to associate based on their political beliefs in violation of the First Amendment. Severe partisan gerrymandering is also contrary to core democratic values because it enables a political party to win many more districts—and thus much more legislative power—than is warranted by that party's popular support. By sharply distorting the relationship between votes and seats, it causes policies to be enacted that do not accurately reflect the public will.

5. The United States Supreme Court has recognized that excessive partisan gerrymandering is unconstitutional. Nevertheless, recent challenges have failed because litigants have been unable to offer a workable standard to distinguish between permissible political line-drawing and unlawful partisan gerrymandering. In this case, Plaintiffs propose a test that ***is*** workable, based on the concept of ***partisan symmetry***. This is simply the idea that a district plan should treat the major parties

symmetrically with respect to the conversion of votes to seats, and that neither party should enjoy a systematic advantage in how efficiently its popular support translates into legislative power.

6. One way to measure a district plan's partisan symmetry is to calculate its ***efficiency gap***. The efficiency gap captures in a single number all of a plan's ***cracking*** and ***packing***—the two fundamental ways in which partisan gerrymanders are constructed. Cracking means dividing a party's supporters among multiple districts so they fall short of a majority in each one. Packing means concentrating a party's supporters in a few districts so their preferred candidates win by overwhelming margins. Both cracking and packing result in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what she needed to prevail (in the case of packing). The efficiency gap is simply the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

7. Partisan symmetry forms the backbone of Plaintiffs' proposed three-prong test for partisan gerrymandering. This test's first prong is ***discriminatory intent***, that is, whether a district plan was enacted with the purpose of benefiting one party or disadvantaging another party. The test's second prong is ***discriminatory effect***, that is, whether the plan exhibits a level of partisan asymmetry that is high and durable relative to historical norms. And the test's third prong is ***justification***, that is, whether the State can justify

the plan's asymmetry based on the State's political geography or legitimate redistricting objectives.

8. The 2016 Plan is plainly unconstitutional under this test. First, it was designed pursuant to criteria explicitly labeled "Partisan Advantage" and "Political Data." Its own authors also admit that it was intended to "gain partisan advantage" and be a "political gerrymander" that is "likely to elect ten Republicans and three Democrats."

9. Second, the 2016 Plan's predecessor (enacted in 2011) exhibited pro-Republican efficiency gaps of over ***20 percent*** in 2012 and 2014, and the 2016 Plan itself produced a pro-Republican efficiency gap of ***19 percent*** in 2016. To put these scores in perspective, the 2011 Plan had the largest average efficiency gap of all maps analyzed from 1972 to the present, and the 2016 Plan had the largest efficiency gap of all maps analyzed in 2016. Efficiency gaps this extreme mean that the 2016 Plan's asymmetry is virtually certain to endure for the remainder of the decade.

10. Third, the 2016 Plan's bias is entirely unjustifiable. Of the hundreds of computer-drawn district maps of North Carolina, ***all of them*** treat the major parties more symmetrically while performing at least as well on every other dimension.

11. To be clear, Plaintiffs do not aim to replace a pro-Republican gerrymander with a pro-Democratic one. Rather, Plaintiffs seek the enactment of a balanced map that does not give either side an unfair partisan advantage as a remedy.

JURISDICTION AND VENUE

12. This action is brought pursuant to the United States Constitution and 28 U.S.C. § 2284(a). A three-judge panel should hear this case.

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a).

14. This Court has personal jurisdiction over each Defendant because each is a citizen of North Carolina.

15. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claims occurred in this district, and each Defendant conducts business in this district.

PARTIES

16. Plaintiff LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA ("LWVNC") is a nonpartisan community-based organization, formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women's suffrage. The LWVNC is dedicated to encouraging its members and the people of North Carolina to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. The mission of LWVNC is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The LWVNC impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. Currently LWVNC has 15 local leagues and over 972 members, each of whom, upon

information and belief, is a registered voter in North Carolina. LWVNC is affiliated with the League of Women Voters of the United States, which was also founded in 1920. LWVNC began as an organization focused on the needs of women and training women voters. It has evolved into an organization concerned with educating, advocating for, and empowering all North Carolinians. With members in almost every county in the State, the LWVNC's local leagues are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. Individual league members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote (GOTV) efforts. LWVNC has developed a Voter Engagement Program that partners with local election boards and schools to encourage young voters to register to vote. LWVNC also devotes substantial time and effort to ensuring that government at every level works as effectively and fairly as possible. This work involves continual attention to and advocacy concerning issues of transparency, a strong and diverse judiciary, fair and equal nonpartisan redistricting, and appropriate government oversight.

17. LWVNC has standing to challenge the 2016 Plan. The Plan discriminates against North Carolina voters who associate with the Democratic Party by diluting their votes for the purpose of maintaining a 10-to-3 Republican advantage in congressional seats. The Plan thus directly impairs LWVNC's mission of encouraging civic engagement and nonpartisan redistricting reform. Additionally, LWVNC is a membership organization, and its members are

harmed by the Plan because it dilutes Democratic votes and impairs Democratic voters' ability to elect their preferred congressional candidates. LWVNC's members' right to participate freely and equally in the political process is burdened as well by the Plan, which in many cases denies the ability to cast a meaningful vote altogether.

18. Plaintiff WILLIAM COLLINS is a 66-year-old U.S. Citizen who has been an active Democratic voter in North Carolina since he was 18 years of age. Mr. Collins retired from Domtar Paper Company, LLC approximately 10 years ago. Mr. Collins is a resident of Washington County, and lives in the 1st Congressional District at issue in this case.

19. Plaintiff ELLIOTT FELDMAN is a 74-year-old U.S. citizen who has been an active voter in North Carolina since 1994. In 2003, Mr. Feldman retired from the United States Customs and Border Protection, where he worked for approximately 25 years. Prior to retirement, Mr. Feldman was registered as an independent. However, in 2002, he registered as a Democrat and has registered as such since then. Mr. Feldman is a resident of Mecklenburg County, North Carolina, and lives in the 12th Congressional District at issue in this case.

20. Plaintiff CAROL FAULKNER FOX is a 52-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 17 years. Ms. Fox is a Lecturing Fellow at Duke University. She is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

21. Plaintiff ANNETTE LOVE is a 59-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 28 years. Ms. Love is a retired independent contractor in the real estate and mortgages profession. She is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

22. Plaintiff MARIA PALMER is a 56-year-old U.S. citizen who has been an active Democratic voter in North Carolina for nearly 20 years. Dr. Palmer is an employee of Carolina Donor Services, an organ procurement organization, and is a Council Member for the Town of Chapel Hill, North Carolina. Dr. Palmer is a resident of Orange County, North Carolina, and lives in the 4th Congressional District at issue in this case.

23. Plaintiff GUNTHER PECK is a 53-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Mr. Peck is an Associate Professor at Duke University. He is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

24. Plaintiff ERSLA PHELPS is a 43-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Ms. Phelps is a Mortgage Operation Specialist for BB&T Bank. Ms. Phelps is a resident of Wilson County, and lives in the 2nd Congressional District at issue in this case.

25. Plaintiff JOHN QUINN, III is a 64-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Mr. Quinn retired from the Federal Deposit Insurance Corporation over 11 years ago. He is a resident of

Buncombe County, and lives in the 10th Congressional District at issue in this case.

26. Plaintiff AARON SARVER is a 39-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for nearly seven years. Mr. Sarver is the Communications Director at Campaign for Southern Equality. Mr. Sarver is a resident of Asheville, North Carolina, and lives in the 11th Congressional District at issue in this case.

27. Plaintiff JANIE SMITH SUMPTER is a 70-year-old U.S. citizen who has been an active voter registered as a Democrat in North Carolina since 1987. Mrs. Sumpter retired from the United States Postal Service in 2008. Mrs. Sumpter has been involved with voter education and registration throughout the State. Mrs. Sumpter is a resident of Mecklenburg County, North Carolina, and lives in the 12th Congressional District at issue in this case.

28. Plaintiff ELIZABETH TORRES-EVANS is a 61-year-old U.S. citizen who has been an active voter registered as a Democrat in North Carolina since 2002. Mrs. Torres-Evans has been a paralegal for approximately 20 years, and currently works in that capacity. Mrs. Torres-Evans is a resident of Granville County, North Carolina, and lives in the 1st Congressional District at issue in this case.

29. Plaintiff WILLIS WILLIAMS is a 74-year-old disabled veteran who has been an active Democratic voter in North Carolina for well over 50 years. Even during his military service, Mr. Williams voted absentee. Mr. Williams is a resident of Martin County, North Carolina, and lives in the 1st Congressional District at issue in this case.

30. The individual Plaintiffs have standing to bring this action. They are all registered voters and Democrats who support the public policies espoused by the Democratic Party and Democratic Party candidates. Along with other Democratic voters across the State, they have been harmed by the 2016 Plan's unconstitutional partisan gerrymandering because the Plan treats Democrats unequally based on their political beliefs and impermissibly burdens their rights of free speech and association. Some of the Plaintiffs have been packed into a handful of districts where Democratic voters make up enormous majorities, while others have been cracked among numerous districts where Democratic candidates are virtually certain to lose. Either way, the Plan's purpose and effect are to dilute Plaintiffs' electoral influence because of their political views.

31. Defendant ROBERT A. RUCHO is being sued in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting.

32. Defendant DAVID R. LEWIS is being sued in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting.

33. Defendant TIMOTHY K. MOORE is being sued in his official capacity as Speaker of the North Carolina House of Representatives.

34. Defendant PHILIP E. BERGER is being sued in his official capacity as President Pro Tempore of the North Carolina Senate.

35. Defendant A. GRANT WHITNEY, JR. is being sued in his official capacity as Chairman of the North Carolina State Board of Elections.

36. Defendant NORTH CAROLINA STATE BOARD OF ELECTIONS is the agency responsible for the administration of the election laws of the State of North Carolina and charged with the duty of "general supervision over the primaries and elections in the State," N.C. Gen. Stat. § 163-22(a), including elections of the thirteen members of the United States House of Representatives from North Carolina.

37. Defendant STATE OF NORTH CAROLINA is a sovereign state in the United States.

STATEMENT OF FACTS

The 2016 Plan Was Enacted with the Intent of Discriminating Against Democrats

38. In 2001, pursuant to the North Carolina State Constitution, Art. II, § 3, the North Carolina General Assembly adopted a congressional district plan (the "2001 Plan") for the State's thirteen congressional districts.

39. Between 2001 and 2010, five congressional elections were held under the 2001 Plan (in 2002, 2004, 2006, 2008, and 2010). In all of these elections, the more successful party received between 51 and 55 percent of the statewide vote, and in all of the elections except one, the more successful party also won a

majority of the Plan's seats.[1] In 2002, Republicans won 52 percent of votes and seven of thirteen seats. In 2004, Republicans won 51 percent of votes and seven of thirteen seats. In 2006, Democrats won 52 percent of votes and seven of thirteen seats. In 2008, Democrats won 55 percent of votes and eight of thirteen seats. And in 2010, Republicans won 54 percent of votes and six of thirteen seats.

40. In 2011, the North Carolina General Assembly, now newly under unified Republican control, enacted a congressional district plan (the "2011 Plan") that radically reshaped the State's districts. As a three-judge panel of this Court eventually held, race was the predominant factor motivating the creation of two of the Plan's districts: the First and Twelfth Congressional Districts. *See Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016), *appeal docketed*, No.15-1262 (U.S. Apr. 11, 2016).

41. Under the 2011 Plan, Democratic candidates won 51 percent of the statewide vote in 2012. However, ***Republican*** candidates won nine of thirteen seats (and nearly won a tenth seat, losing the Seventh Congressional District by just 654 votes). In 2014, Republican candidates won a narrow statewide majority of 54 percent of the vote. But this slim victory translated into a supermajority of ten of thirteen seats.[2]

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[1] The statewide vote shares reported in this paragraph are adjusted using imputations for uncontested races.

[2] Again, the statewide vote shares are adjusted to take into account uncontested races.

42. After the 2011 Plan was invalidated in *Harris*, the Republican leadership in the Legislature appointed a Joint Select Committee on Redistricting (the "Committee") to draft a new congressional district plan. This Committee, like its predecessor that designed the 2011 Plan, was chaired by Republican Senator Robert Rucho and Republican Representative David Lewis. The Committee was made up of 25 Republican legislators and 12 Democratic legislators.

43. On February 16, 2016, the Committee met to discuss the adoption of written redistricting criteria composed prior to the meeting by Senator Rucho and Representative Lewis. These criteria included ***"Partisan Advantage"***: "The partisan makeup of the congressional delegation under the enacted plan is ***10 Republicans and 3 Democrats***. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation." *See* Contingent Congressional Plan Committee Adopted Criteria (attached hereto as Exhibit A).

44. The criteria also described the use of ***"Political Data"***: "The only data other than population data to be used to construct congressional districts shall be ***election results*** in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan." *See id.*

45. The "Partisan Advantage" and "Political Data" criteria amount to overt admissions that the 2016

Plan was intended to benefit Republicans and disadvantage Democrats. This conclusion is bolstered by Representative Lewis's comments at the February 16, 2016 Committee hearing. Discussing the "Partisan Advantage" criterion, he stated that its aim was that, "to the extent possible, the map drawers create a map which is perhaps likely ***to elect 10 Republicans and 3 Democrats***." North Carolina Joint Select Committee on Congressional Redistricting Hearing Transcript at 48 (Feb. 16, 2016) (attached hereto as Exhibit B). He added, "I acknowledge freely that ***this would be a political gerrymander***, which is not against the law." *Id.* He continued, "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 50.

46. Discussing the "Political Data" criterion, Representative Lewis stated that "to the extent [we] are going to use political data in drawing this map, ***it is to gain partisan advantage***." *Id.* at 54; *see also id.* ("making clear that our intent is to use . . . the political data we have to our partisan advantage"). He also explained the method through which political data would benefit Republicans. "[Y]ou would want to draw the lines so that more of the whole VTDs [Voter Tabulation Districts] voted for the Republican on the ballot than they did the Democrat." *Id.* at 57.

47. The Committee was compelled to vote on the adoption of the criteria on February 16, 2016, the very day on which its members (other than Senator Rucho and Representative Lewis) learned about the criteria's existence. *See* North Carolina Joint Select Committee

on Congressional Redistricting Hearing Transcript at 37 (Feb. 17, 2016) (attached hereto as Exhibit C). Unsurprisingly, all Democrats on the Committee voted against the criteria, while all Republicans voted in favor. Ex. B at 69.

48. After the criteria were adopted, the Committee's members were given only twenty-four hours to design maps based on them. Ex. C at 36. On February 17, 2016, the very next day, the Committee met again to consider a congressional district plan—the 2016 Plan—presented by Senator Rucho and Representative Lewis. The Committee approved the Plan on a straight party-line vote. *Id.* at 72.

49. On February 18, 2016, the 2016 Plan was introduced in and passed by the North Carolina Senate, with all Democrats voting against it and all Republicans voting in favor.

50. On February 19, 2016, the 2016 Plan was introduced in and passed by the North Carolina House of Representatives, with all Democrats voting against it and all Republicans voting in favor.

The 2016 Plan Has the Effect of Discriminating Against Democrats

The Efficiency Gap Captures the Extent of Partisan Gerrymandering

51. The Supreme Court has unanimously agreed that partisan gerrymandering can rise to the level of a constitutional violation. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion) ("[A]n ***excessive*** injection of politics is ***un***lawful. So it is, and so does our opinion assume.").

52. In *LULAC v. Perry*, 548 U.S. 399 (2006), a majority of the Justices expressed interest in a test for unconstitutional partisan gerrymandering based on the concept of ***partisan symmetry***. Partisan symmetry is a "require[ment] that the electoral system treat similarly-situated parties equally." *Id.* at 466 (Stevens, J., concurring in part and dissenting in part). In other words, a plan is symmetric when it creates a level playing field, giving neither major party a systematic advantage over its opponent in the conversion of electoral votes into legislative seats.

53. In *LULAC*, the Court considered one particular measure of partisan symmetry, called ***partisan bias***. Partisan bias refers to the divergence in the share of seats that each party would win given the same share (typically 50 percent) of the statewide vote. *See id.* at 419-20 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part).

54. Partisan bias is not the only measure of partisan symmetry. In recent years, political scientists and legal academics have developed a new symmetry metric, called the ***efficiency gap***. *See, e.g.*, Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55 (2014); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 101 (2015); Expert Report of Prof. Simon D. Jackman in *Whitford v. Nichol*, No. 15-cv-421-bbc (July 7, 2015).

55. The efficiency gap is rooted in the insight that, given the constitutional requirement of equal population, there are only two ways to implement a

partisan gerrymander. First, a party's supporters can be ***cracked*** among a large number of districts so that they fall somewhat short of a majority in each one. These voters' preferred candidates then predictably lose each race. Second, a party's backers can be ***packed*** into a small number of districts in which they make up enormous majorities. These voters' preferred candidates then prevail by overwhelming margins. All partisan gerrymandering is accomplished through cracking and packing, which enable the party controlling the mapmaking to manipulate vote margins in its favor.

56. Both cracking and packing produce so-called ***"wasted" votes***—that is, votes that do not directly contribute to a candidate's election. When voters are cracked, their votes are wasted because they are cast for losing candidates. Similarly, when voters are packed, their votes are wasted to the extent they exceed the 50 percent-plus-one threshold required for victory (in a two-candidate race). Partisan gerrymandering can also be understood as the manipulation of wasted votes in favor of the gerrymandering party, so that it wastes fewer votes than its adversary.

57. The efficiency gap is ***the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast***. Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in

each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22 percent in favor of Party A.

58. The efficiency gap is ***not*** based on the principle that parties have a right to proportional representation based on their share of the statewide vote, nor does it measure the deviation from seat-vote proportionality. Instead, by aggregating all of a plan's cracking and packing into a single number, the efficiency gap measures a party's surplus seat share: the proportion of seats a party receives that it would ***not*** have received under a balanced plan in which both sides had approximately equal wasted votes. In the above example, for instance, the 22 percent efficiency gap in favor of Party A means that it won 22 percent more seats—that is, one more seat out of five—than it would have under a balanced plan.

The 2016 Plan Is an Outlier by State and National Standards

59. Over the 1972-2016 period—since the end of the reapportionment revolution of the 1960s—the distribution of congressional plans' efficiency gaps has been normal and has had a mean and a median close to zero. *See* Stephanopoulos & McGhee, *supra*, at 870. This indicates that neither major party has enjoyed an overall advantage in congressional redistricting for most of the modern era from 1972 to the present.

60. Recently, the average magnitude of the efficiency gap has increased sharply. This metric stayed roughly constant from 1972 to 2010. But in the current cycle, fueled by rising partisanship and greater technological sophistication, it has spiked to the highest level recorded in the modern era. *See id.* at 873. This means that the severity of today's partisan gerrymandering is historically unprecedented.

61. Between 1972 and the present, the partisan fairness of North Carolina's congressional plans went through three distinct phases. In the 1970s and 1980s, the plans substantially favored Democrats, with average efficiency gaps around 9 percent. In the 1990s and 2000s, the plans were almost perfectly balanced, with average efficiency gaps around 1 percent. And in the current cycle, both the 2011 Plan and the 2016 Plan massively advantaged Republicans. The 2011 Plan exhibited efficiency gaps larger than ***20 percent*** in 2012 and 2014. Similarly, the 2016 Plan produced an efficiency gap of ***19 percent*** in 2016. These are by far the worst scores observed in North Carolina's modern history.

62. To place these scores in a national context, they can be compared to the entire distribution of relevant congressional plans' efficiency gaps in the modern era (spanning more than 500 elections from 1972 to 2016). The 2011 Plan's efficiency gaps in 2012 and 2014 are in roughly the worst ***2 percent*** of this distribution, and generate the largest average of ***any*** plan in this period. The 2016 Plan's efficiency gap in 2016 is also in approximately the worst ***4 percent*** of the historical distribution, and the single worst score

of all relevant congressional plans in the country in 2016.

63. This conclusion is confirmed by partisan bias, the measure of partisan symmetry considered by the Supreme Court in *LULAC*. From the 1970s to the 2000s, North Carolina's congressional plans had average partisan biases that either modestly favored Democrats or were almost perfectly balanced. But in 2012 and 2014, the 2011 Plan exhibited pro-Republican partisan biases larger than ***25 percent***. In 2016, likewise, the 2016 Plan produced a pro-Republican partisan bias of ***27 percent***. Again, these scores are by far the worst in North Carolina's modern history and at the far edge of the nationwide distribution.

64. The 2016 election results also highlight ***how*** this extreme level of partisan unfairness was achieved: namely, the rampant cracking and packing of North Carolina's Democratic voters, resulting in their votes being disproportionately wasted. Among "cracked" districts in which the prevailing candidate received less than 60 percent of the vote, Republican candidates won ***all six*** of them (Districts 2, 5, 6, 8, 9, and 13). Conversely, the one "packed" district in which the prevailing candidate received more than 70 percent of the vote (District 1) was won by a Democratic candidate. Due to this systematic manipulation, Republican candidates won their ten seats by an average margin of 20 percentage points, while Democratic candidates won their three seats by an average margin of ***37 percentage points***.

The 2016 Plan's Partisan Asymmetry Is Highly Durable

65. Not only is the 2016 Plan highly asymmetric in its treatment of the major parties, but this asymmetry is nearly certain to persist under all plausible electoral environments. Since 1992, the Democratic statewide vote share in North Carolina congressional elections has fluctuated between roughly 45% and 55%. Over this range of conditions, under the Plan, Democrats would ***never*** win more than five out of thirteen districts—and, indeed, would keep winning just three seats even if voter sentiment swung by up to ***six points*** in their favor. Unsurprisingly, the Plan's pro-Republican efficiency gap would remain enormous across these scenarios, averaging 22%, peaking at 31%, and never falling below 15%.

66. The durability of the 2016 Plan's partisan skew can also be demonstrated through historical analysis of congressional plans nationwide. Based on the relationship between these plans' ***initial*** and ***lifetime average*** efficiency gaps over the last half-century, the Plan is virtually certain to exhibit a very large pro-Republican average efficiency gap over the period it is in effect. In fact, based on historical data, there is close to a ***zero percent*** chance that the Plan will, on average, favor Democratic candidates over its lifetime.

The 2016 Plan's Partisan Asymmetry Cannot Be Justified

67. Not only is the 2016 Plan an extreme and durable pro-Republican gerrymander, but these features cannot be justified by North Carolina's

political geography or legitimate redistricting objectives. The congressional plan in effect during the 2000s (the 2001 Plan) is proof. It complied with all federal and state legal requirements, but had an average efficiency gap of only ***2 percent***, or almost ***20 percentage points*** less than the 2011 Plan and the 2016 Plan.

68. Similar evidence that the 2016 Plan's partisan asymmetry is unjustifiable comes from hundreds of North Carolina congressional district plans created through a computer algorithm. These maps were designed using traditional redistricting criteria, and comply with federal and state legal requirements. ***All*** of the maps also have much smaller efficiency gaps than the 2016 Plan. In fact, the vast majority of the maps have efficiency gaps close to ***zero***.

FIRST CLAIM FOR RELIEF

(Denial of Equal Protection under the Fourteenth Amendment of the U.S. Constitution Pursuant to 42 U.S.C. § 1983)

69. Plaintiffs rely upon and incorporate the facts alleged in paragraphs 1-68 of this Complaint.

70. The 2016 Plan is a partisan gerrymander so extreme that it violates Plaintiffs' Fourteenth Amendment right to equal protection of the laws. The Plan intentionally, severely, durably, and unjustifiably cracks and packs Democratic voters, thus disproportionately wasting their votes and diluting their electoral influence. Accordingly, the Plan deprives Plaintiffs of their civil rights under color of state law in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

71. In *LULAC*, a majority of the Justices expressed interest in a partisan gerrymandering test based on the concept of partisan symmetry. *See, e.g.*, 548 U.S. at 420 (opinion of Kennedy, J.) (not "discounting its utility in redistricting planning and litigation"); *id.* at 466 (Stevens, J., concurring in part and dissenting in part) (symmetry "is widely accepted by scholars as providing a measure of partisan fairness in electoral systems"); *id.* at 483 (Souter, J., concurring in part and dissenting in part) (noting "the utility of a criterion of symmetry as a test"). Lower courts have recently confirmed the doctrinal availability—and significant promise—of such an approach. *See, e.g.*, *Whitford v. Nichol*, 151 F. Supp. 3d 918, 930-31 (W.D. Wis. 2015).

72. Plaintiffs propose a three-prong test for partisan gerrymandering that is rooted both in the concept of partisan symmetry and in well-established equal protection doctrine. The test's first prong asks whether a district plan was enacted with ***discriminatory intent***, that is, in order to engage in "intentional discrimination against an identifiable political group." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion). This element is satisfied when a purpose motivating a map is to benefit one party or to disadvantage another party.

73. The test's second prong is whether a district plan has a ***discriminatory effect***, that is, whether it exhibits a high and durable level of partisan asymmetry relative to historical norms. This is the prong that takes advantage of the doctrinal opening created by the Court in *LULAC*. The element also parallels the core inquiry in one-person, one-vote

cases: whether the total population deviation of a plan's districts exceeds a reasonable threshold, such as 10 percent for state legislative plans. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

74. Several measures of partisan symmetry exist, including the efficiency gap and partisan bias. The efficiency gap may be used in all electoral settings, while partisan bias is applicable only in competitive States. *See* Stephanopoulos & McGhee, *supra*, at 855-62.

75. The durability of a district plan's asymmetry may be assessed through sensitivity testing, that is, by shifting electoral conditions in both parties' directions and then recalculating the plan's asymmetry. If a plan's partisan imbalance would disappear given plausible electoral shifts, then the plan is not a resilient gerrymander. *See Bandemer*, 478 U.S. at 132-33 (plurality opinion).

76. As in the one-person, one-vote context, the courts may eventually set an asymmetry threshold, above which the effect prong is satisfied and below which it is not. But this threshold need not be set in the present case. *See Whitford v. Nichol*, 180 F. Supp. 3d 583, 597 (W.D. Wis. 2016).

77. Finally, the test's ***justification*** prong asks whether a district plan's large and durable asymmetry can be "justified by the State" based on the State's political geography or legitimate redistricting objectives. *Brown*, 462 U.S. at 843. Under this element, the burden of justification is on the State; it is the plan's ***asymmetry*** (not its general contours) that must be justified; and alternative maps are the most probative evidence. *See id.*

78. The 2016 Plan is plainly unconstitutional under Plaintiffs' proposed three-prong test for partisan gerrymandering. ***First***, the legislative leaders who proposed and enacted the Plan admit that it was intended to be a "political gerrymander" "likely to elect ten Republicans and three Democrats." The written criteria for the Plan's design confirm that "[t]he partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats."

79. ***Second***, the 2016 Plan's partisan asymmetry is virtually certain to be both extremely large and extremely durable. The Plan's predecessor exhibited pro-Republican efficiency gaps and partisan biases above 20 percent in both 2012 and 2014—by far the worst scores in North Carolina's modern history, and each in roughly the worst 2 percent of the entire historical distribution from 1972 to 2016. The Plan itself produced a pro-Republican efficiency gap of 19 percent and a pro-Republican partisan bias of 27 percent in 2016—scores almost exactly as severe. A variety of analyses also indicate that the Plan will remain heavily tilted in Republicans' favor for the remainder of the decade, even if Democratic or Republican waves (or any electoral outcomes less extreme than such waves) occur.

80. ***Third***, the State cannot justify the 2016 Plan's extreme and durable asymmetry based on the State's political geography or legitimate redistricting objectives. The highly balanced 2001 Plan shows that the State's geography and redistricting criteria are perfectly compatible with a high level of partisan symmetry. This conclusion is bolstered by the

hundreds of computer-drawn maps, all of which at least match the 2016 Plan in terms of federal and state legal requirements—and all of which exhibit far smaller efficiency gaps.

SECOND CLAIM FOR RELIEF

(Violation of the First Amendment Right to Freedom of Speech and Association Pursuant to 42 U.S.C. § 1983)

81. Plaintiffs rely upon and incorporate the facts alleged in paragraphs 1-80 of this Complaint.

82. Under the First Amendment, Plaintiffs have the right to express their political views, to associate with and advocate for the political party of their choice, and to participate in the political process. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 356 (1976) ("[P]olitical belief and association constitute the core of those activities protected."). Also under the First Amendment, "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views" is highly disfavored, *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), and is subject to strict scrutiny, *see, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).

83. The 2016 Plan severely "burden[s] or penalize[es]" Democratic voters because of their political beliefs and association with the Democratic party by systematically cracking and packing them, and thus disproportionately wasting their votes and diluting their electoral influence. The Plan employs data about Democratic voters' political expression to retaliate against them and to prevent them from

meaningfully participating in the political process. This burden or penalty, moreover, is entirely intentional; in fact, its imposition was a central objective of the Plan's authors. The Plan's infringement of core First Amendment rights also cannot survive strict scrutiny because it does not advance ***any*** legitimate governmental interest, much less a ***compelling*** one.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that the 2016 Plan is unconstitutional because it violates the rights of Plaintiffs, and all Democratic voters in North Carolina, under the First and Fourteenth Amendments of the United States Constitution;

2. Declare that the rights of Plaintiffs, and all Democratic voters in North Carolina, will be irreparably harmed without the intervention of this Court to secure those rights for the exercise thereof in a timely and meaningful manner;

3. Preliminarily and permanently enjoin Defendants, their agents, officers and employees, including clerks in all 100 North Carolina counties, from administering, preparing for, or moving forward with any future elections of North Carolina's congressional members using the 2016 Plan;

4. Establish a congressional district plan that complies with the United States Constitution and all federal and state legal requirements, if the North Carolina General Assembly and/or Governor fail to enact a new plan in a timely manner;

5. Make any and all orders that are just, necessary, and proper to preserve Plaintiffs' constitutional rights to equally participate in elections of congressional seats;

6. Award Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. §§ 1988, 1973l(e); and

7. Grant any and all other relief this Court deems just and proper.

This the 10th day of February, 2017.

/s/Anita S. Earls
Anita S. Earls

* * *

Supplemental Declaration of Jowei Chen
League of Women Voters of North Carolina v. Rucho, No. 16-cv-1164 (M.D.N.C July 11, 2018) (ECF 129-2)

I, Jowei Chen, under penalty of perjury, declare the following:

1. I was asked by plaintiffs' counsel to use the following process to select one of the 3,000 North Carolina congressional maps I previously generated in this litigation as a demonstration plan for purposes of establishing standing: (1) Start with the 1,000 maps in Simulation Set 2, all of which protect more incumbents than the 2016 Plan and split fewer counties. (2) Of these maps, identify the ones that contain a district with a Black Voting Age Population above 40%. (3) Of these maps, identify the ones that contain seven Republican districts and six Democratic districts using Dr. Thomas Hofeller's seven-election average (and thus an efficiency gap near zero). (4) Of these maps, identify the one that has the most compact districts, on average, considering both Reock and Polsby-Popper compactness. In calculating the Black Voting Age Population of each district, I include only individuals who identify as single-race African-American.

2. This process led to the selection of Plan 297 in Simulation Set 2 (hereinafter: Plan 2-297). Maps of Plan 2-297 and the 2016 Plan are below, in which each district in each plan is shaded based on Dr. Hofeller's seven-election average. Individual maps of each of Plan 2-297's and the 2016 Plan's districts (also shaded using Dr. Hofeller's seven-election average) are included at the end of this declaration.

Plan 297 of Simulation Set 2

12 Split Counties	12 Split VTDs
Davidson (Districts 5 and 9)	19 (Rutherford City)
Franklin (Districts 11 and 12)	48 (Gaston City)
Gaston (Districts 2 and 3)	045 (Mecklenburg City)
Guilford (Districts 6 and 7)	48 (Rowan City)
Johnston (Districts 10 and 9)	90 (Davidson City)
Lee (Districts 7 and 8)	044 (Guilford City)
Mecklenburg (Districts 3 and 4)	D (Lee City)
Pitt (Districts 12 and 13)	10 (Robeson City)
Robeson (Districts 8 and 9)	PR08 (Johnston City)
Rowan (Districts 4 and 5)	06~01 (Wake City)
Rutherford (Districts 1 and 2)	19 (Franklin City)
Wake (Districts 10 and 11)	0101 (Pitt City)

Enacted 2016 Plan (SB 3)

13 Split Counties	12 Split VTDs
Bladen (Districts 7 and 9)	P26 (Bladen City)
Buncombe (Districts 10 and 11)	14.2 (Buncombe City)
Columbus (Districts 6 and 10)	29 (Columbus City)
Cumberland (Districts 8 and 9)	CC08 (Cumberland City)
Durham (Districts 1 and 4)	G71 (Guilford City)
Guilford (Districts 6 and 13)	FT (Iredell City)
Iredell (Districts 10 and 13)	PR26 (Johnston City)
Johnston (Districts 2 and 7)	007 (Mecklenburg City)
Mecklenburg (Districts 9 and 12)	1509 (Pitt City)
Pitt (Districts 1 and 3)	28 (Rowan City)
Rowan (Districts 8 and 13)	19 -05 (Wake City)
Wake (Districts 2 and 4)	PRTA (Wilson City)
Wilson (Districts 1 and 2)	

3. Like all of the maps in Simulation Set 2, Plan 2-297 protects 13 incumbents (compared to 11 in the 2016 Plan), splits 12 counties (compared to 13 in the 2016 Plan), splits 12 VTDs (the same as the 2016 Plan), and contains districts that are equal in population to within one person. Plan 2-297 further has an average Reock compactness score of 0.464 (compared to 0.337 in the 2016 Plan) and an average Polsby-Popper compactness score of 0.301 (compared to 0.242 in the 2016 Plan).

4. The below table provides additional information about each district in Plan 2-297: (1) its population; (2) its Black Voting Age Population share; (3) its partisan score using Dr. Hofeller's seven-election average; (4) its Reock compactness score; and (5) its Polsby-Popper compactness score.

Table 1: Characteristics of Districts in Plan 297 from Simulation Set 2 (Plan 2-297)

District	Total Population	Black Voting Age Population	District's Republican Vote Share (Hofeller Formula)	Reock Score	Polsby-Popper Score
1	733,499	3.89%	52.62%	0.320	0.324
2	733,499	10.16%	53.62%	0.553	0.326
3	733,499	27.79%	45.82%	0.516	0.237
4	733,499	19.09%	57.77%	0.574	0.448
5	733,498	8.53%	63.89%	0.359	0.276
6	733,499	22.60%	46.30%	0.522	0.320
7	733,499	22.98%	51.49%	0.481	0.248
8	733,499	28.24%	46.43%	0.398	0.246
9	733,498	18.78%	52.18%	0.661	0.300
10	733,499	22.79%	47.40%	0.393	0.249
11	733,498	22.80%	39.78%	0.418	0.269
12	733,499	41.42%	40.84%	0.486	0.327
13	733,499	20.79%	54.43%	0.490	0.343

5. Plaintiffs' counsel also provided me with a list of North Carolina precincts, in each of which either an individual plaintiff or a member of the League of Women Voters of North Carolina lives. The below table specifies the following information about each of these precincts: (1) in which district in the 2016 Plan the precinct is located; (2) what this district's partisan score is using Dr. Hofeller's seven-election average; (3) in which district in Plan 2-297 the precinct is located and (4) what this district's partisan score is using Dr. Hofeller's seven-election average.

Table 2:
Precincts in which League of Women Voters of North Carolina Plaintiffs and Members Reside:

County	Precinct Name	Precinct's District in Enacted Plan (SB 2)	Republican Vote Share of Precinct's District in Enacted Plan (Hofeller Formula)	Precinct's District in Plan 297 of Simulation Set 2	Republican Vote Share of Precinct's District in Plan 297 of Simulation Set 2 (Hofeller Formula)
Washington	PLYMOUTH 1	1	31.17%	12	[illegible]
Martin	J/MERIVILLE	1	31.17%	12	[illegible]
Wake	38-11	2	[illegible]	11	[illegible]
Wake	91-04	4	[illegible]	10	[illegible]
Forsyth	874	5	[illegible]	9	[illegible]
Guilford	MOORE	6	[illegible]	9	[illegible]
Wayne	13	7	[illegible]	12	[illegible]
Moore	EUREKA/ WHISPERING PINES	8	[illegible]	8	[illegible]
Mecklenburg	[illegible]	9	[illegible]	3	[illegible]
Columbia	WEST NEWTON	10	[illegible]	2	[illegible]
Burke	DREXEL 01	11	[illegible]	2	[illegible]
Mecklenburg	[illegible]	12	[illegible]	3	[illegible]
Guilford	G21	13	[illegible]	6	[illegible]

6. While I have carried out this analysis with respect to Plan 2-297, the results would be very similar under any of the maps I generated with seven Republican districts and six Democratic districts using Dr. Hofeller's seven-election average. Under any

of these maps, many Democratic voters, in many parts of North Carolina, would be placed in districts with significantly different partisan compositions than their districts under the 2016 Plan.

I declare under penalty of per,ury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

This 11th day of July, 2018.

[handwritten: signature]
Jowei Chen

Declaration of Dr. Jowei Chen
Common Cause v. Rucho, No. 16-cv-01026
(M.D.N.C. July 11, 2018) (ECF 130-2)

In connection with my March 1, 2017 expert report in this litigation, I turned over all data concerning 1,000 North Carolina congressional maps created as Simulation Set 1, produced using a computer simulation process following only the non-partisan portions of the Adopted Criteria used for the 2016 Plan. I also turned over all data concerning 1,000 additional congressional maps created as Simulation Set 2, produced using a simulation process following the non-partisan portions of the Adopted Criteria and avoiding the pairing of any incumbents.

On July 4, 2018, Counsel for Common Cause plaintiffs gave to me a list of the fifteen individual plaintiffs in this litigation and their respective residential addresses. I geocoded these addresses, determining the latitude and longitude coordinates of each plaintiff's residence.

I used these geocoded addresses in the following ways. For each plaintiff, I first identified the district from the enacted 2016 Plan (SB 2) in which the plaintiff was placed. Next, I identified the district from each of the 1,000 plans in Simulation Set 1 and each of the 1,000 plans in Simulation Set 2 in which each plaintiff is located. I then compared the partisan composition of the enacted district and the 2,000 computer-simulated districts in which each plaintiff resides. I describe these comparisons below.

Figure 1 compares the partisanship of each plaintiff's district in the enacted 2016 Plan to the partisanship of the plaintiff's district in each of the

1,000 plans in Simulation Set 1. In this Figure, the partisanship of each district is measured as the Republican vote share of all votes cast in North Carolina's 20 statewide elections held during 2008-2014 (the elections specified by the Adopted Criteria). This Figure contains a separate row for each plaintiff; Plaintiffs Richard and Cheryl Lee Taft are listed on the same row because they reside at the same address. Within each row, the red star denotes the partisanship of the plaintiffs' district in the enacted 2016 Plan, while the 1,000 gray circles depict the partisanship of plaintiff's district in each of the 1,000 plans in Simulation Set 1. Hence, for example, the bottom row in Figure 1 illustrates that in the enacted 2016 Plan, Plaintiff Larry Hall resides in a district with a Republican vote share of 29.2%; by contrast, most of the Simulation Set 1 plans would have placed this plaintiff into a district with a Republican vote share of 35% to 40%.

Figure 2 also compares the partisanship of each plaintiff's enacted plan district to the partisanship of the plaintiff's district in each of the 1,000 Simulation Set 1 plans. However, Figure 2 measures the partisanship of each district using Dr. Thomas Hofeller's seven-election formula (the "Hofeller formula"), which calculates the Republican share of votes cast in seven statewide elections held during 2008-2014.

Next, Figure 3 compares the partisanship of each plaintiff's district in the enacted 2016 Plan to the partisanship of the plaintiff's district in each of the 1,000 plans in Simulation Set 2, with district partisanship measured as the Republican vote share

of all votes cast in North Carolina's 20 statewide elections held during 2008-2014. Finally, Figure 4 again compares the partisanship of each plaintiff's enacted plan district to the partisanship of the plaintiff's district in each of the 1,000 Simulation Set 2 plans. However, Figure 4 measures the partisanship of each district using the Hofeller formula.

Figure 1:

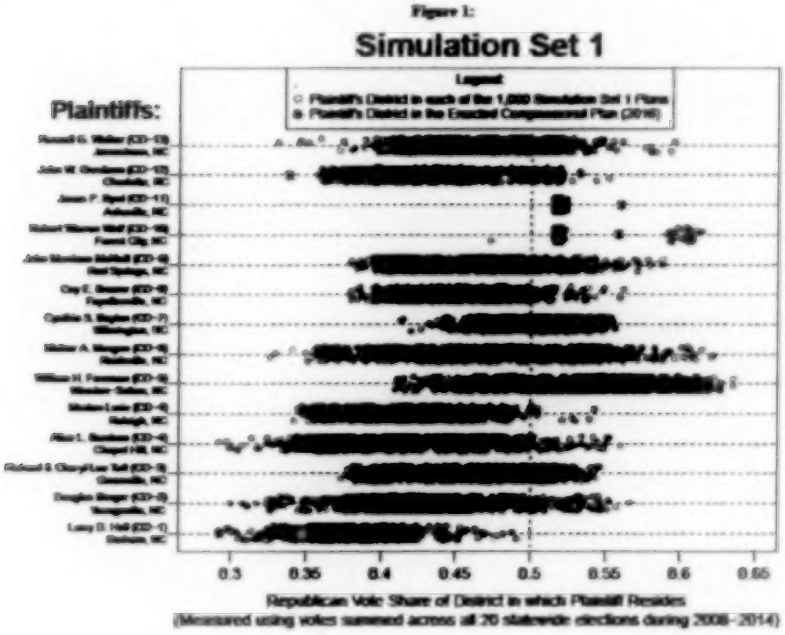


Figure 2:

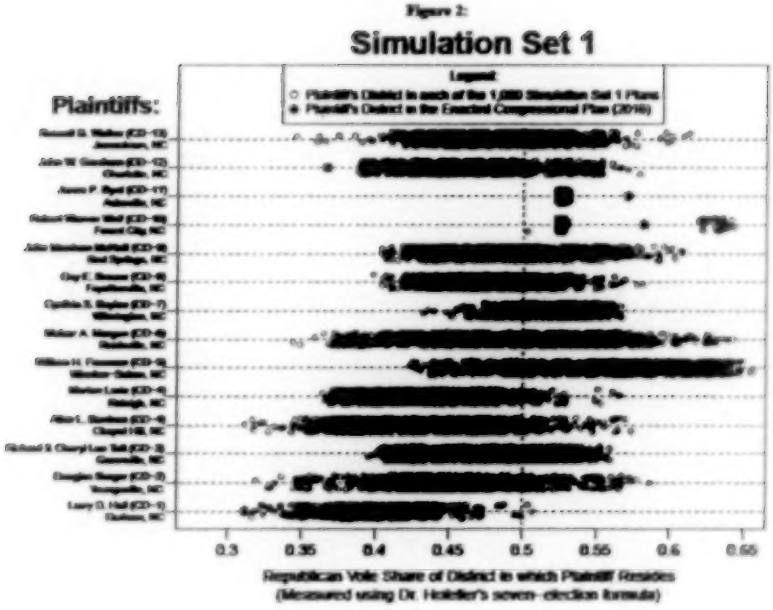

Simulation Set 1
Plaintiffs:
0.3
0.35
0.4
0.45
0.5
0.55
0.6
0.65
Republican Vote Share of District in which Plaintiff Resides
(Measured using Dr. Hofeller's seven-election formula)

Figure 3:

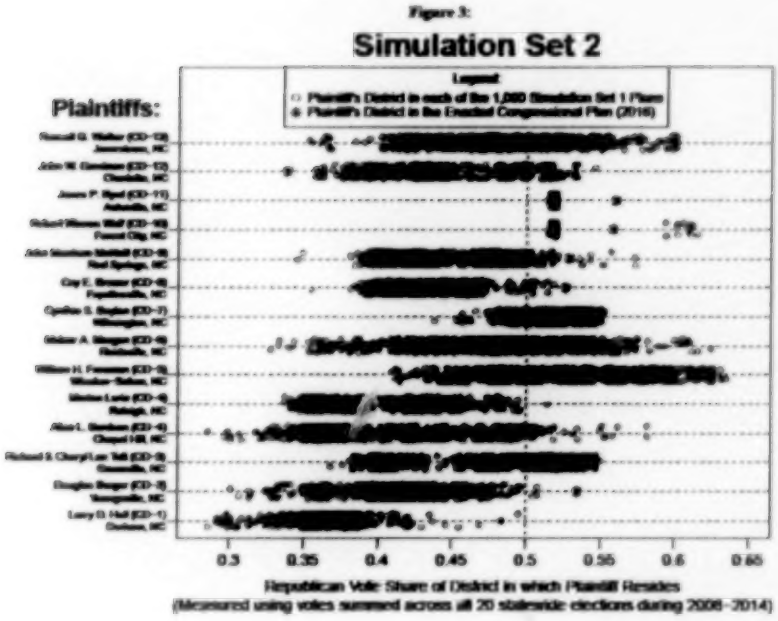
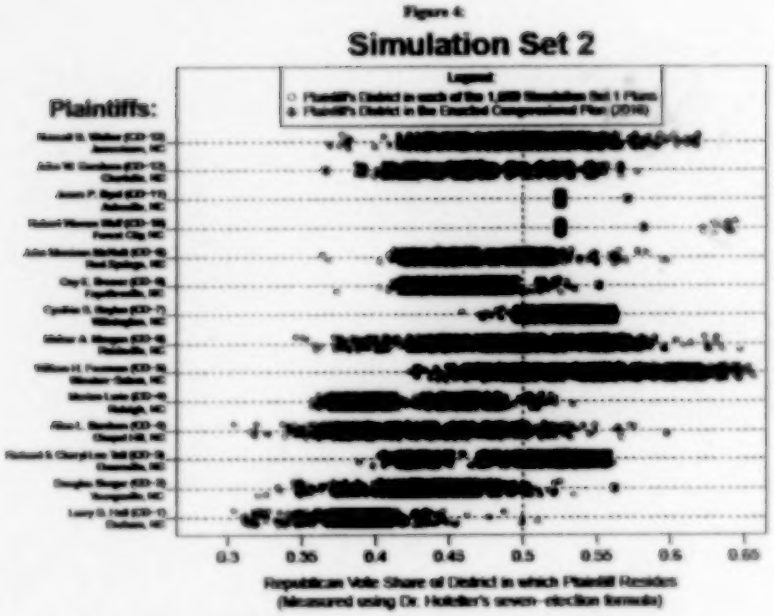

Simulation Set 2
Legend
Plaintiffs:
0.3
0.35
0.4
0.45
0.5
0.55
0.6
0.65
Republican Vote Share of District in which Plaintiff Resides
(Measured using votes summed across all 20 statewide elections during 2008 - 2014)

Figure 4:



Comparison of Enacted and Simulated Districts for Individual Plaintiffs:

Plaintiff Larry Hall resides in Congressional District 1 of the Enacted 2016 Plan, and this enacted district has a 31.2% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 999 of 1,000 simulated plans (99.9%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 998 of 1,000 simulated plans (99.8%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Douglas Berger resides in Congressional District 2 of the Enacted 2016 Plan, and this enacted district has a 56.2% Republican vote share, as measured by the Hofeller formula. In Simulation Set

1, 986 of 1,000 simulated plans (98.6%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, all 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiffs Richard and Cheryl Taft reside in Congressional District 3 of the Enacted 2016 Plan, and this enacted district has a 54.9% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 988 of 1,000 simulated plans (98.8%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 938 of 1,000 simulated plans (93.8%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Alice Bordsen resides in Congressional District 4 of the Enacted 2016 Plan, and this enacted district has a 37.7% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 829 of 1,000 simulated plans (82.9%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 770 of 1,000 simulated plans (77.0%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Morton Lurie resides in Congressional District 4 of the Enacted 2016 Plan, and this enacted district has a 37.7% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 959 of 1,000 simulated plans (95.9%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set

2, 864 of 1,000 simulated plans (86.4%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff William Freeman resides in Congressional District 5 of the Enacted 2016 Plan, and this enacted district has a 56.1% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 425 of 1,000 simulated plans (42.5%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 606 of 1,000 simulated plans (60.6%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Melzer Morgan resides in Congressional District 6 of the Enacted 2016 Plan, and this enacted district has a 54.5% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 768 of 1,000 simulated plans (76.8%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 790 of 1,000 simulated plans (79.0%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Cynthia Boylan resides in Congressional District 7 of the Enacted 2016 Plan, and this enacted district has a 53.4% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 765 of 1,000 simulated plans (76.5%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 514 of 1,000 simulated plans (51.4%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Coy Brewer resides in Congressional District 8 of the Enacted 2016 Plan, and this enacted district has a 55.1% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 989 of 1,000 simulated plans (98.9%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff John McNeill resides in Congressional District 9 of the Enacted 2016 Plan, and this enacted district has a 56.0% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 959 of 1,000 simulated plans (95.9%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 990 of 1,000 simulated plans (99.0%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Robert Wolf resides in Congressional District 10 of the Enacted 2016 Plan, and this enacted district has a 58.2% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 970 of 1,000 simulated plans (97.0%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 985 of 1,000 simulated plans (98.5%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Jones Byrd resides in Congressional District 11 of the Enacted 2016 Plan, and this enacted district has a 57.1% Republican vote share, as

measured by the Hofeller formula. In Simulation Set 1, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff John Gresham resides in Congressional District 12 of the Enacted 2016 Plan, and this enacted district has a 36.6% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 1,000 of 1,000 simulated plans (98.6%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a less Democratic-leaning district, as measured by the Hofeller formula.

Plaintiff Russell Walker resides in Congressional District 3 of the Enacted 2016 Plan, and this enacted district has a 53.7% Republican vote share, as measured by the Hofeller formula. In Simulation Set 1, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula. In Simulation Set 2, 1,000 of 1,000 simulated plans (100%) placed this plaintiff into a more Democratic-leaning district, as measured by the Hofeller formula.

Partisanship of Plaintiffs' Districts in Plan 297 of Simulation Set 2:

At the instruction of counsel for the Common Cause plaintiffs, I report in Table 1 below the partisanship of the districts from Plan 297 of Simulation Set 2 in which each of the 15 Common

Cause plaintiffs reside. Table 1 contains one row for each plaintiff. The fifth column of this table reports the partisanship of the Plan 297 district in which each plaintiff resides. The third column of this table reports the partisanship of the district in the Enacted 2016 Plan in which each plaintiff resides. As before, district partisanship is measured in this table using the Hofeller formula.

Table 1: Partisanship of Plaintiffs' Districts in Plan 1-297 and in the Enacted Plan

Plaintiff	Plaintiff's District in Enacted Plan (SB 2)	Republican Vote Share of Plaintiff's District in Enacted Plan (Hofeller Formula)	Plaintiff's District in Plan 297 of Simulation Set 2	Republican Vote Share of Plaintiff's District in Plan 297 of Simulation Set 2 (Hofeller Formula)
Larry D. Hall	1	31.17%	11	38.78%
Douglas Berger	2	56.20%	12	40.64%
Richard & Cheryl Lee Tait	3	54.82%	13	54.43%
Alice L. Bordsen	4	37.68%	11	38.78%
Marion Lurie	4	37.68%	11	38.78%
William H. Freeman	5	56.15%	6	49.30%
Mildred A. Morgan	6	54.46%	7	51.46%
Cynthia S. Boylan	7	53.42%	9	52.18%
Coy E. Brewer	8	55.13%	8	46.43%
John Morrison McNeill	9	56.04%	8	46.43%
Robert Warren Wolf	10	58.17%	1	52.62%
James P. Byrd	11	57.11%	1	52.62%
John W. Gresham	12	36.83%	3	45.82%
Russell G. Walker	13	53.71%	6	49.30%

I declare under penalty of perjury under the laws of the United States that he foregoing is true and correct to the best of my knowledge.

This 11th day of July, 2018.

[handwritten: signature]
Jowei Chen

Excerpts from Expert Report of Jowei Chen (Mar. 1, 2017) (Joint Plaintiffs' Exh. 2010)

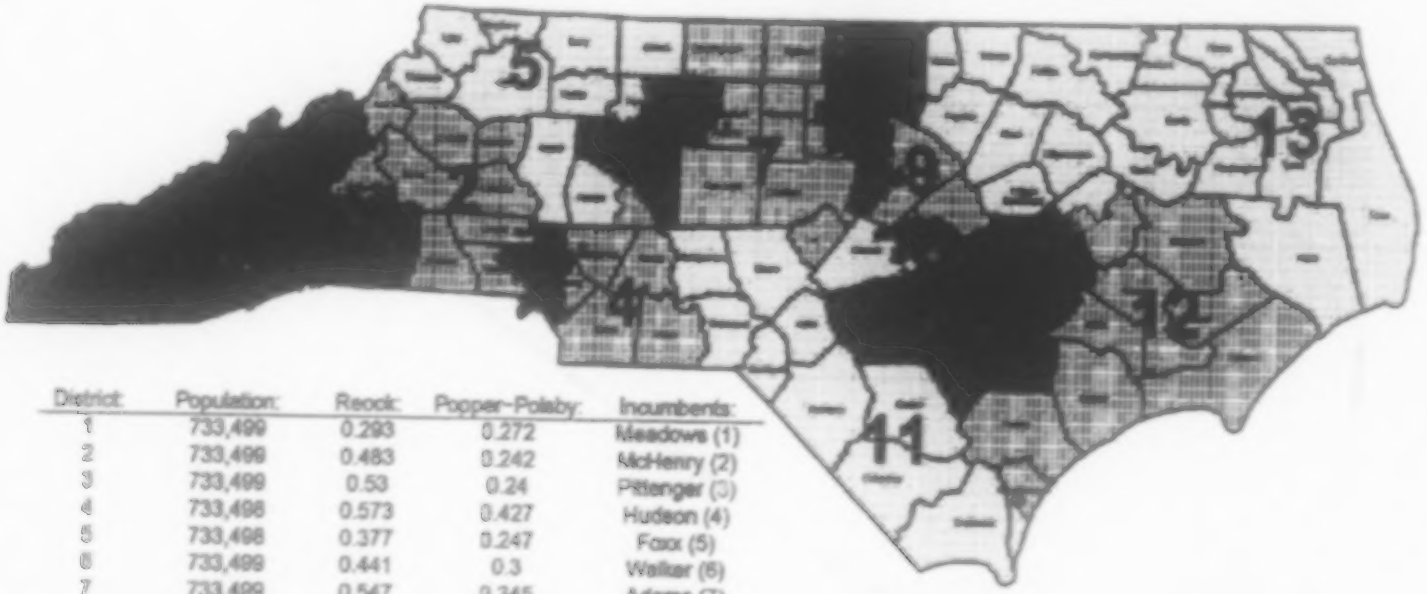
Table 1: Summary of Three Sets of Simulated Districting Plans and Enacted SB 2 Plan

	Senate Bill 2:	Simulation Set 1:	Simulation Set 2:	Simulation Set 3:
Description:	General Assembly's Enacted Plan	Simulated maps only follow traditional districting criteria	Maps protect all 13 incumbents and otherwise follow traditional districting criteria	Maps intentionally match SB 2 plan on 13 county splits and 11 protected incumbents
Total Number of Simulated Plans:		1,000 simulations	1,000 simulations	1,000 simulations
Number of Split Counties:	13	12 (1,000 simulations)	12 (1,000 simulations)	13 (1,000 simulations)
Number of Split VTDs:	12	12 (1,000 simulations)	12 (1,000 simulations)	12 (1,000 simulations)
Incumbents Protected:	11	2 to 11	13 (1,000 simulations)	11 (1,000 simulations)
Average Reock Score (Compactness):	0.3377	0.372 to 0.430	0.371 to 0.466	0.347 to 0.453
Average Popper-Polsby Score (Compactness):	0.2418	0.253 to 0.312	0.250 to 0.310	0.249 to 0.313
Number of Republican Districts (Modular Percentile):	10	5 (32 simulations) 6 (324 simulations) 7 (456 simulations) 8 (177 simulations) 9 (11 simulations)	5 (9 simulations) 6 (194 simulations) 7 (539 simulations) 8 (258 simulations) 9 (19 simulations)	4 (1 simulations) 5 (33 simulations) 6 (267 simulations) 7 (530 simulations) 8 (169 simulations) 9 (9 simulations)

Figure 1
(See Insert Next Page)

Figure 1:

Example of a Computer-Simulated Districting Plan
Drawn to Optimize Geographic Compactness and Protect All 13 Incumbents

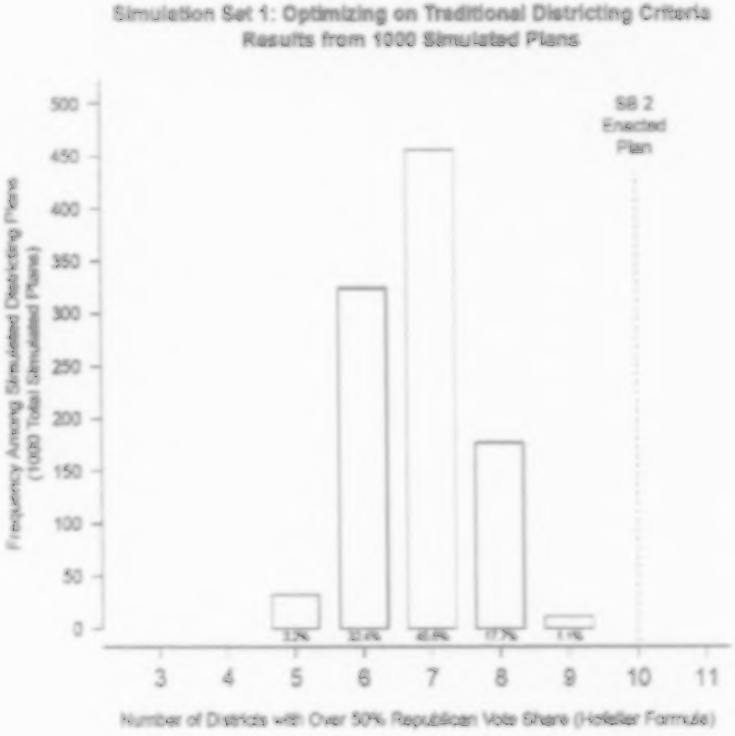


District:	Population:	Reock:	Popper-Polsby:	Incumbents:
1	733,499	0.293	0.272	Meadows (1)
2	733,499	0.483	0.242	McHenry (2)
3	733,499	0.53	0.24	Pittenger (3)
4	733,498	0.573	0.427	Hudson (4)
5	733,498	0.377	0.247	Foxx (5)
6	733,499	0.441	0.3	Walker (6)
7	733,499	0.547	0.345	Adams (7)
8	733,498	0.467	0.259	Price (8)
9	733,499	0.43	0.243	Holding (9)
10	733,499	0.451	0.243	Rouzer (10)
11	733,499	0.273	0.2	Ellmers (11)
12	733,499	0.39	0.263	Jones (12)
13	733,498	0.357	0.41	Butterfield (13)
Plan Average:	733,498.7	0.432	0.284	

12 Split Counties:	12 Split VTD's:
Forsyth (Districts 5 and 6)	37111GLENWD
Gaston (Districts 2 and 3)	3707141
Guilford (Districts 6 and 7)	37119045
Harnett (Districts 10 and 11)	3715913
Johnston (Districts 10 and 9)	37067062
McDowell (Districts 1 and 2)	37081G26
Mecklenburg (Districts 3 and 4)	37136BJ
New Hanover (Districts 11 and 12)	3718309-05
Orange (Districts 7 and 8)	37101PR12
Pitt (Districts 12 and 13)	37085PR24
Rowan (Districts 4 and 5)	37129W18
Wake (Districts 8 and 9)	3714700501

Figure 2
(See Insert Next Page)

Figure 2:


Simulation Set 1: Optimizing on Traditional Districting Criteria
Results from 1000 Simulated Plans
Frequency Among Simulated Districting Plans
(1000 Total Simulated Plans)
SB 2
Enacted
Plan
0
50
100
150
200
250
300
350
400
450
500
3
4
5
6
7
8
9
10
11
Number of Districts with Over 50% Republican Vote Share (Hofeller Formula)

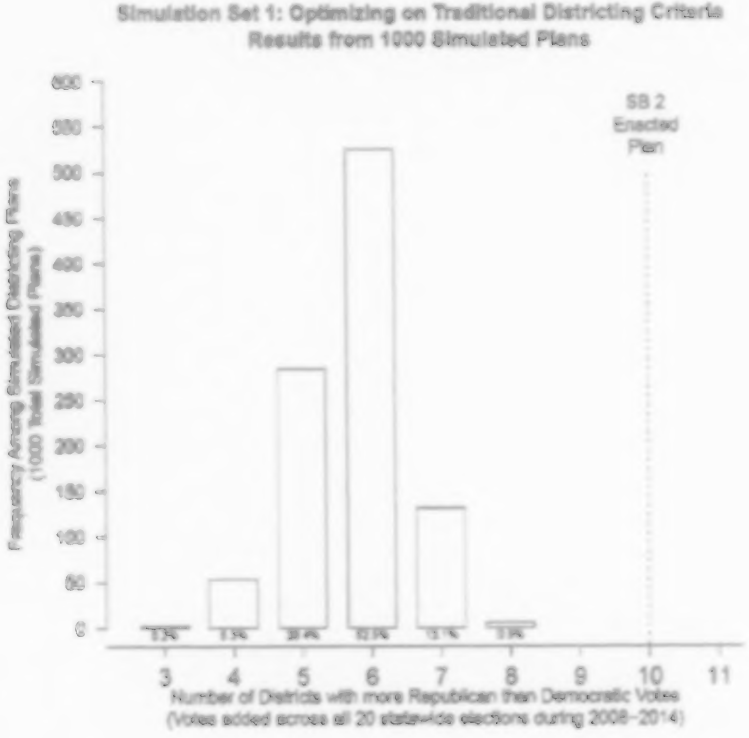
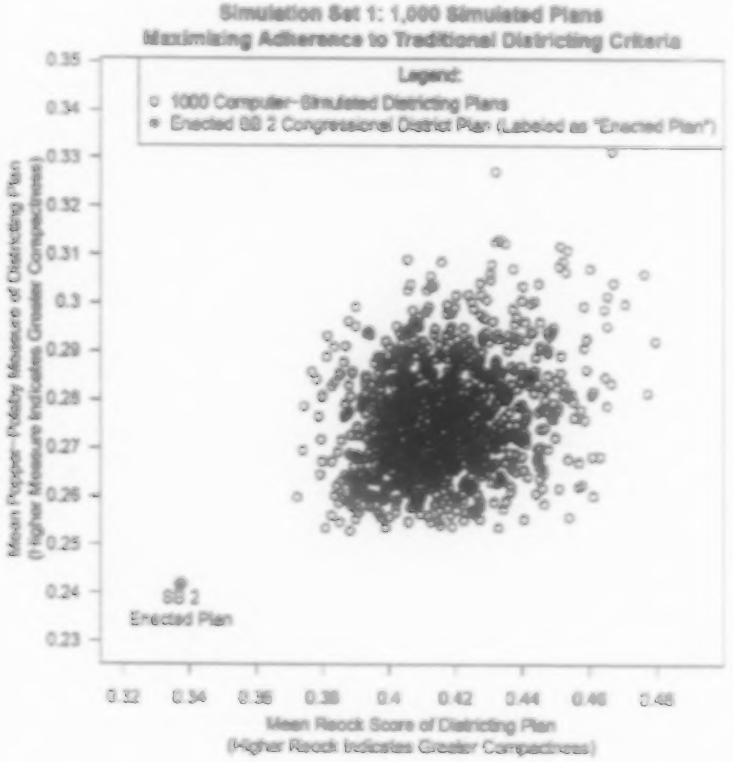

Simulation Set 1: Optimizing on Traditional Districting Criteria
Results from 1000 Simulated Plans
Frequency Among Simulated Districting Plans
(1000 Total Simulated Plans)
SB 2
Enacted
Plan
0
50
100
150
200
250
300
350
400
450
500
550
600
3
4
5
6
7
8
9
10
11
Number of Districts with more Republican than Democratic Votes
(Votes added across all 20 statewide elections during 2008–2014)

Figure 3
(See Insert Next Page)

Figure 3:


Simulation Set 1: 1,000 Simulated Plans
Maximizing Adherence to Traditional Districting Criteria
Legend:
1000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Polsby-Popper (Polsby Measure of Districting Plan
(Higher Measure Indicates Greater Compactness)
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan

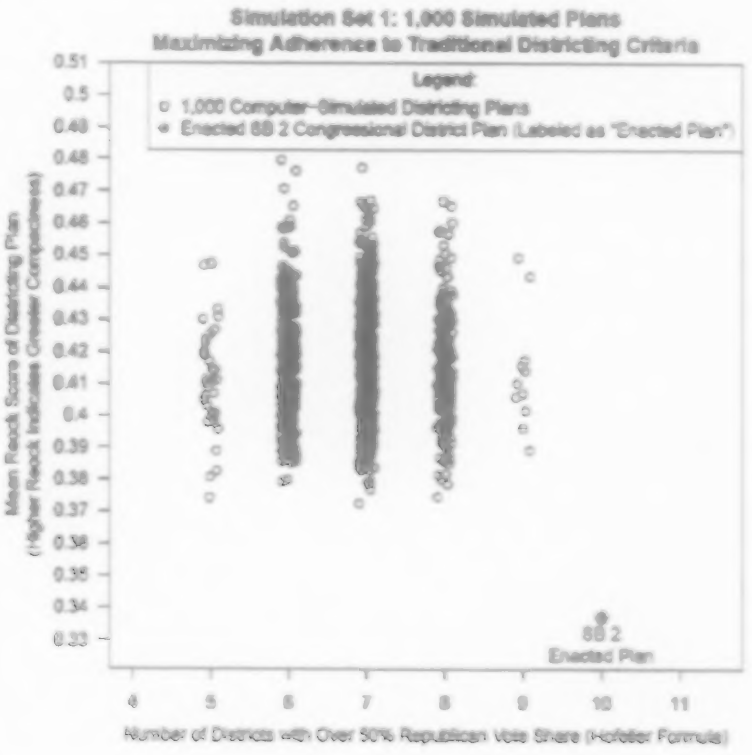
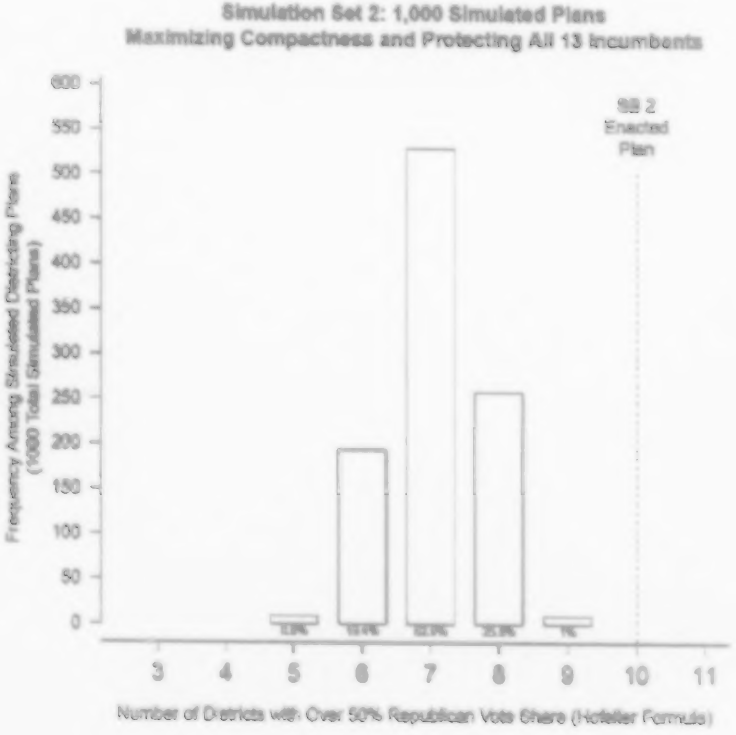

Simulation Set 1: 1,000 Simulated Plans
Maximizing Adherence to Traditional Districting Criteria
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Number of Districts with Over 50% Republican Vote Share (Hofeller Formula)

Figure 4

(See Insert Next Page)

Figure 4:


Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
SB 2
Enacted
Plan
Frequency Among Simulated Districting Plans
(1000 Total Simulated Plans)
0
50
100
150
200
250
300
350
400
450
500
550
600
3
4
5
6
7
8
9
10
11
Number of Districts with Over 50% Republican Vote Share (Hofeller Formula)

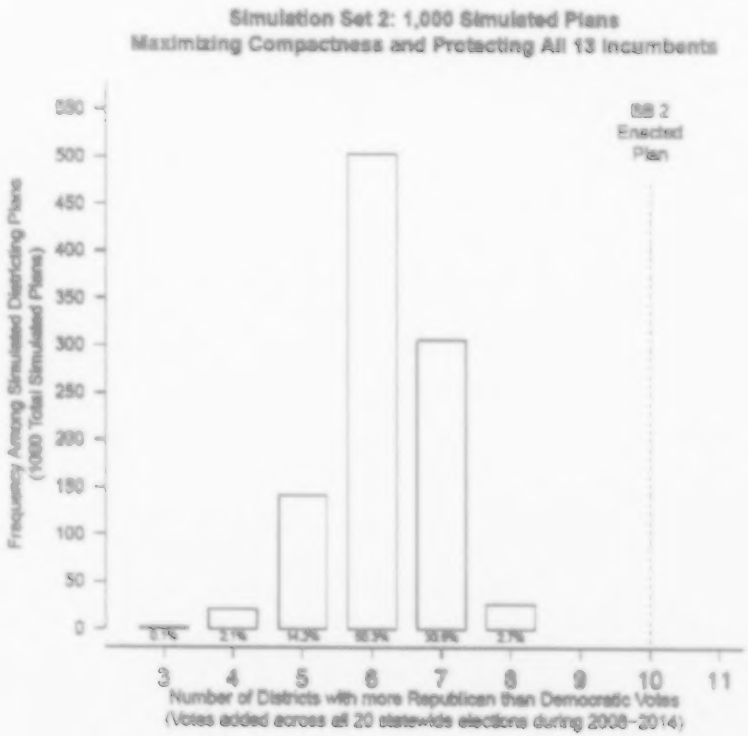
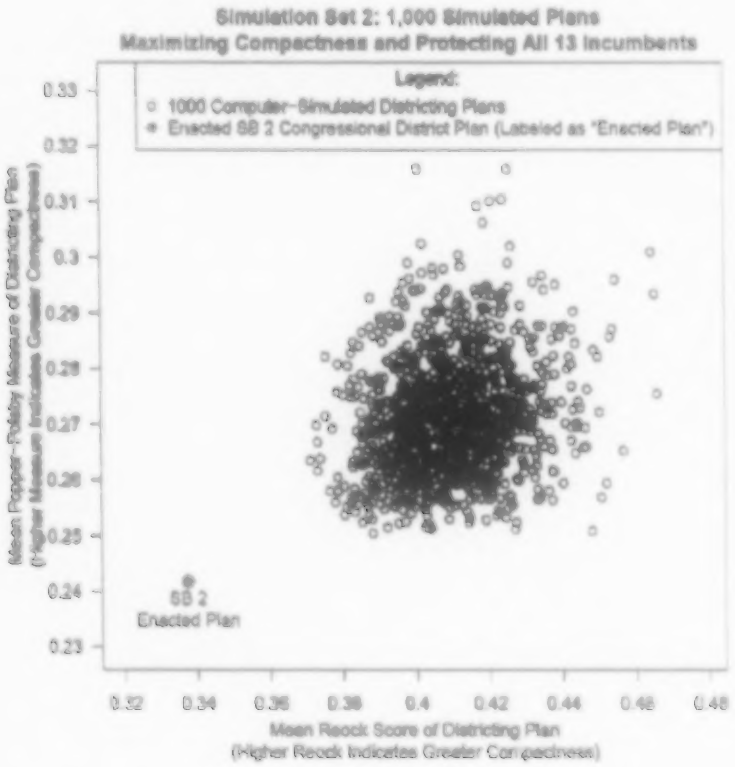

Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
SB 2
Enacted
Plan
Frequency Among Simulated Districting Plans
(1000 Total Simulated Plans)
0
50
100
150
200
250
300
350
400
450
500
3
4
5
6
7
8
9
10
11
Number of Districts with more Republican than Democratic Votes
(Votes added across all 20 statewide elections during 2008–2014)

Figure 5
(See Insert Next Page)

Figure 5:


Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
Legend:
1000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Popper-Polsby Measure of Districting Plan
(Higher Measure Indicates Greater Compactness)
SB 2
Enacted Plan
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)

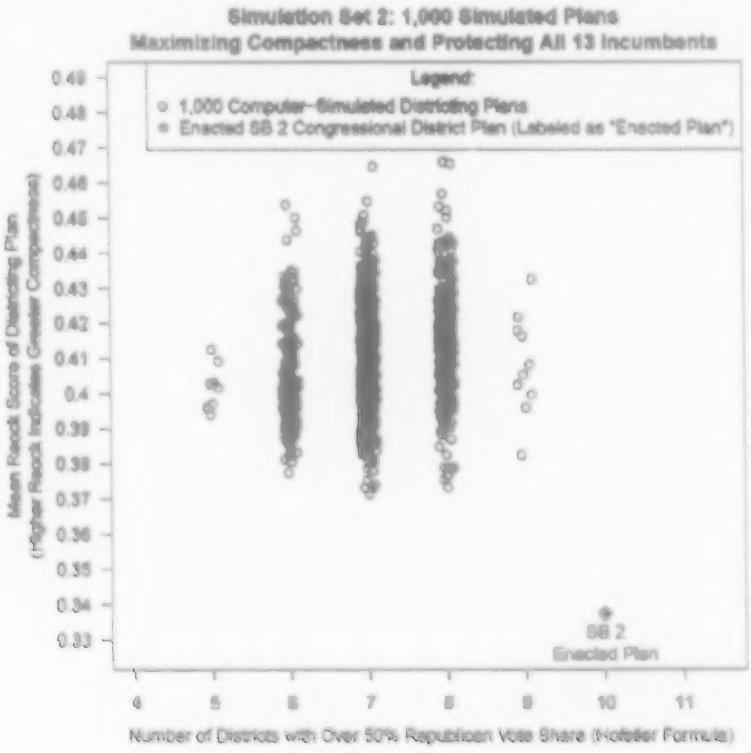
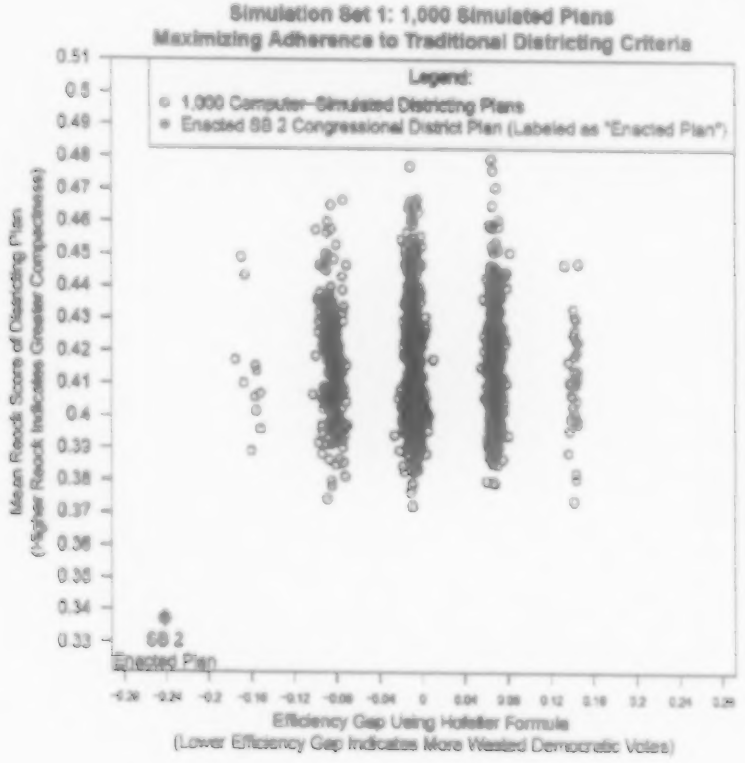

Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Number of Districts with Over 50% Republican Vote Share (Hofeller Formula)

Figure 9

(See Insert Next Page)

Figure 9:


Simulation Set 1: 1,000 Simulated Plans
Maximizing Adherence to Traditional Districting Criteria
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Efficiency Gap Using Hofeller Formula
(Lower Efficiency Gap Indicates More Wasted Democratic Votes)

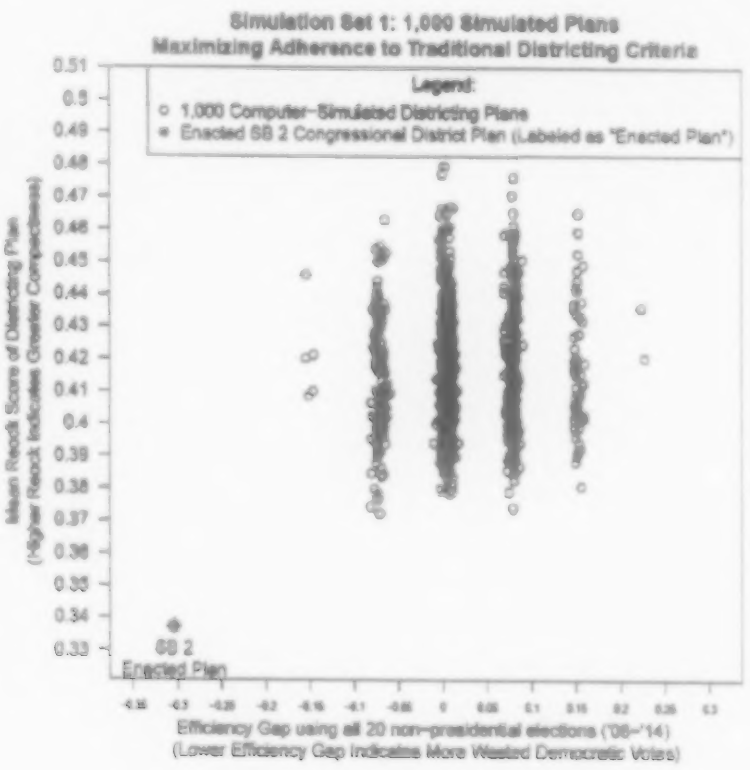
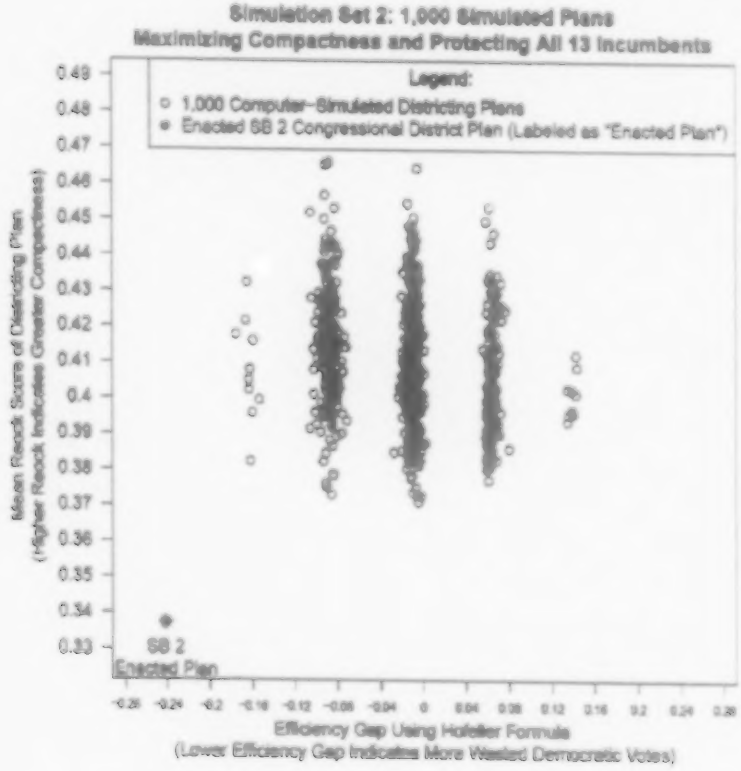

Simulation Set 1: 1,000 Simulated Plans
Maximizing Adherence to Traditional Districting Criteria
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Efficiency Gap using all 20 non-presidential elections ('08-'14)
(Lower Efficiency Gap Indicates More Wasted Democratic Votes)

Figure 10

(See Insert Next Page)

Figure 10:


Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Efficiency Gap Using Hofeller Formula
(Lower Efficiency Gap Indicates More Wasted Democratic Votes)

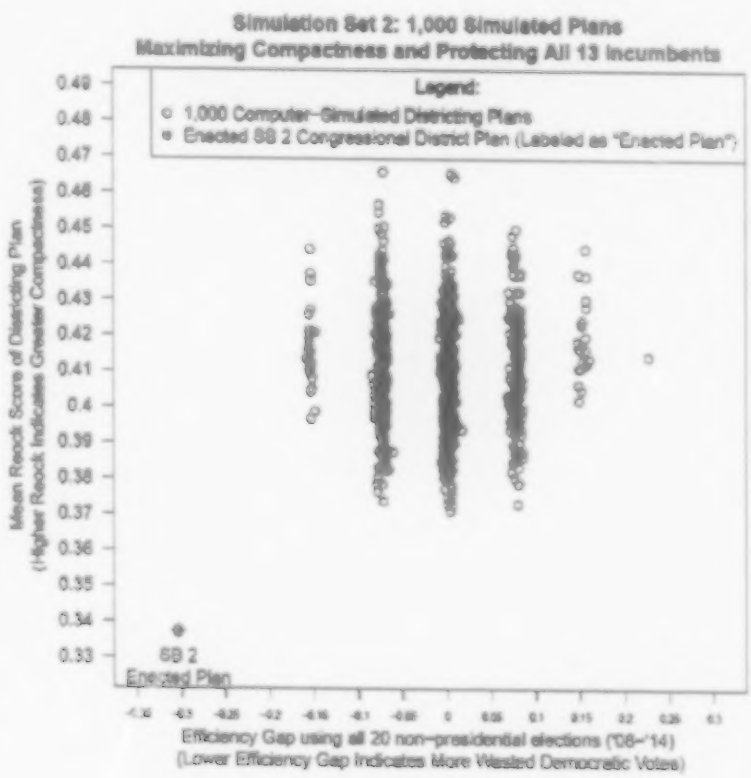

Simulation Set 2: 1,000 Simulated Plans
Maximizing Compactness and Protecting All 13 Incumbents
Legend:
1,000 Computer-Simulated Districting Plans
Enacted SB 2 Congressional District Plan (Labeled as "Enacted Plan")
Mean Reock Score of Districting Plan
(Higher Reock Indicates Greater Compactness)
SB 2
Enacted Plan
Efficiency Gap using all 20 non-presidential elections ('08-'14)
(Lower Efficiency Gap Indicates More Wasted Democratic Votes)

Figure 12
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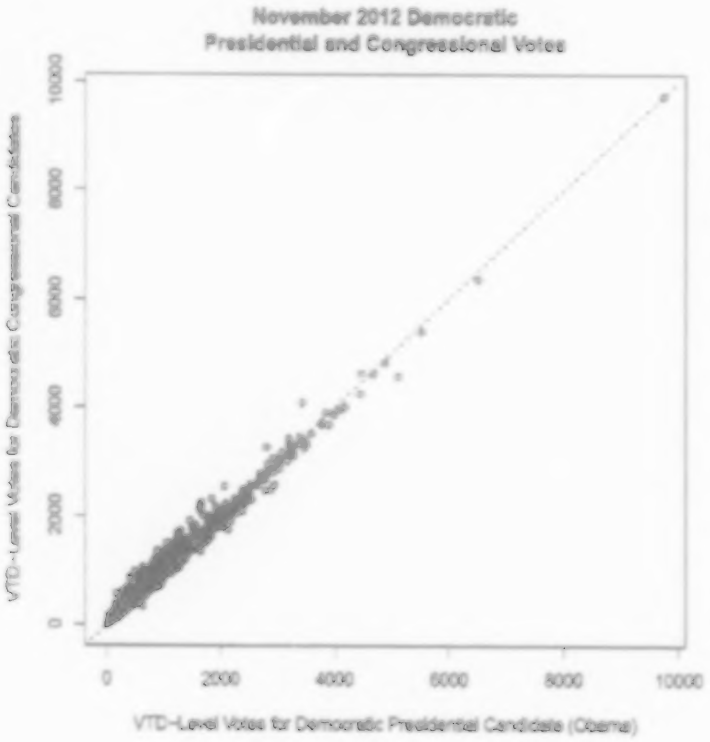
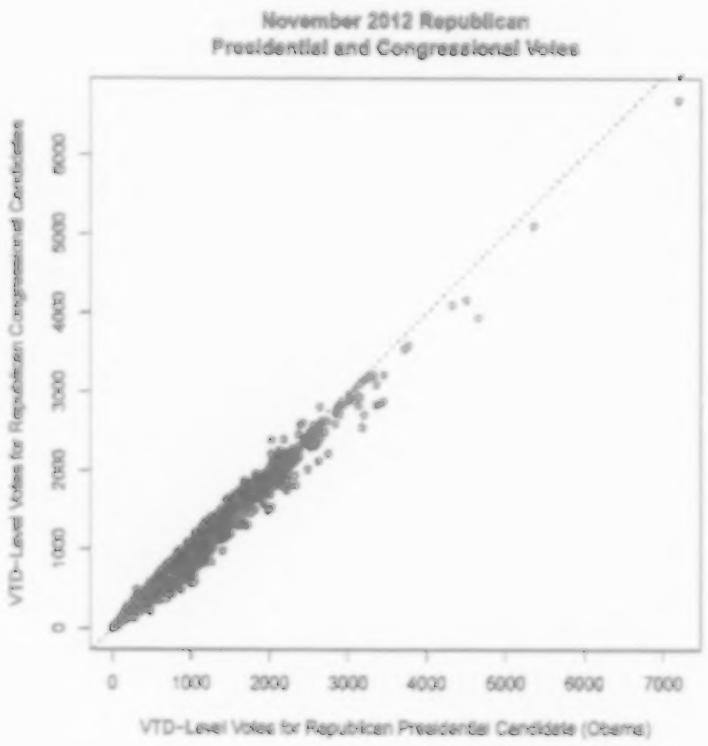
Figure 12:


November 2012 Democratic
Presidential and Congressional Votes
VTD-Level Votes for Democratic Congressional Candidates
0
2000
4000
6000
8000
10000
VTD-Level Votes for Democratic Presidential Candidate (Obama)


November 2012 Republican
Presidential and Congressional Votes
VTD-Level Votes for Republican Congressional Candidates
0
1000
2000
3000
4000
5000
6000
7000
VTD-Level Votes for Republican Presidential Candidate (Obama)

Excerpts from Assessing the Current North Carolina Congressional District Plan: Amended Report of Simon Jackman (Apr. 18, 2017) (League of Women Voters Plaintiffs' Exh. 4002)

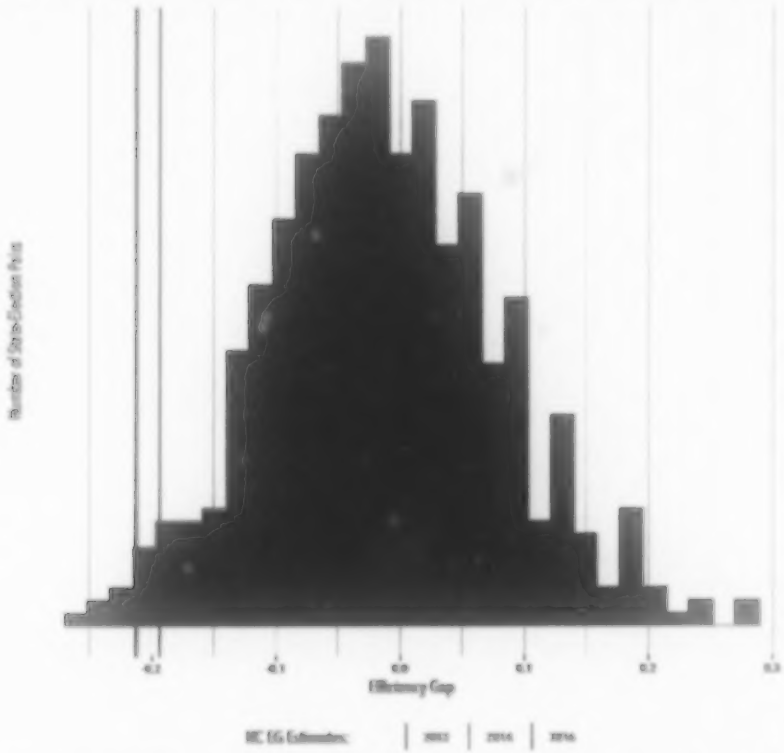


Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

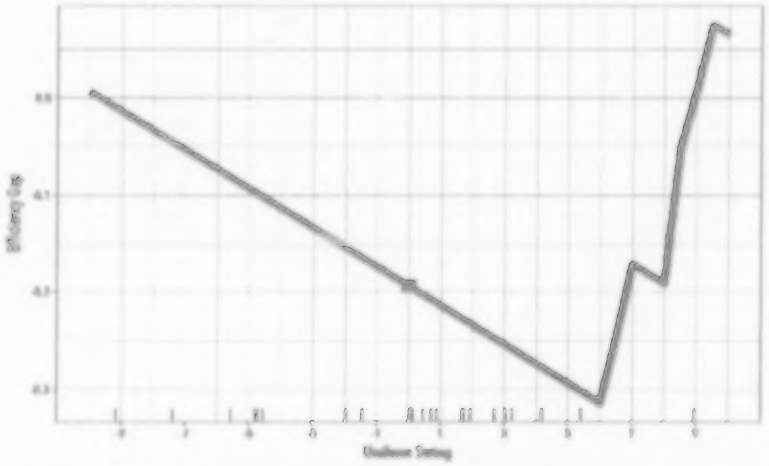


Figure 21: North Carolina efficiency gap scores generated by perturbing the actual 2016 result by varying degrees of uniform swing. The red square indicates the observed efficiency gap for North Carolina in 2016. Tick marks on the horizontal axis indicates swings in North Carolina Congressional elections 1972-2016.

Excerpts from Rebuttal Report of Simon Jackman (Apr. 17, 2017) (League of Women Voters Plaintiffs' Exh. 4003)

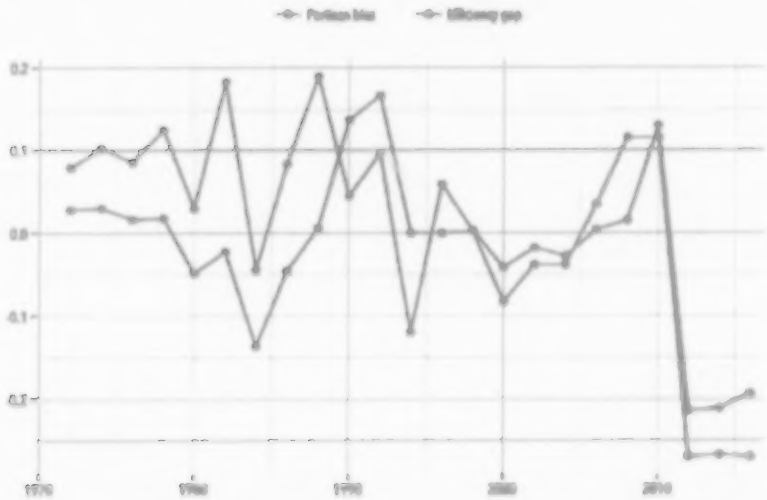


Figure 1: Efficiency gap and partisan bias from North Carolina Congressional elections, 1972-2016.

* * *

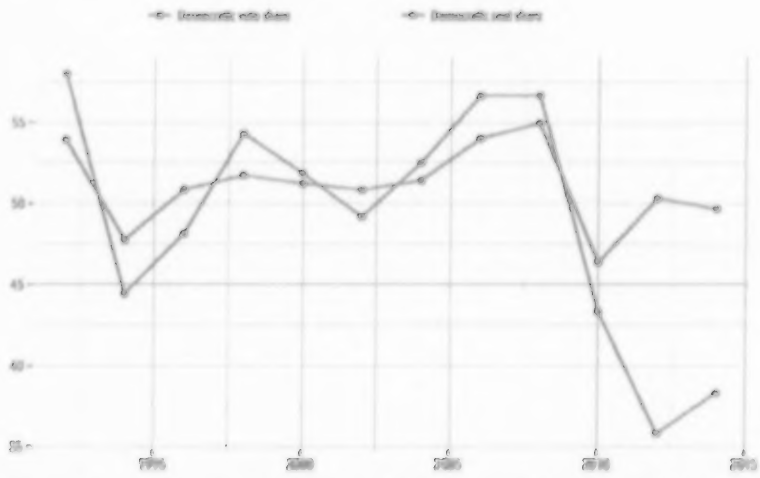


Figure 7: Democratic vote share and Democratic seat sharing in North Carolina General Assembly elections, 1992-2014.

Stipulation as to League of Women Voters of North Carolina Plaintiffs (Oct. 17, 2017) (League of Women Voters Plaintiffs' Exh. 4080)

Plaintiffs, League of Women Voters of North Carolina, et al., and defendants, Robert A. Rucho et al., by and through their respective undersigned counsel, hereby stipulate and state that plaintiff League of Women Voters of North Carolina has individual members who are registered Democrats living in each of North Carolina's thirteen congressional districts as established by SB2, the 2016 Contingent Congressional plan, enacted by the General Assembly. Each of those registered Democrats support and vote for Democratic candidates and have an interest in furthering policies at the national level that are consistent with the Democratic Party Platform.

Respectfully submitted this 17th day of October, 2017.

OGLETREE, DEAKINGS, NASH, SMOAK & STEWART, P.C.

/s/ Phillip J. Strach
Phillip J. Strach

* * *

No. 18-422

In the
Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal From the United States District Court for the Middle District of North Carolina

JOINT APPENDIX
Volume II of II

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(Additional Counsel Listed on Inside Cover)

February 8, 2019

Jurisdictional Statement Filed October 1, 2018
Jurisdiction Postponed January 4, 2019

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Appendix B

Notice of Appeal, United States District Court for the Middle District of North Carolina, *Common Cause v. Rucho*, No. 1:16-cv-1026 (Aug. 31, 2018) App-349

Appendix C

Order, United States District Court for the Middle District of North Carolina, *Common Cause v. Rucho*, No. 1:16-cv-1026 (Sept. 4, 2018) App-351

Appendix D

Order, United States District Court for the Middle District of North Carolina, *Common Cause v. Rucho*, No. 1:16-cv-1026 (Sept. 12, 2018) App-355

Declaration of Walter L. Salinger (July 10, 2018)

I, Walter L. Salinger, under penalty of perjury, declare the following:

1. I am a recent Director of the League of Women Voters of North Carolina ("LWVNC"), a plaintiff in the above captioned case. I just left my role on the Board of Directors as of July 1, 2018.

2. In that role, among other things, I monitored and analyzed our statewide membership database. Because of my deep familiarity with that database, I continue to assist the co-Presidents and Board in issues relating to member data, and was asked to provide this declaration because of that familiarity.

3. I am authorized to speak for the LWVNC in this case.

4. I am aware that in this litigation, the Defendants have stipulated to the fact that the League of Women Voters of North Carolina has members in each of the state's thirteen congressional districts, and that it has members in each of those districts who are registered as Democrats, support and vote for Democratic candidates, and have an interest in furthering policies at the national level that are consistent with the Democratic Party platform. I have reviewed that stipulation, which has been marked as Exhibit 4080.

5. I was asked by my attorneys in this case to provide more information as it relates to that stipulation. Specifically, I was asked to clarify some actual precincts within each of those congressional districts, in which those referenced LWVNC members specifically lived. As I understand it, this information

may be used to help the court confirm that the LWVNC does indeed have standing to litigate this case.

6. Based on my review and comparison of the LWVNC membership database and with publicly available information in the North Carolina voter registration database, I am personally aware of the following facts:

a. At least one member of the League of Women Voters of North Carolina lives in Precinct 20-11 in Wake County, is registered to vote as a Democrat and regularly votes in Democratic primaries;

b. At least one member of the League of Women Voters of North Carolina lives in Precinct 01-04 in Wake County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

c. At least one member of the League of Women Voters of North Carolina lives in Precinct 074 in Forsyth County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

d. At least one member of the League of Women Voters of North Carolina lives in Precinct NCGR2 in Guilford County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

e. At least one member of the League of Women Voters of North Carolina lives in Precinct 13 in Wayne County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

f. At least one member of the League of Women Voters of North Carolina lives in Precinct "Eureka/Whispering Pines" in Moore County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

g. At least one member of the League of Women Voters of North Carolina lives in Precinct "West Newton" in Catawba County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

h. At least one member of the League of Women Voters of North Carolina lives in Precinct Drexel 01 in Burke County, is registered to vote as a Democrat, and regularly votes in Democratic primaries;

i. At least one member of the League of Women Voters of North Carolina lives in Precinct 020 in Mecklenburg County, is registered to vote as a Democrat, and regularly votes in Democratic primaries; and

j. At least one member of the League of Women Voters of North Carolina lives in Precinct 031 in Guilford County, is registered to vote as a Democrat, and regularly votes in Democratic primaries.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on July 10, 2018

[handwritten: signature]
Walter L. Salinger

Dr. Hofeller Draft Map Summary
(League of Women Voters Plaintiffs' Exh. 4022)

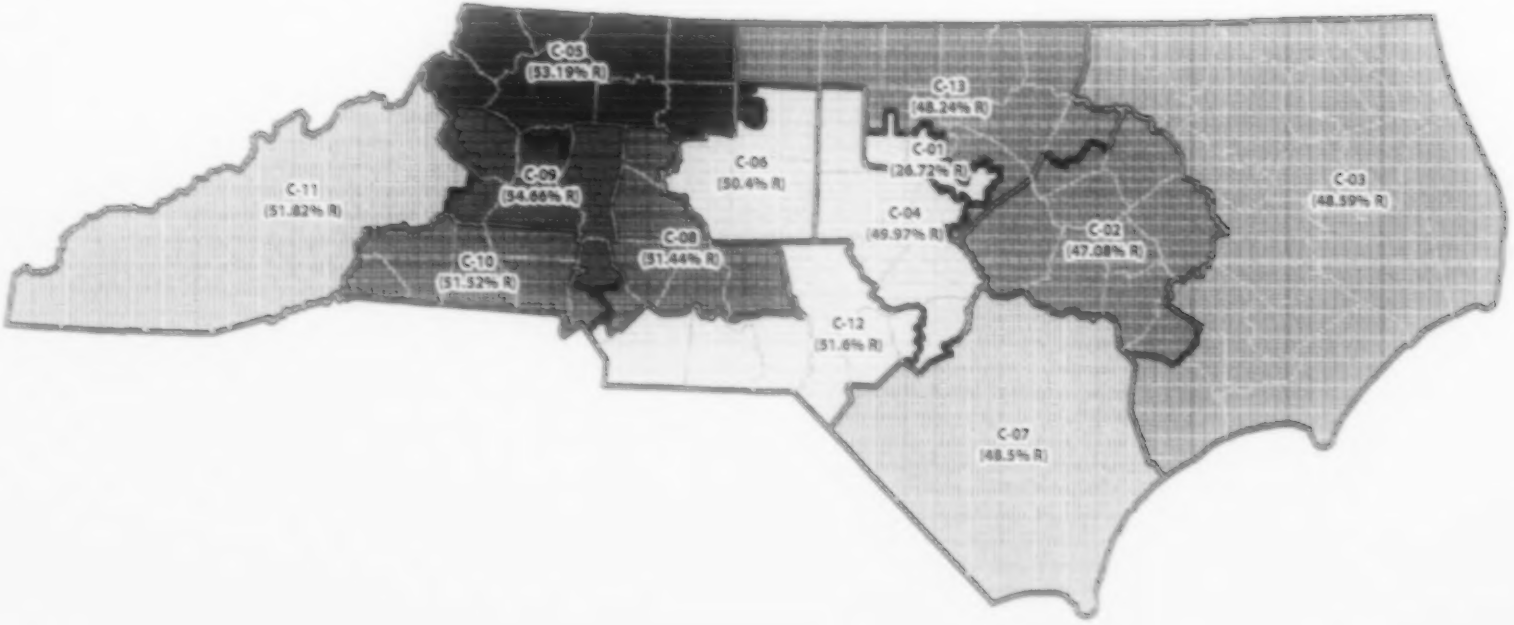
Plan Name	Total County Splits	Republican/ Democrat Seats using 20 election average	Average Reock Score
Congress ST-B	10	7R / 6D	0.41

Congress 17A Map With Election Data
(League of Women Voters Plaintiffs' Exh. 4023)

(See Insert Next Page)

Exhibit 4023: Congress 17A Map with Election Data

Plan 17A
7 Republican districts (20-race average)
Split counties: 10



LWV PLAINTIFFS' EXHIBIT
4023
1:16-CV-1164

Congress ST-B Map with Election Data
(League of Women Voters Plaintiffs' Ex. 4024)

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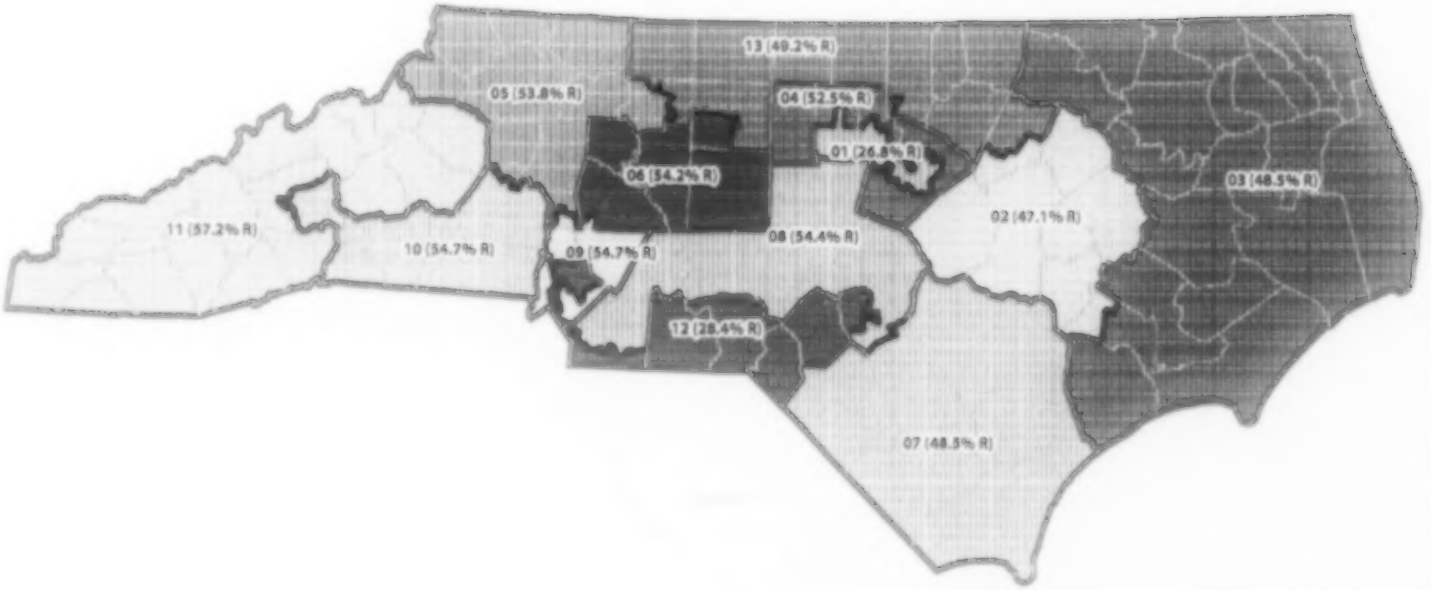
Exhibit 4024: Congress ST-B Map with Election Data

Plan STB
7 Republican districts (average of 20 races)
Split counties: 15



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Dr. Hofeller Buncombe County Map
(League of Women Voters Plaintiffs' Exh. 4066)

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PLAINTIFFS' EXHIBIT 4066

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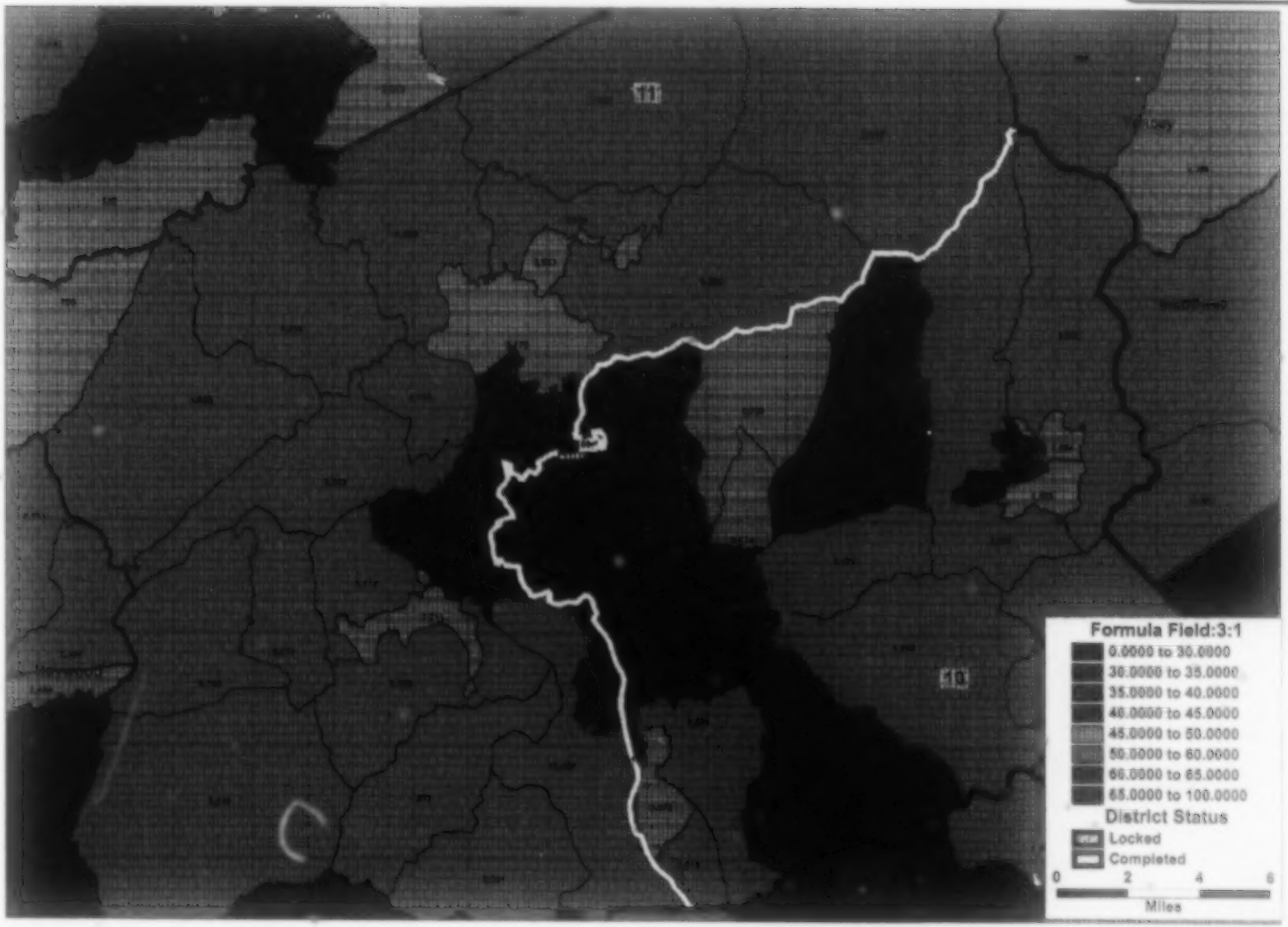
Buncombe County



Dr. Hofeller Cumberland County Map
(League of Women Voters Plaintiffs' Exh. 4067)

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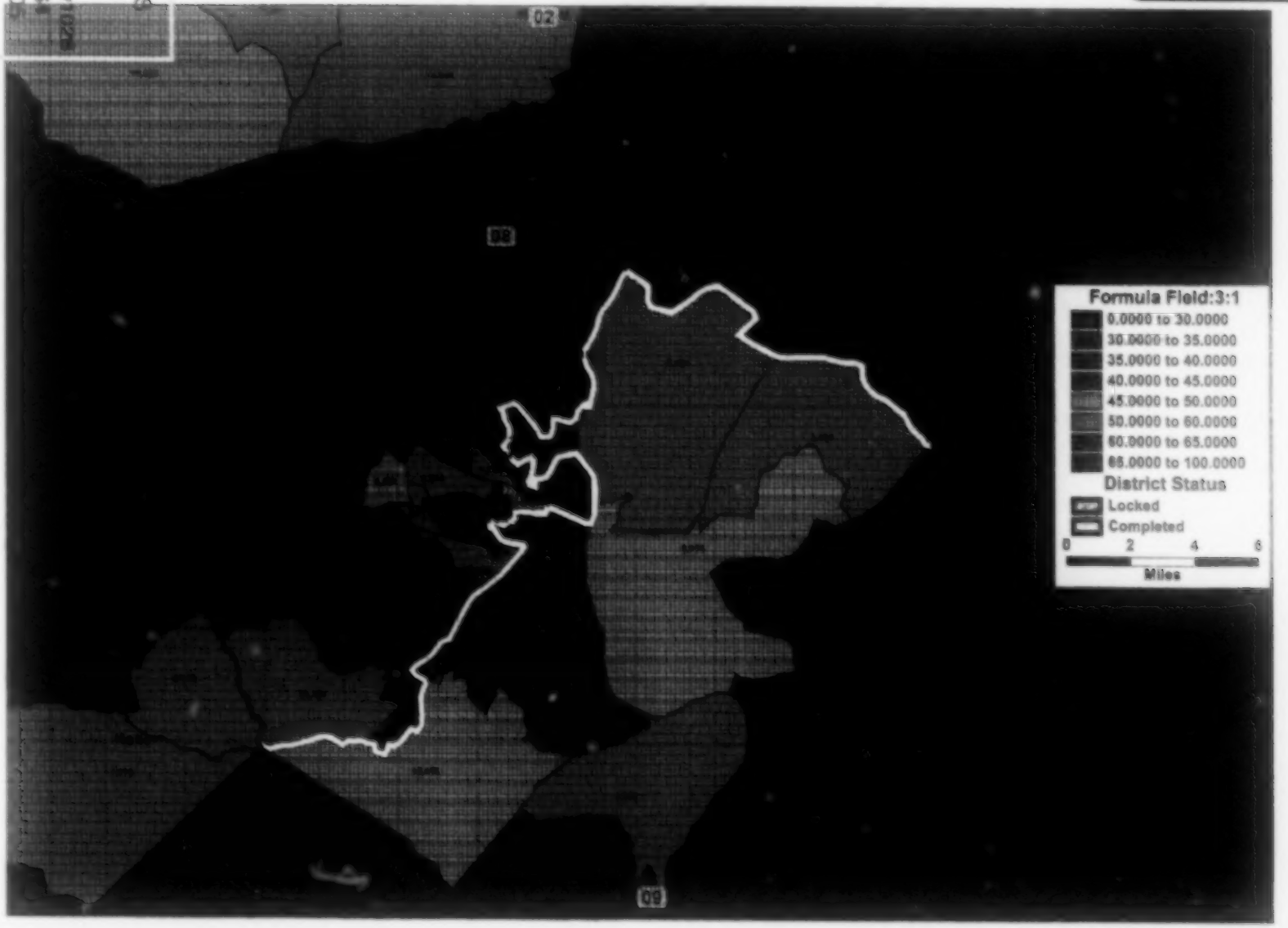
Case No. 16cv1626
16cv1164
Exhibit No. 5105

PLAINTIFFS'
EXHIBIT
4067
1:16-CV-1164

Cumberland County



Dr. Hofeller Guilford County Map
(League of Women Voters Plaintiffs' Exh. 4068)

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16cv116
hibit No. 510

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Guilford County

Dr. Hofeller Johnston County Map
(League of Women Voters Plaintiffs' Exh. 4069)

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PLAINTIFFS' EXHIBIT 4069 1:16-CV-1164

Johnston County

Dr. Hofeller Mecklenburg County Map
(League of Women Voters Plaintiffs' Exh. 4070)

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60.0000 to 65.0000
65.0000 to 100.0000
District Status

Dr. Hofeller Pitt County Map
(League of Women Voters Plaintiffs' Exh. 4071)

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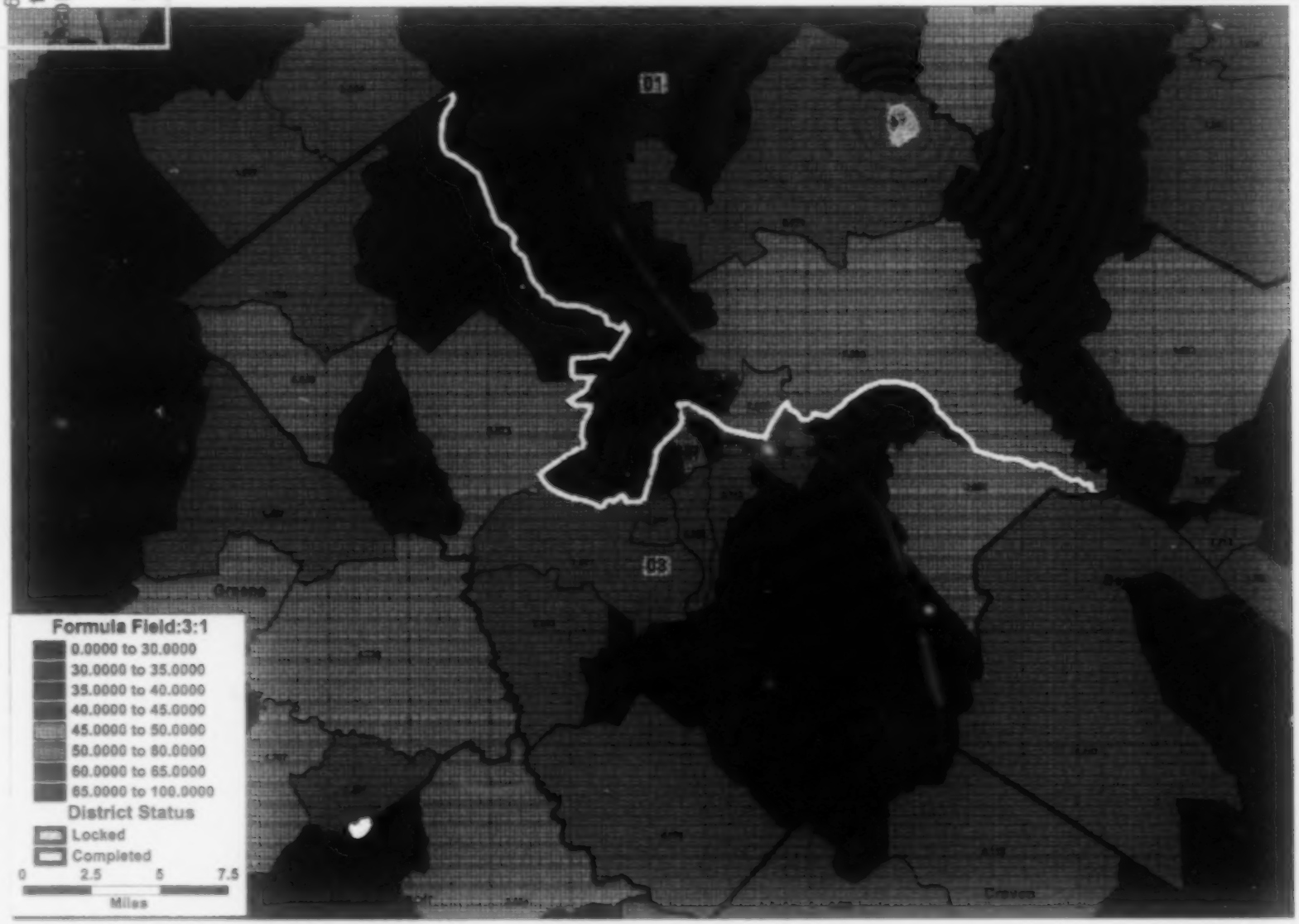
Pitt County



Dr. Hofeller Durham and Wake Counties Map
(League of Women Voters Plaintiffs' Exh. 4072)

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Durham and Wake Counties

Dr. Hofeller Wilson County Map
(League of Women Voters Plaintiffs' Exh. 4073)

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Wilson County

PLAINTIFFS'
EXHIBIT
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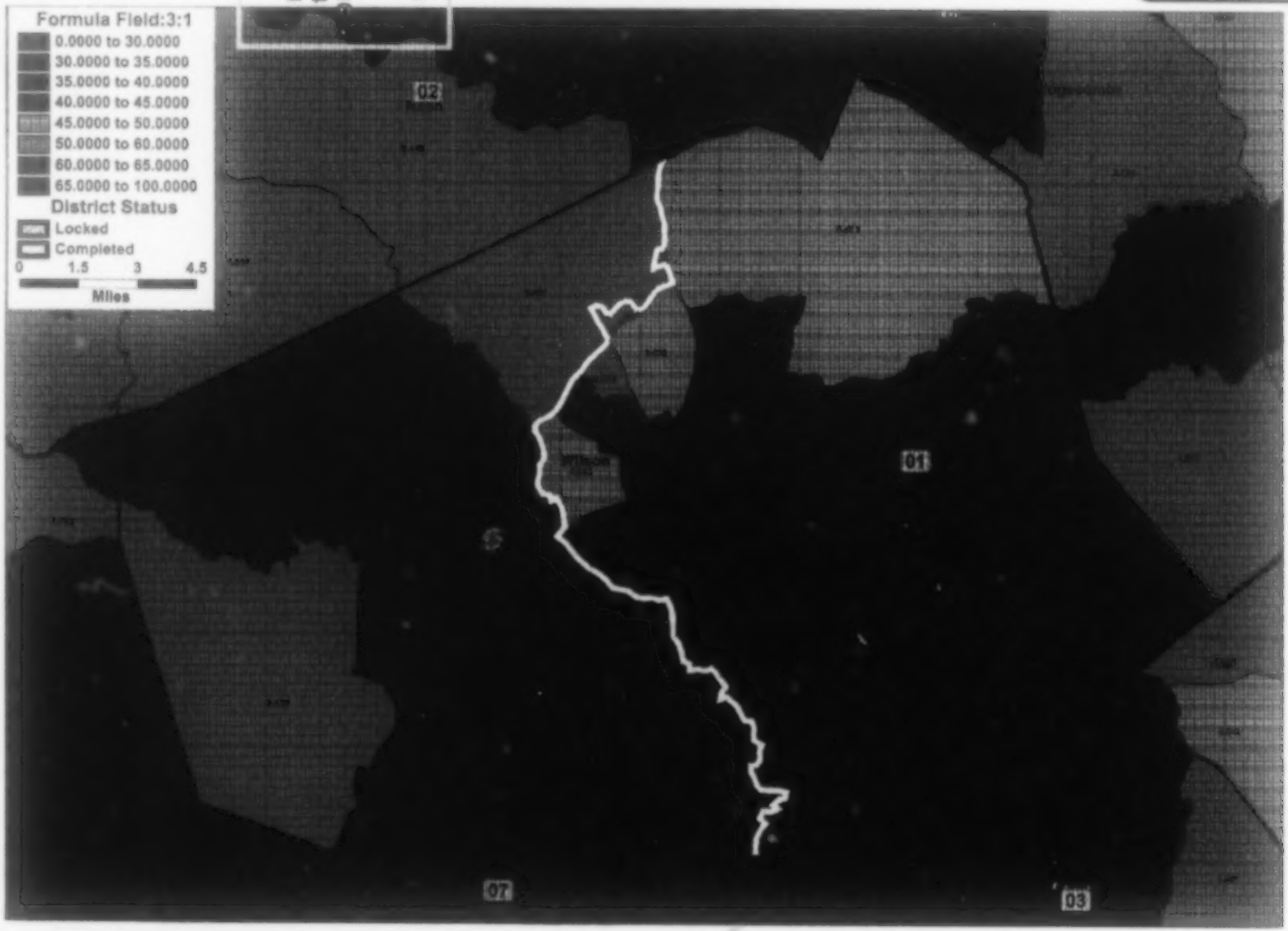

Dr. Hofeller Bladen County Map
(League of Women Voters Plaintiffs' Exh. 4074)

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PLAINTIFFS'
EXHIBIT
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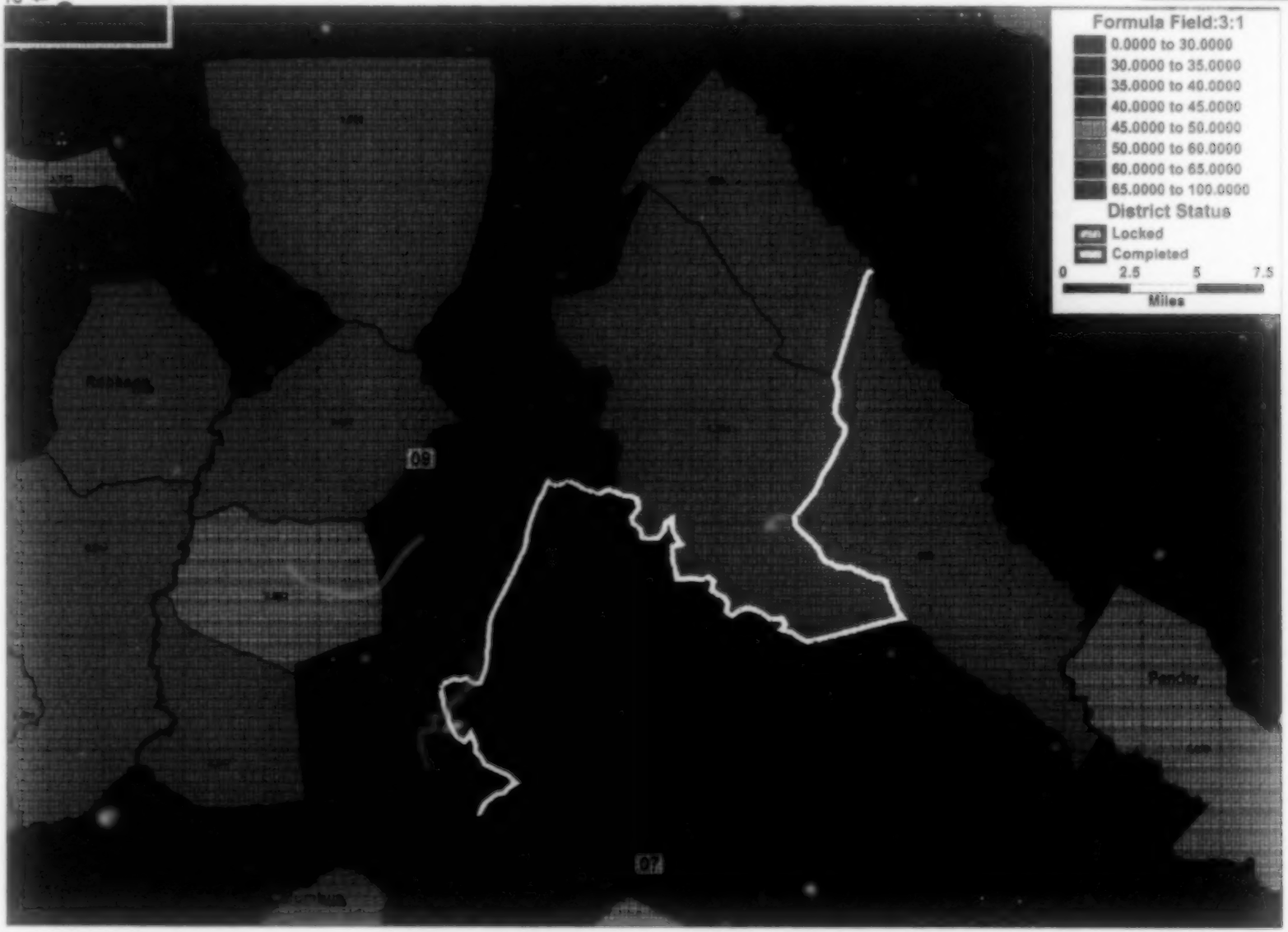
1:16-CV-1164

Bladen County



Dr. Hofeller Catawba County Map
(League of Women Voters Plaintiffs' Exh. 4075)

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16cv1164
ibit No. 5113

PLAINTIFFS'
EXHIBIT
4075
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Catawba County

Dr. Hofeller Iredell County Map
(League of Women Voters Plaintiffs' Exh. 4076)

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FENDANT'S
HIBIT
se No. 16cv
16cv116
hibit No. 511

Iredell County

Dr. Hofeller Rowan County Map
(League of Women Voters Plaintiffs' Exh. 4077)

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PLAINTIFFS'
EXHIBIT
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1:16-CV-1164

DEFENDANT'S
EXHIBIT
Case No. 16cv1
16cv1164
Exhibit No. 5115

Rowan County

Excerpts from Joint Redistricting Committee, North Carolina General Assembly Extra Session on Redistricting (Feb. 16, 2016)

...

[47] ...

REP. LEWIS: Mr. Chairman, I would ask -- with your permission, I've asked the Sergeants at Arms to distribute the criteria labeled "Partisan Advantage." If you could direct the staff to read that, I'd be happy to speak on it.

SEN. RUCHO: Ms. Churchill, would you read the one on partisan advantage?

MS. CHURCHILL: "Partisan Advantage: The partisan makeup of the Congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The committee shall make reasonable efforts to construct districts in the 2016 contingent Congressional plan to maintain the current partisan makeup of North Carolina's Congressional delegation."

SEN. RUCHO: Representative Lewis, explain.

REP. LEWIS: Mr. Chairman, the explanation of this is reasonably simple. As we are allowed to consider political data in the [48] drawing of the maps, I would propose that to the extent possible, the map drawers create a map which is perhaps likely to elect 10 Republicans and 3 Democrats. I acknowledge freely that this would be a political gerrymander, which is not against the law.

SEN. RUCHO: All right. Members of the committee, any questions? Senator Blue?

SEN. BLUE: Just one, Mr. Chairman, and this is a point of order since you've got my friend the rules committee chairman up there. What are the rules under which this committee is operating, House or Senate? If it's the Senate and if it's neither, where do they come from, but if it's the Senate, aren't ayes and nays prohibited in committee votes?

SEN. APODACA: The chairs agreed we'd operate under the House rules, and I can tell you I wasn't here for that, but they did.

(Laughter.)

SEN. RUCHO: All right. Senator Blue?

SEN. BLUE: One follow-up.

SEN. RU CHO: Let me have your attention.

SEN. BLUE: Since I'm not familiar with the House rules anymore, there is a permitted [49] abstention in the ayes and nos under the House rules; is there not?

SEN. APODACA: Mr. Chairman?

SEN. RUCHO: Representative Starn, if you can respond to that question?

REP. STAM: I could. There is no such rule under House rules n ow or when Senator Blue was the Speaker of the House.

SEN. RUCHO: Senator Blue, did you get your answer?

SEN. BLUE: I got an answer.

(Laughter.)

SEN. RUCHO: Good. Thank you. Okay. Members of the committee, let's pay close attention to this. Sen at or McKissick?

SEN. MCKISSICK: In looking a t this particular criteria, I mean, certainly partisan advantage is a legitimate consideration, but I don't know why, based upon the number of Democratic registered voters, Republican registered voters and unaffiliated voters in this state we would want to ever sit and ingrain as a criteria for redistricting that we would only allow one party 3 seat s in Congress, and the other one, 10 in Congress, when not very long ago, before 2010, we [50] had 7 Democrats and 5 Republicans, so I'm trying to understand why you feel this would be fair, reasonable, and balanced in terms of voter registrations in this state as it is currently divided.

REP. LEWIS: Thank you for your question, Senator. I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats.

(Laughter.)

SEN. MCKISSICK: Follow-up, if I could.

SEN. RUCHO: Follow-up.

SEN. MCKISSICK: Were you aware of the fact that in the 2012 election cycle, if you total the total number of votes received by Democrats running for Congress versus the total number of votes cast for Republicans running for Congress, that Democratic candidates had a higher number of total votes, but ended up with fewer seats? Were you aware of that factor in drawing up this criteria?

REP. LEWIS: I am aware, Senator -- first of all, thank you for your question. I am aware that there are numerous examples, especially [51] through the 2000s, when the majority of seats went t o a party that had the fewer votes. We elect our representatives based on a system of drawing districts and the people in those districts being able to vote. We do not elect at large. I know you're very much aware of that, and we will -- this will maintain that system.

SEN. MCKISSICK: Last follow-up, Mr. Chairman.

SEN. RUCHO: Follow-up. Last follow- up.

SEN. MCKISSICK: I would simply say this: If we were looking at a fair and reasonable division as a criteria moving forward, it wouldn't necessarily have to be an even division. It could -- obviously, since majority -- Republicans are a majority now, give Republicans a slight edge, but to come up with such an imbalance in a split I think is highly inappropriate. It's unfair. It does not recognize the way votes have been cast in this state as recently as 2012. It doesn't recognize the division of registered voters in this state between Democrats, Republicans, and Independents, and it's really a matter of political gerrymandering in the worst sense in which we can do so.

[52] Come up with something different. It could be 5 Democratic seats, and there's no reason why that couldn't be accomplished. It could be 6 Democratic seats and still give the Republicans an edge, but to say you're going to marginalize with only 3 seats as a criteria, let the voters decide.

REP. LEWIS: Well, sir, I definitely -- I thank you for that comment. Certainly we look forward to

receiving -- what I'm asking this committee to adopt is the maps that this -- that the chairs will present to this committee absent a stay arriving from the Court. Certainly the members of this committee that don't feel this balance is appropriate can certainly offer their own maps for consideration.

SEN. RUCHO: Representative Lewis, in the case Senator McKissick brought forth, if you see some districts that tend to have a larger voter turnout than others, that could easily explain what Senator McKissick described. Am I not correct?

REP. LEWIS: Yes, sir. I think that's a constant variable in this. If you have an area that has a lot of contested races, those areas tend to produce more folks to the polls. If you have -- you know, we don't want to get into the Electoral [53] College, but I can remember this debate's been going on since 2000 because of the use -- you know, there are times -- do you maximize or, for lack of a more polite term, do you pump up or boost up votes in certain areas to try and create the larger cumulative total, or do you file, run, and win in the districts in which you live? Our system has historically been the latter.

SEN. RUCHO: I have a follow-up there. Senator McKissick, go ahead.

SEN. MCKISSICK: Yeah. Simply this: I think what voters want are more competitive districts, more competitive districts where they have a clear choice between a Democrat, a Republican, and perhaps an unaffiliated candidate that's running, but not ones that are gerrymandered to give one party or the other just a clear partisan advantage. More competitive districts, I support completely, but that means

drawing the maps in a way where you're not from the outset establishing criteria that gives one party an unfair advantage.

SEN. RUCHO: Representative Lewis?

REP. LEWIS: Mr. Chairman, the only thing that I could add is that we want to make clear that [54] we to the extent are going to use political data in drawing this map, it is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood. I have the utmost respect for those that do not agree with this particular balance.

I will say -- and the gentleman from Durham did not say this, but I will say that during the public comment yesterday, more than one speaker referred to, "Can't we just draw them where there's 5 this way or 6 that way?" That is partisan gerrymandering if you're drawing 5 and 7 or 6 and -- whatever it is. I'm making clear that our intent is to use -- is to use the political data we have to our partisan advantage.

SEN. RUCHO: Representative Michaux?

REP. MICHAUX: Yeah. Mr. Chairman, you know if we were where you are today and we came up with this idea, you-all would be jumping all over the place, trying to dissuade us from that. First you want to -- you really want to dissuade race from being put in here. Now you want to make sure that you keep your 10 to 3 advantage, the same situation that got you in trouble before, and now you're going to -- what you're telling us is, "We [55] want you to do this, and you vote for it, and this is the way it's going to be," period, end of report.

SEN. RUCHO: Okay. There was no question, I don't think, so -- unless you want to respond to his comment.

REP. LEWIS: No.

SEN. RUCHO: Okay. I've got Representative Stam first.

REP. STAM: Yes. I'd like to share a statistic that I haven't used in about 10 years, but I'll tell you why. During the last redistricting by the other party in 2004, I did jump up and down because I saw what was coming. I n the elect ion of 2004 for the House -- write these statistics down -- 52 percent of the voters chose the Republican candidate, 44 percent, the Democratic candidate, and 4 percent, Libertarian. Well, that should be a landslide for Republicans, but it ended up that we were in the minority, 57 to 63.

The reason I stopped using those type of statistics is I realized that it can be totally skewed by whoever happens to not have a candidate opposing that person. That shows a huge advantage. [56] For example, near a military base, they have much fewer voters than the population -- in other words, it's a bogus statistic, so I don't use it anymore.

SEN. RUCHO: Thank you. I've got Representative Hager.

REP. HAGER: Thank you, Mr. Chairman. You know I haven't been here long, but I guess in the House, I've become one of the more senior members with my colleagues that came in in 2011, but, you know, I got to thinking -- and I have the utmost respect for Senator McKissick and Representative Michaux, but, you know, if I beat my dog every day for 4 or 5

years and then I quit doing it and I told David to quit beating his dog, you'd consider me a little bit hypocritical, wouldn't you, David?

If you look at that map on the wall and look a t the 1992 map and look at District 10 and District 1, District 10 is my district now. Look a t where we've come with District 10 since then. I mean, it's just -- it's amazing to me that we can argue that we shouldn't -- that the folks that have been here f or a long time can argue that we shouldn't gerrymander these on political reasons, and they' re some of the same people that developed [57] that map of District 1 and District 10 in 1992.

SEN. RUCHO: Thank you. Any additional questions? Senator Smith-Ingram?

SEN. SMITH-INGRAM: Thank you, Mr. Chair. Can you be specific as to what constitutes partisan advantage? Do we have to tie it to a number?

REP. LEWIS: No, ma'am, but I will -- first of all, thank you for the question. To perhaps expound on it a bit, this would -- this would contemplate looking at the political data, which was an earlier criteria adopted by this committee, and as you draw the lines, if you're trying to give a partisan advantage, you would want to draw the lines so that more of the whole VTDs voted for the Republican on the ballot than they did the Democrat, if that answers your question.

SEN. SMITH-INGRAM: I think that --

SEN. RUCHO: Follow-up?

SEN. SMITH-INGRAM: Thank you. Follow-up. It answers about 50 percent of my question. If I could ask you another one, maybe a different way? You threw

out some numbers. Would there not be partisan advantage with 8/5?

REP. LEWIS: Thank you for that question, Senator. I would point out that indeed, you could [58] use political numbers to draw a partisan -- to draw districts in which 8 Republicans would win or 5 Democrats. I'm saying to the extent that you can, make it 10/3.

SEN. SMITH - INGRAM: Last follow-up.

SEN. RUCHO: Last follow-up.

SEN. SMITH - INGRAM: Just a statement. I am concerned that we are trying to mimic the outcome of the previous election that never existed for a very long time in North Carolina until this district was redrawn in 2011. The challenge here is we are balancing where we are with where we have been historically, but at the end of the day, we are elected to come together, to work together, to serve the constituents and citizens of North Carolina. This is one of the concerns resonated yesterday, and many of us have it here. We are drawing these lines so that we get to pick our voters as opposed to them choosing us. I t is unfair. I t should not be perpetuated in this process, and I will not be supporting it.

SEN. RUCHO: Thank you. Representative Jones?

REP. JONES: Thank you, Mr. Chair. I appreciate it. I want to say how much I have [59] enjoyed this discussion about -- about gerrymandering. You know, that's a word that seems to me, as someone who has lived in North Carolina for all my life and has really kind of studied the political process particularly over the last few decades, a word that was never really used

until somehow the Republicans came to a majority in 2010.

Just as we're taking this little trip down memory lane for just a moment, I -- I remember things like multi-member districts in North Carolina when we were drawing the legislature. I thought what an extreme opportunity that was to gerrymander.

I saw it happen in my own area where, you know, we couldn't do single -member districts. We couldn't even do double-member districts. Sometimes it had to be three- or four-member districts in order for the political party in charge at the time, which was the Democratic Party, to gain a political advantage, so Representative Lewis, I appreciate your honesty as you come forward today, and we-- and we explain that political gerrymandering I guess is what it is, but I just find it very interesting to hear some of the comments coming from some of the avenues that we're [60] hearing them come from today. We never heard those comments for decades and decades and decades in North Carolina, whether it was the media, whether it was the majority party, whomever, and so I guess the process is what it is.

I 'm glad that we have had some court decisions that have led to what I think is a lot less gerrymandering than what we had in prior decades, where we -- now we do have single-member districts. Now we do have where we don't just split counties in any possible way, and we have the pod system and things like that, so I really take offense when I hear those that say that somehow the political gerrymandering of today is greater than somehow it was in prior years, when anybody that goes back and

studies the history knows that that's simply not the case.

That's my comment, and I will ask I guess a ques t ion for you, Representative Lewis. Is it possible that people might choose to vote for a candidate that is of a different political party than what their political affiliation is?

REP. LEWIS: Well, thank you f or that question, Representative Jones. Of course it is. I mean, we all offer ourselves, and the voters in [61] our districts decide that we best represent what we believe the direction of the government should be and that's how they cast their votes, so certainly a person is free to vote ever how they choose to vote.

REP. JONES: Well, that's what I think, and I think regardless how you draw these districts -- you know, I come from an area where I can remember a time where voting f or the Democratic party was extremely -- extremely high, and that time has changed, and those votes have changed. A lot of people that I can tell don't necessarily vote f or the same part y that they're registered, and so I -- you know, I think we ought to respect the voters as individuals, and whether they're registered Democrat, Republican, Libertarian, unaffiliated, whatever, recognize that they do have an opportunity to vote for any candidate that is on the ballot before them. I appreciate your answer, and I appreciate your hones t y and integrity and going forward with the process.

SEN. RUCHO: Thank you, Representative Jones. Senator Clark?

SEN. CLARK: Thank you, Mr. Chairman. I'm having difficulty understanding why I should [62]

agree to vote for maps to bake in partisan advantage that was achieved through the use of unconstitutional maps. Could you explain that to me?

REP. LEWIS: Well, to be clear, sir, we -- we are proposing that the maps that are drawn now under this criteria which we have passed a plank of, and continue to move forward, one of the goals in drawing the map will be to preserve the 10/3. With all due respect, I've listened to this, and we can of course continue to discuss this as long as the committee wants to. It's always sort of amazed me that if the map elect s one side, the other side considers -- considers it a gerrymander, and something bad. If it elects their side, they consider it a work of art, and good government, so this is saying that one of the goals will be to elect -- to speak directly to your point, the goal is to elect 10 Republicans and 3 Democrats.

SEN. RUCHO: Thank you. Representative Lewis, there was a comment earlier about the districts, the 13 districts that exist, 10 presently Republican, and 3 Democrat, and under the circumstances, could you explain a little bit about the makeup of the Republican districts and who [63] they're composed of, and what is necessary for that Republican to win an election?

REP. LEWIS: Thank you for the question, Mr. Chairman. First of all, it would be necessary to go back and review the stat packs and whatnot from the 2011 districts, which are online if anybody would like to do that, but to the best of my knowledge, Republicans hold no majority as far as voter registration in any of those districts.

It's also -- well, and it is firmly my belief that it's the responsibility of each of the political parties to

nominate quality candidates who can appeal to the entire political spectrum. It was pointed out yesterday during the public hearing that the unaffiliated ranks in our state continue to grow. If you don't get them -- if you don't get a large percentage of the unaffiliated vote in most of our districts, you're not going to win, and so I would say that you are required to have a good-quality candidate that appeals to the political expectations of the majority of the folds in that district.

I can go back, and we can go through some of the points. I do still -- I actually maintain that the districts that we have now are largely [64] competitive. I pointed out before that in the race for attorney general that Attorney General Cooper won nearly all of these. We can go back through this 2011 debate if we'd like to, but I would again maintain that you've got to put forward a good candidate that appeals to the majority of folks, and that the majority of folks in these districts in the enacted plan are not registered Republicans. In fact, to the best of my knowledge, in all but perhaps one, we are the minority in all of the districts.

SEN. RUCHO: Thank you. Okay, Representative Jackson?

REP. JACKSON: Thank you, Mr. Chairman. Senator Clark took one of my points that I was going to make, but part of my uneasiness with this is that it refers to the current Congressional plan. I think you could make reference just saying that you want to do it to a partisan advantage and maximize Republican members, and I could agree with that, I guess, but you have that opportunity.

I would point out that your maps originally had a 9/4 split, and that any reference to 10/3 is not what your maps were; your maps were a 9/4 split. What you've done is taken out the [65] 2012 election, but that's not my question.

My question is, are we going to rank these criteria in any order, because you've used words in this criteria like "reasonable efforts." Well, if -- are the -- how will the mapmakers know what a reasonable effort is? In trying to come up with 10 Republican districts, will they be able to make a reasonable effort that means that now they can consider the 2008, 2012 elections? Will they be able to split precincts as part of making a reasonable effort to make a 10/3 split?

REP. LEWIS: Representative Jackson, that you for that series of questions. The answer to your question, the first part was -- I'm sorry Mr. Chairman, I'm sorry.

SEN. RUCHO: Go ahead, please.

REP. JACKSON: Will there be any type of ranking of these criteria anywhere?

REP. LEWIS: No. No is the answer. That's why these criteria are being presented individually and discussed and debated individually. Map-- drawing maps is largely a balancing act. We are trying to specify certain [66] things that you cannot use. You asked about race. You cannot use that, and I apologize; I don't remember what else you asked about, Representative Jackson.

REP. JACKSON: Follow-up, Mr. Chairman?

SEN. RUCHO: Follow-up.

REP. JACKSON: Okay. So it would be your contention, then, that making reasonable efforts would not include violating any of the other criteria that we have passed?

REP. LEWIS: Absolutely. Mr. Chairman?

SEN. RUCHO: Yes?

REP. LEWIS: If there aren't further quest ions, I move adoption of the 2016 contingent Congressional plan proposed criteria labeled "Partisan Advantage."

SEN. RUCHO: All right.

REP. JONES: Second.

SEN. RUCHO: Representative Jones has seconded. All right, members of the committee, there has been considerable discussion, and if there's any additional thoughts, this is your opportunity.

(No response.)

SEN. RUCHO: Seeing none, Mr. Clerk, [67] please go through the roll.

CLERK: Lewis?

REP. LEWIS: Aye.

CLERK: Jones?

REP. JONES: Aye.

CLERK: Brawley?

REP. BRAWLEY: Aye.

CLERK: Cotham?

REP. COTHAM: No.

CLERK: Davis?

REP. DAVIS: Aye.

CLERK: Farmer-Butterfield?

REP. FARMER-BUTTERFIELD: No.
CLERK: Hager?
REP. HAGER: Aye.
CLERK: Hanes?
REP. HANES: No.
CLERK: Hardister?
REP. HARDISTER: Aye.
CLERK: Hurley?
REP. HURLEY: Aye.
CLERK: Jackson?
REP. JACKSON: No.
CLERK: Johnson?
REP. JOHNSON: Aye.
[68] CLERK: Jordan?
REP. JORDAN: Aye.
CLERK: McGrady?
REP. MCGRADY: Aye.
CLERK: Michaux?
REP. MICHAUX: No.
CLERK: Moore?
REP. MOORE: No.
CLERK: Stam?
REP. STAM: Aye.
CLERK: Stevens?
REP. STEVENS: Aye.
CLERK: Rucho?
SEN. RUCHO: Aye.

CLERK: Apodaca?
SEN. APODACA: Aye.
CLERK: Barefoot?
SEN. BAREFOOT: Aye.
CLERK: Blue?
SEN. BLUE: No.
CLERK: Brown?
SEN. BROWN: Aye.
CLERK: Clark?
SEN. CLARK: No.
CLERK: Harrington?
[69] SEN. HARRINGTON: Aye.
CLERK: Hise?
SEN. HISE: Aye.
CLERK: Jackson?
SEN. JACKSON: Aye.
CLERK: Lee?
SEN. LEE: Aye.
CLERK: McKissick?
SEN. MCKISSICK: No.
CLERK: Randleman?
SEN. RANDLEMAN: Aye.
CLERK: Sanderson?
SEN. SANDERSON: Aye.
CLERK: Smith?
SEN. SMITH: No.
CLERK: Smith-Ingram?

SEN. SMITH-INGRAM: No.

CLERK: Wells?

SEN. WELLS: Aye.

CLERK: 23-11.

SEN. RUCHO: All right, members of the committee, roll call on the "Partisan Advantage" criteria was ayes, 23, nos, 11.

...

Excerpts from Joint Redistricting Committee, North Carolina General Assembly Extra Session on Redistricting (Feb. 18, 2016)

...

[40] ...

SEN. RUCHO: Thank you. Before we go onto the [41] next question, what I would like to do is, Ms. McCraw, would you explain your analysis, the staff analysis on the number of split counties and split VTDs so that members would understand what this map, 2016 Contingent Congressional Map, is as compared to previous maps?

MS. MCCRAW: Yes, Senator Rucho. Kara McCraw, Legislative Analysis Division. You do have a table in front of you that says "Comparison of Split Counties and Split VTDs in Congressional Plans." This compiles into a table starting with the '92 Congressional Plan, the three in the '90s, the 2001 Congressional as well as the current plan and the proposed plan. Using the data that is available on the NCGA redistricting archives, if you go to each of those plans, there are reports that are on the General Assembly website that show the counties that are split between districts. And then beginning in the 2000 decade precincts or VTDs that are split, that information is not available for the '90s. So you can see in that the '92 Congressional Plan had 44 counties split; the '97 had 22; the '98, 21; then in 2001, the Congressional Plan had 28; the 2011 had 40; and the proposed plan has 13.

VTD split, we only have the data back through the last decade. In 2001 that was run as precinct splits

and that was 22 at that time; 2011 had [42] 68; and the current plan has 12.

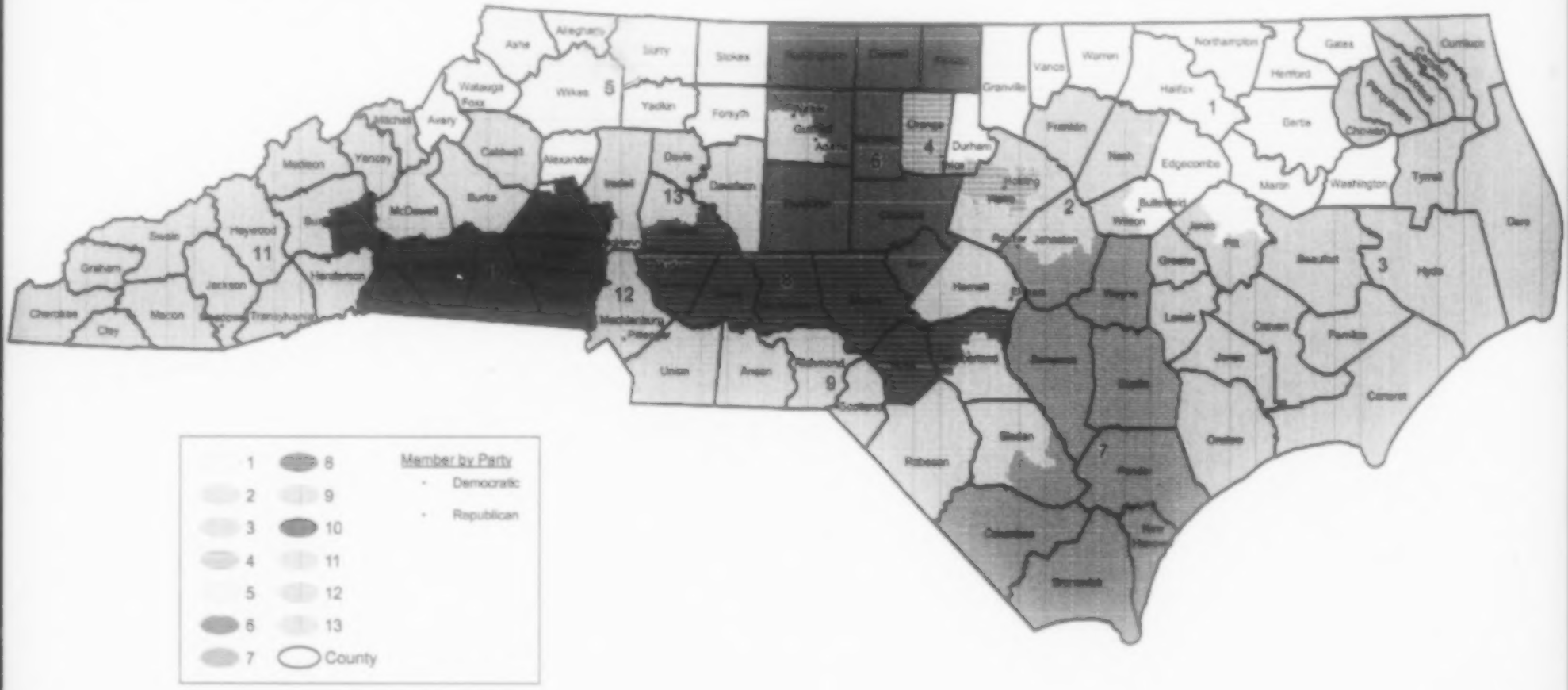
SEN. RUCHO: Any questions on that particular information, members? You can see that this map is—has 87 whole counties, and it has only 12 VTD splits.

...

2016 Enacted Map (Common Cause Exh. 1001)

(See Insert Next Page)

2016 Contingent Congressional Plan - Corrected



2016 Regular Session

Printed by the NC General Assembly, February 18, 2016.

EXHIBIT

1001

1:16-CV-1026

2016 Contingent Congressional Plan Committee Adopted Criteria (Common Cause Exh. 1007)

Equal Population

The Committee will use the 2010 federal decennial census data as the sole basis of population for the establishment of districts in the 2016 Contingent Congressional Plan. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.

Contiguity

Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

Political data

The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting districts ("VTDs") should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.

Partisan Advantage

The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Twelfth District

The current General Assembly inherited the configuration of the Twelfth District from past General Assemblies. This configuration was retained because the district had already been heavily litigated over the past two decades and ultimately approved by the courts. The Harris court has criticized the shape of the Twelfth District citing its "serpentine" nature. In light of this, the Committee shall construct districts in the 2016 Contingent Congressional Plan that eliminate the current configuration of the Twelfth District.

Compactness

In light of the Harris court's criticism of the compactness of the First and Twelfth Districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of the current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact. Reasonable efforts shall be made not to divide a county into more than two districts.

Incumbency

Candidates for Congress are not required by law to reside in a district they seek to represent. However, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan.

Excerpts from Senate Redistricting Committee, North Carolina General Asse.nbly Extra Session on Redistricting (Feb. 18, 2016)

...

[23] provided assistance in drawing these districts, either individually or collectively, that you looked to for assistance in preparing this map?

SEN. ROCHO: I don't think that's relevant to the -- Senator McKissick.

SEN. MCKISSICK: Yes.

SEN. ROCHO: We're talking about the maps and how they're drawn and all of the stat packs. I don't think that question is relevant to the decision as to whether you will vote for or against the map. Thank you, that is the decision of the Chair.

SEN. MCKISSICK: A follow-up question for the Chair. I see. I just think it is highly relevant to know who the consultants were and where they were located so they could be identified as a part of the record. Particularly since it has been indicated that race was not one of the criteria that was used in developing the maps here at the General Assembly. I don't know if perhaps consultants that might have been used might have used databases outside of the General Assembly where, say, race and other considerations might have been used in helping to draft the map that is before us.

SEN. ROCHO: Senator McKissick.

SEN. MCKISSICK: Yes.

[24] SEN. RUCHO: I'll be clear, the criteria that Representative Lewis has submitted is the criteria that was used to draw the maps, and probably that's

as much as we need to know. Okay. Thank you, have you got an additional question?

SEN. MCKISSICK: Yes.

SEN. RUCHO: Go ahead.

SEN. MCKISSICK: Now, in terms of the partisan advantage that was identified as a criteria, of course that was identified, and it was passed by the committee. I was wondering why there was a 10-3 split when if you look at the registrations of Democrats, Republicans, and unaffiliated voters in North Carolina it would suggest, perhaps, that division ought to be different. And if we look at the fact that back in 2012, for example, of the candidates running for Congress, the Democratic candidates received more total votes than Republicans but ended up with only three seats. I mean, what is -- how was the determination made that we should have a 10-3 split in devising this map? When perhaps, based upon voter registration and voting trends, even using patterns from races which have been identified here, it was suggested that perhaps a greater number of seats in districts should have been carved out for Democrats.

[25] SEN. RUCHO: Representative Lewis.

REP. LEWIS: Thank you, Mr. Chairman. Thank you for the question. Senator, to try and fully respond to your question, the first part of your question is we believe that voting patterns are better indicators than voter registration. So we did not actually use voter registration in drawing these maps.

The second part of your question, why did we attempt to achieve a 10-3 congressional map draw is

that was the criteria that was openly debated and adopted by the 2016 Joint Select Interim Committee.

SEN. MCKISSICK: Last follow-up, Mr. Chair.

SEN. RUCHO: Follow-up.

SEN. MCKISSICK: And that's simply this, obviously there's Supreme Court decisions that use the term "communities of interest" as a valid criteria in drafting these types of congressional district maps. Was there a specific reason why it was not one of the identifying criteria that was adopted -- at least proposed and adopted by the committee? Since it is a valid criteria underneath cases decided by the United States Supreme Court, why would we want to disregard that as a criteria for us trying to draw maps since there is certainly advantages in grouping people into districts based upon common collective interests,

...

Excerpts from Senate Floor Session, North Carolina General Assembly Extra Session on Redistricting (Feb. 18, 2016)

...

[36] LT. GOV. FOREST: Senator Rucho, do you yield for another question. Senator Rucho, do you yield?

SEN. RUCHO: Yes, I do.

LT. GOV. FOREST: Okay. Senator.

SEN. BRYANT: So when and where were the maps initially drawn, and were public funds involved in that process?

SEN. RUCHO: My understanding of it is that when we consulted with Dr. Hofeller, and of course, consulted with our attorneys to make sure that we have the best answer to be able to comply with the Court, since not like you, an accomplished lawyer, I'm just merely a dentist, and the -- you know, we -- we did talk with the experts, and we were able to find a plan to do it.

And in doing so, that's how we actually got the criteria established, which is why and how Dr. Hofeller was able to draw maps that are what we have before us.

SEN. BRYANT: One more follow-up.

LT. GOV. FOREST: Senator Rucho, do you yield?

SEN. RUCHO: Yes, I so.

SEN. BRYANT: So at -- at what point, or

...

[41] SEN. RUCHO: Yes.

SEN. MCKISSICK: Do you know if before the adoption of the criteria, if your consultant had already begun making maps without knowing that those criteria would be adopted?

SEN. RUCHO: Well, to say that I think it's simple to say that, you know, there is always criteria when you establish that. You know, I mean, it's like a let me just say to you, it's like any bill in the Legislature. When you submitted a bill, you already have it planned out where you have privilege, you know, privacy and the like, and you're thinking about what you want to put to the bill.

What we thought -- we think about what we would like to see in there, the same manner as you do. And in doing so, you know, you go ahead and you say, you know, "We want it to be drawn with whole counties," which we actually got only -- 87 whole counties, which was the best it's ever been. And we didn't want to cut any -- divide any VTDs, or as few as possible, so that we can at least do it on -- based on trying to maintain the zero deviation. And you know, the basic criteria that would be there and that you would discuss.

[42] And I'm sure -- and matter of fact, it may be a great time for me to ask you some questions about who your map drawers were and who funded it and the like, too. So -- but in essence, we did we had a discussion with him, and make sure that he fully understand what his limitations were. And in doing so, you know as well as I do, listing those criteria, that's what he was told to do and that's what I 'm sure he did.

SEN. MCKISSICK: So -- follow-up, Mr. President?

SEN. RUCHO: Senator Rucho, do you yield?

SEN. RUCHO: Yes, sir.

SEN. MCKISSICK: Very brief follow-up, Senator Rucho. So it's possible that before those criteria were adopted, if he had the traditional categories that were available under the 2011 stat pack that might have included race or party affiliations and a number of other parameters that they -- it's a possibility that he began drawing early maps, taking into consideration those factors before the criteria were adopted, isn't it?

SEN. APODACA: Mr. President, Senator Apodaca, what purpose do you rise?

SEN. APODACA: Inquiry of the Chair, [43] please.

LT. GOV. FOREST: Senator Apodaca.

SEN. APODACA: Mr. President, are we talking about this map, or are we talking about how we draw maps, or what imaginary maps may have been done, or who may have done what, when, or where, or are we voting on this map today as presented?

LT. GOV. FOREST: Thank you, Senator. I -- I would recommend that we keep our focus on the map that we're talking about today, specifically on that bill. The question, we can follow-up -- go ahead and finish the question. Senator Rucho, if you'd like to answer it, feel free.

SEN. RUCHO: I'm not sure how to say it any clearer. The answer was simple. We -- you know, the -- the -- the criteria that was there was what was given to the -- to the map drawer. They were told that "This is all you live with and this is all you work with in drawing this map." What part of that am I not

understanding? Or maybe you're not understanding it. The criteria was established, and that is the criteria that was followed.

SEN. MCKISSICK: Okay. I -- I understand

...

[80] SEN. RUCHO: Yes.

SEN. CLARK: Let me narrow my question a little bit more. Was the criteria -- criteria to maintain political advantage provided to the mapmakers prior to the public hearing?

SEN. RUCHO: Repeat that again. I couldn't hear you.

SEN. CLARK: Was the criteria to maintain political advantage for the Republican Party provided to the mapmakers prior to the public hearing?

SEN. RUCHO: Well, we looked at the -- at the previous map, which was done following the Voting Rights Act and all the other things that needed to be addressed the way the Supreme Court had told us to do. And that is how we did the other map. This one was found unconstitutional.

What we were doing is saying, okay, political gerrymandering is not illegal, despite what Senator Stein says, and -- and CD-12 is a political gerrymandering that was approved by the Supreme Court. So there is nothing wrong with political gerrymandering. I -- I won't accept that as being a criticism.

SEN. CLARK: I didn't say anything was [81] wrong with it. I'm just asking you to tell me --

SEN. RUCHO: Just letting you know.

SEN. CLARK: -- whether or not one of the criteria provided to the mapmakers was to maintain political advantage, and was that done prior to the public hearing?

SEN. RUCHO: To answer your question --

LT. GOV. FOREST: You go ahead, Senator.

SEN. RUCHO: To answer your question, we wanted to achieve the same goal s that were available or that were achieved on the previous map on this new map so that -- and -- and to clearly achieve -- we had 13 -- excuse me, 10/3, and we said 10/3 would be the appropriate way to go in this one, too.

SEN. CLARK: I guess --

LT. GOV. FOREST: Senator --

SEN. CLARK: -- I should take that for a yes.

LT. GOV. CLARK: Senator, do you want to speak to the bill or do you want to ask another question?

SEN. CLARK: Will the Senator yield for another question?

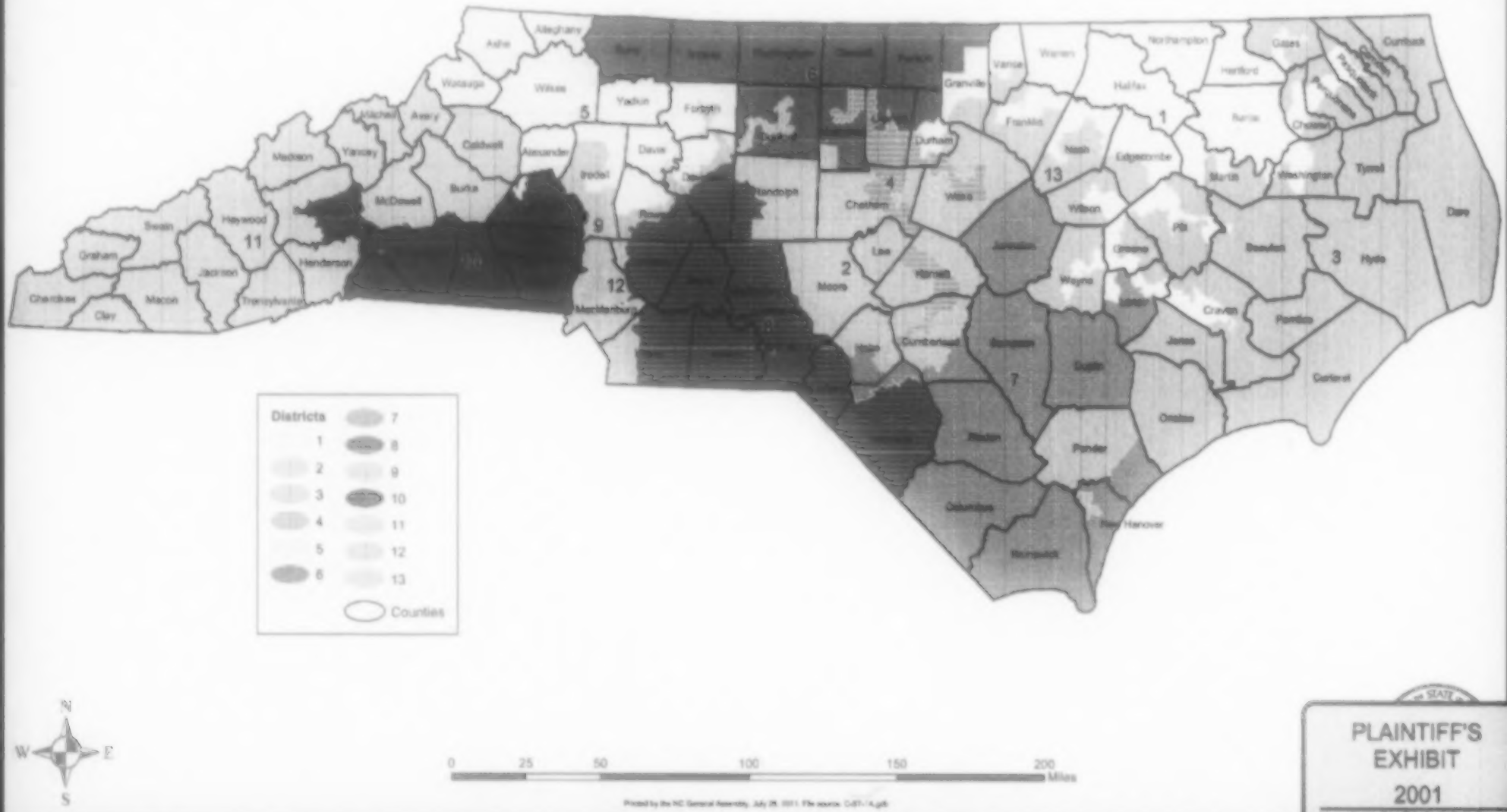
LT. GOV. FOREST: Senator Rucho, do you

...

Rucho-Lewis Congress 3 (2011 Enacted Map)
(Joint Plaintiffs' Exh. 2001)

(See Insert Next Page)

RUCHO-LEWIS CONGRESS 3



PLAINTIFF'S EXHIBIT
2001
1:16-CV-1026

Dr. Hofeller's Formula
(Joint Plaintiffs' Exh. 2002)

FORMULA

(100*(G08G_RV+ G08S_RV+ G08K_RV+ G12G_RV+ G120_RV+ G10S_RV+ G14S_RV))/(G08G_RV+ G08G_DV+ G08S_DV+ G08S_RV+ G08K_DV+ G08K_RV+ G12G_DV+ G12G_RV+ G120_DV+ G120_RV+ G10S_DV+ G10S_RV+ G14S_DV+ G14S_RV)

SEVEN FACTORS

1. 08 Governor
2. 08 U. S. Senate
3. 08 Commissioner of Insurance
4. 12 Governor
5. 12 Commissioner of Labor
6. 10 U.S. Senate
7. 14 U.S. Senate

Excerpt from Expert Report of
Jonathan Mattingly
(Common Cause Plaintiffs' Exh. 3002)

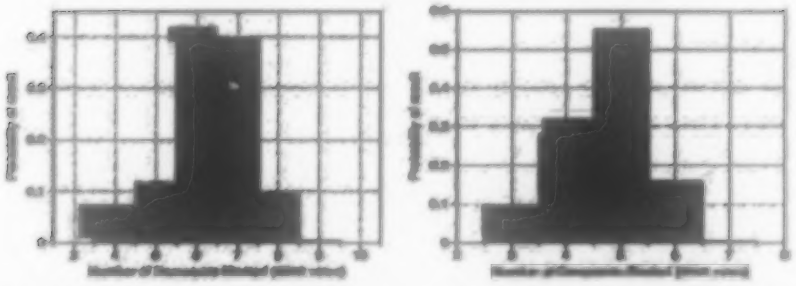
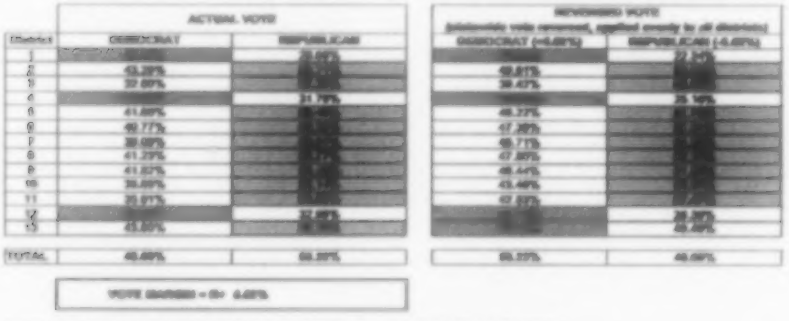
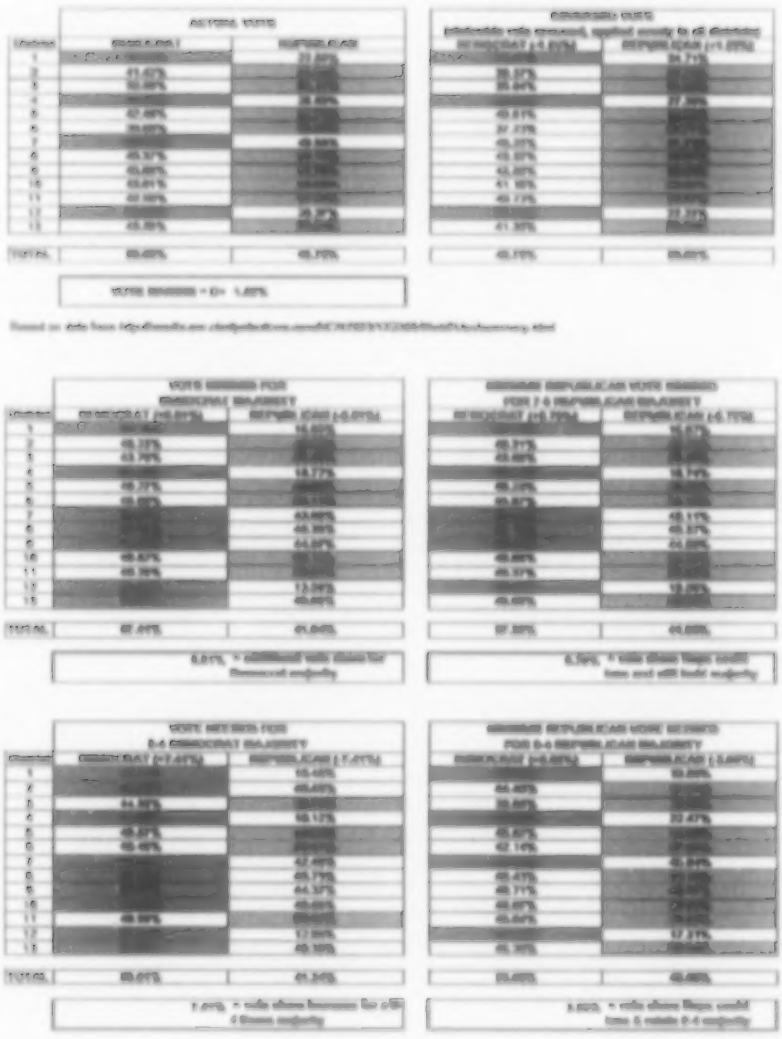


Figure 1: Probability of a given number of Democratic wins among the 13 congressional seats using 2012 election (left) and 2016 election (right) votes.

2016 North Carolina Congressional Election - Total Vote Share (Common Cause Plaintiffs' Exh. 3022)



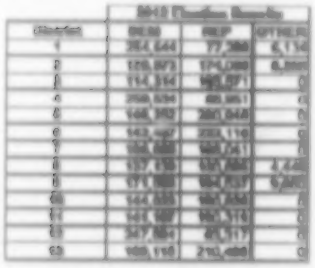


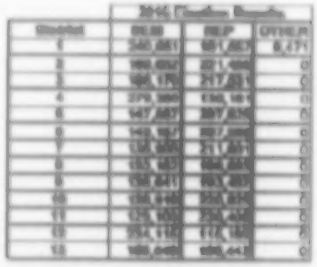
2012 and 2016 North Carolina Congressional Elections - Mean-Medium Analysis (Common Cause Plaintiffs' Exh. 3023)

District	2012 DEM VOTE SHARE	2016 DEM VOTE SHARE
1	[illegible]	[illegible]
2	41.42%	43.29%
3	36.89%	32.80%
4	[illegible]	[illegible]
5	42.46%	41.00%
6	39.06%	40.77%
7	60.10%	39.09%
8	46.37%	41.23%
9	46.66%	41.82%
10	43.01%	36.86%
11	42.59%	35.01%
12	[illegible]	[illegible]
13	43.20%	43.90%

MEAN	50.71%	46.24%
MEDIAN	43.20%	41.60%
GAP	7.59%	4.64%

= districts in which Democrat vote share exceeds mean

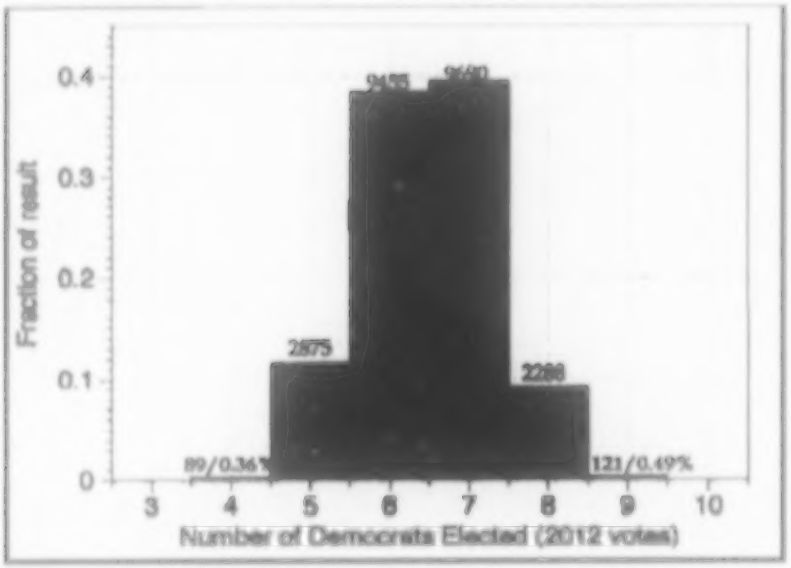




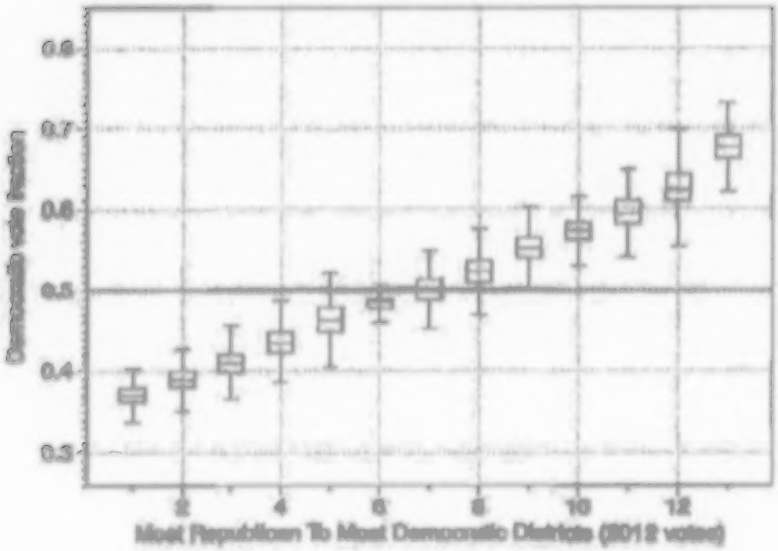
Excerpts from Jonathan Mattingly PowerPoint Demonstrative (Common Cause Plaintiffs' Exh. 3040)

Outcomes among 24,518 simulated maps

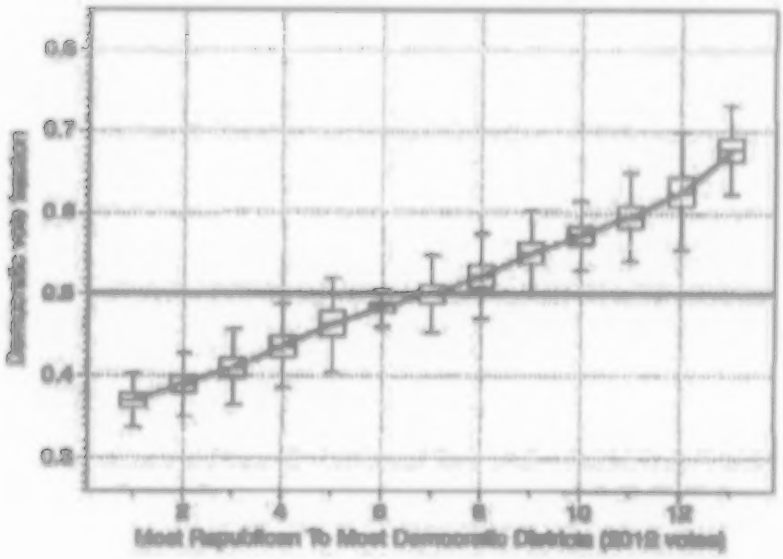
Votes for U.S. House 2012 (51%-49%/4-9 seats)



Analysis of 13 districts in simulated maps
Votes of U.S. House 2012 (51%-49%/4-9 seats)

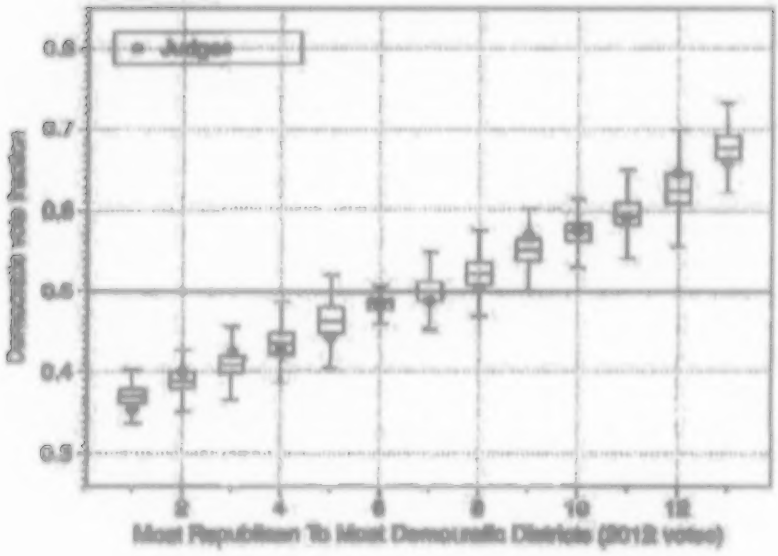


Analysis of 13 districts in simulated maps
Votes of U.S. House 2012 (51%-49%/4-9 seats)



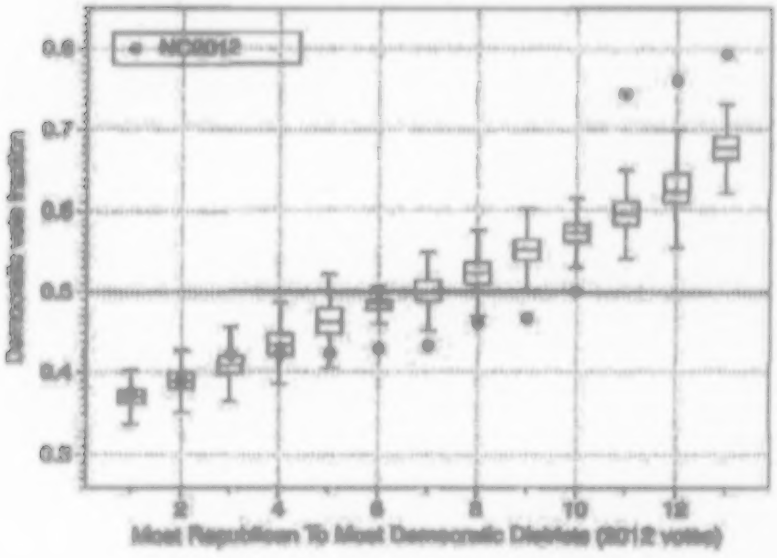
Analysis of 13 districts in Judges' plan

Votes for U.S. House 2012 (51%-49%/4-9 seats)



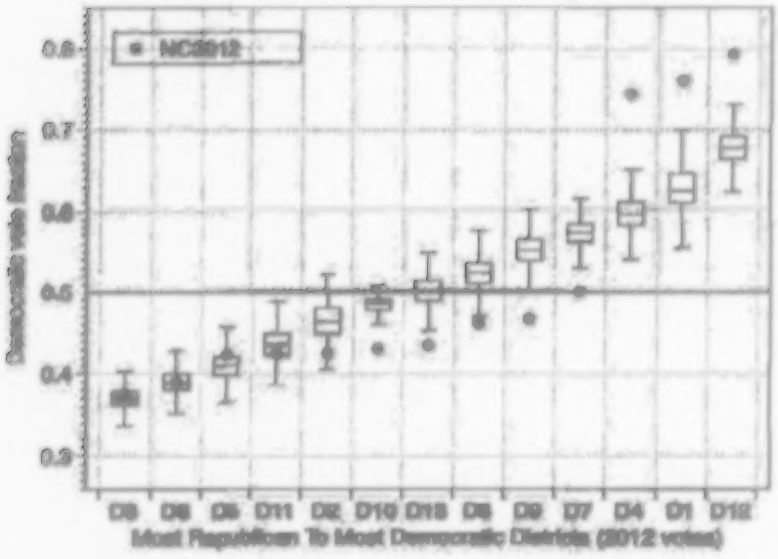
Analysis of 13 districts in NC2012 plan

Votes for U.S. House 2012 (51%-49%/4-9 seats)



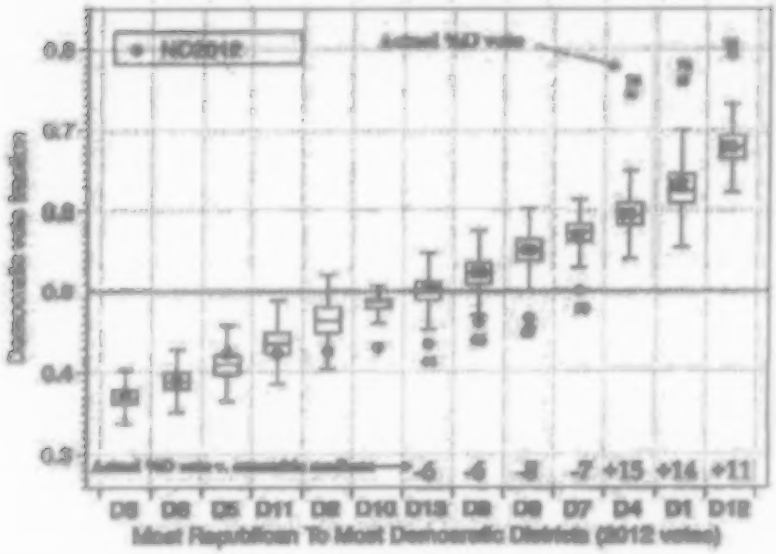
Analysis of 13 districts in NC2012 plan

Votes for U.S. House 2012 (51%-49%/4-9 seats)



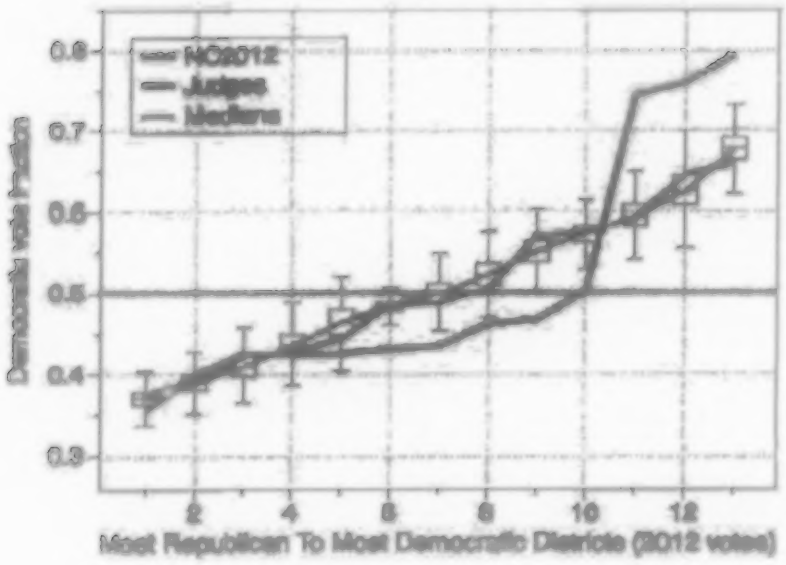
Analysis of 13 districts in NC2012 plan

Votes for U.S. House 2012 (51%-49%/4-9 seats)



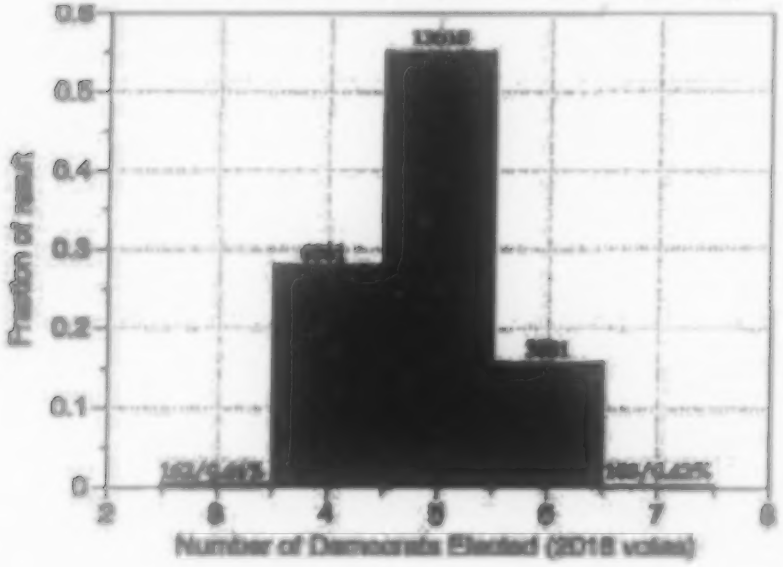
Comparison of results

Ensemble - Judges - NC2012



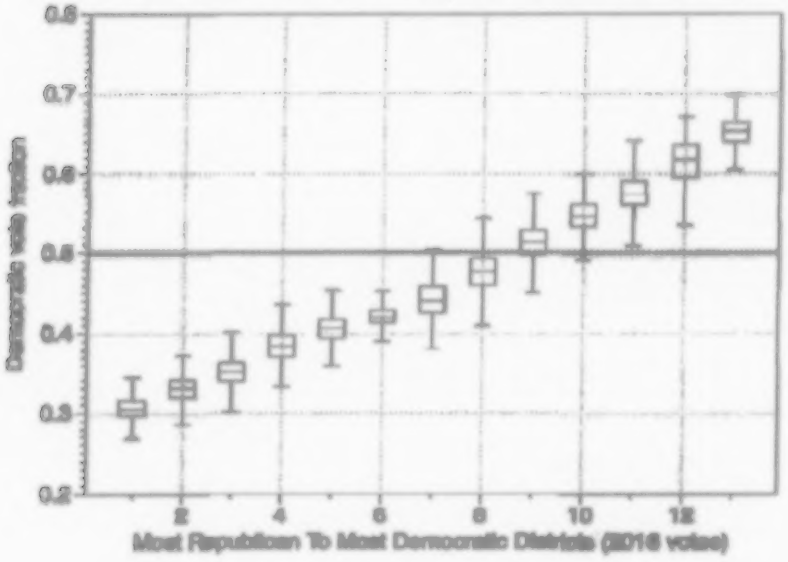
Outcomes among 24,518 simulated maps

Votes for U.S. House 2016 (53%-47%/10-3 seats)



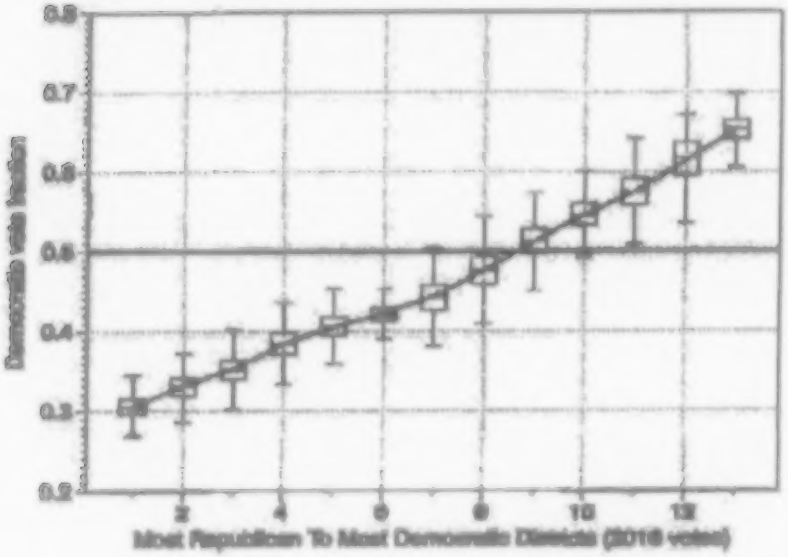
Analysis of 13 districts in simulated maps

Votes for U.S. House 2016 (53%-47%/10-3 seats)



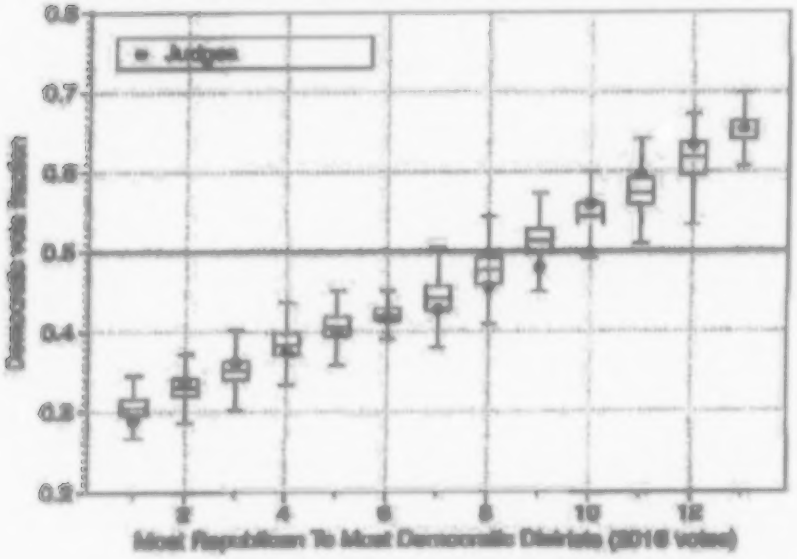
Analysis of 13 districts in simulated maps

Votes for U.S. House 2016 (53%-47%/10-3 seats)



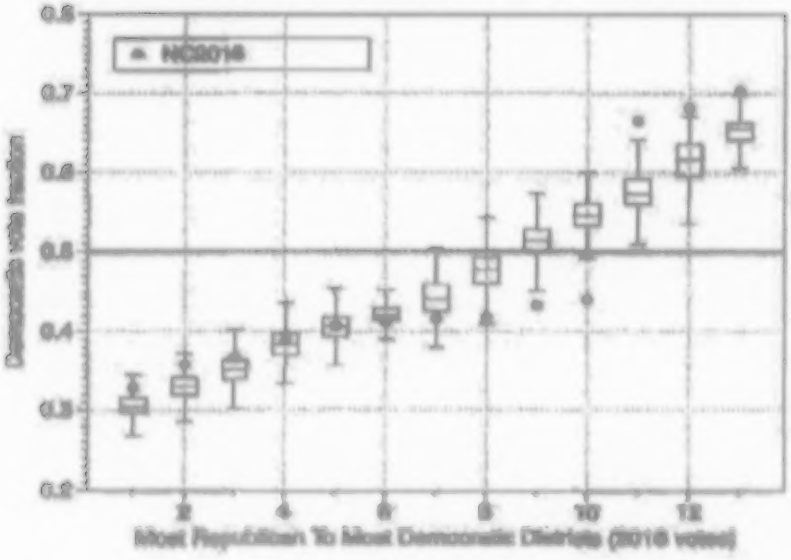
Analysis of 13 districts in Judges' Plan

Votes for U.S. House 2016 (53%-47%/10-3 seats)



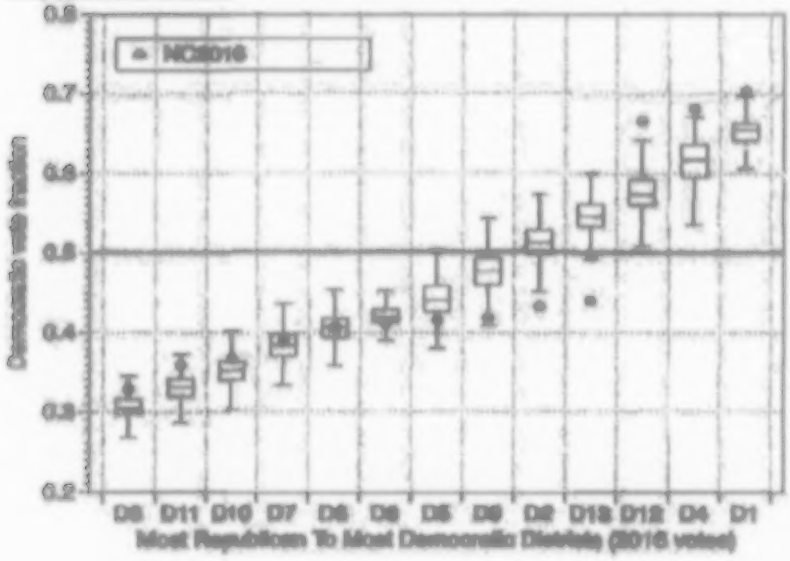
Analysis of 13 districts in NC2016 Plan

Votes for U.S. House 2016 (53%-47%/10-3 seats)



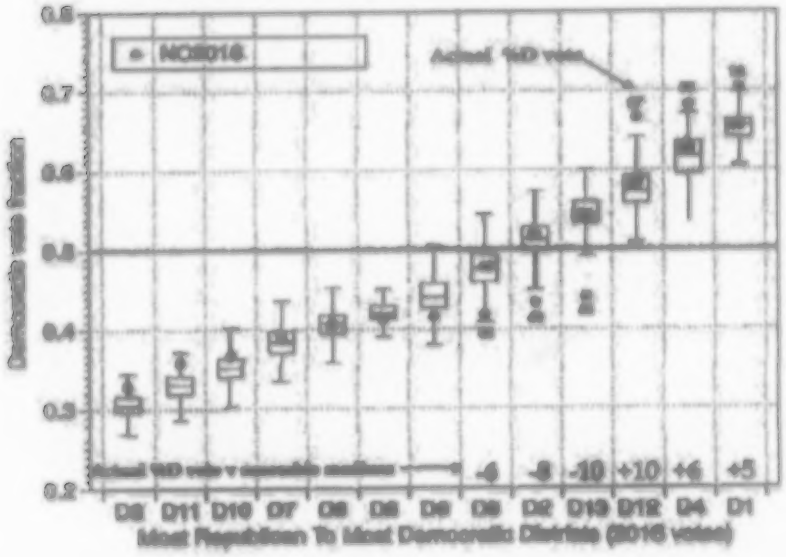
Analysis of 13 districts in NC2016 Plan

Votes for U.S. House 2016 (53%-47%/10-3 seats)



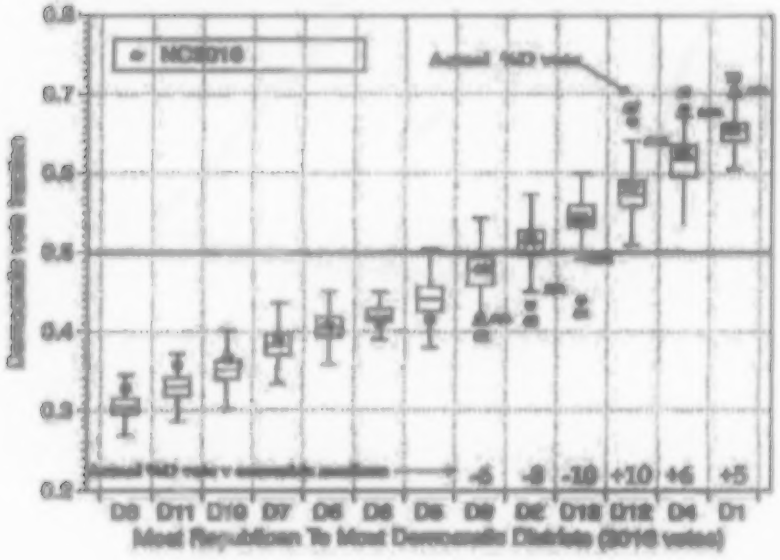
Analysis of 13 districts in NC2016 Plan

Votes for U.S. House 2016 (53%-47%/10-3 seats)



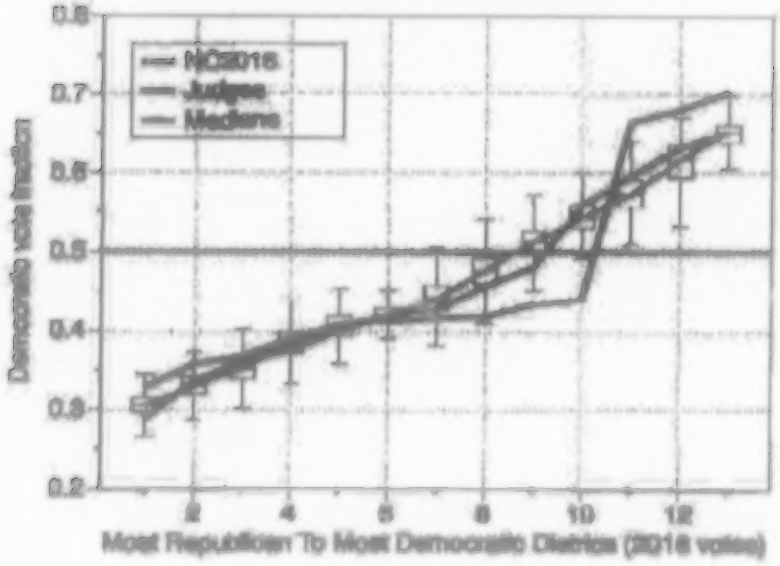
Analysis of 13 districts in NC2016 Plan

Votes for U.S. House 2016 (53%-47%/10-3 seats)



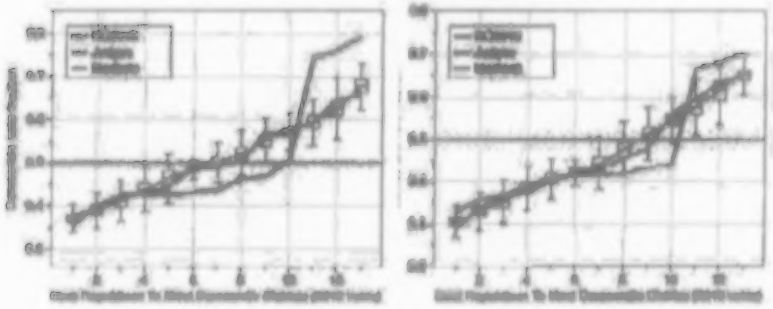
Comparison of results

Ensemble - Judges - NC2016



Comparison of results

Ensemble - Judges - NC2016



Demonstrative Presentation Used in Cross Examination of M.V. Hood III (Common Cause Plaintiffs' Exh. 3042)

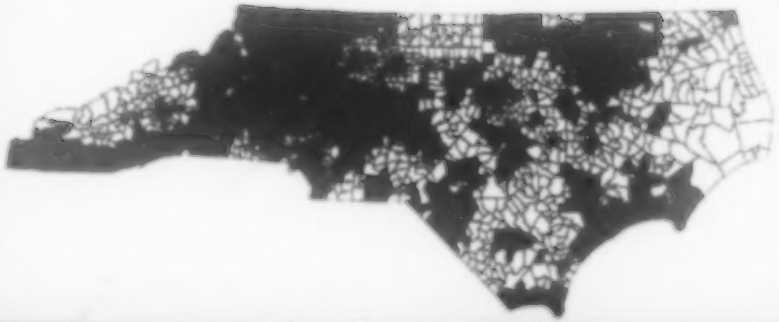
(See Insert Next Page)

* Dr. M. V. Hood Cross-Exam

PLAINTIFF'S
EXHIBIT
3042
1:16-cv-1026

Figure 3. North Carolina Partisan Cluster Analysis

Figure 3. North Carolina Partisan Cluster Analysis

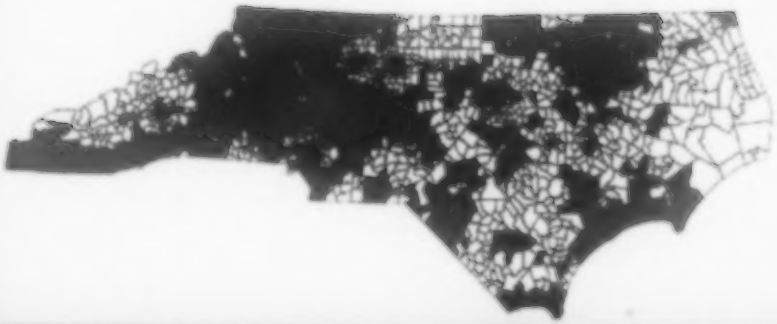


"Looking at the map (Figure 3), one can see that large sections of North Carolina are occupied by either Republican or Democratic clusters." p. 13

"North Carolina's political geography can affect the manner in which congressional districts are created." p. 13

"Democrats are more likely to be found in urban areas in Republicans in rural areas." p. 13

Figure 3. North Carolina Partisan Cluster Analysis



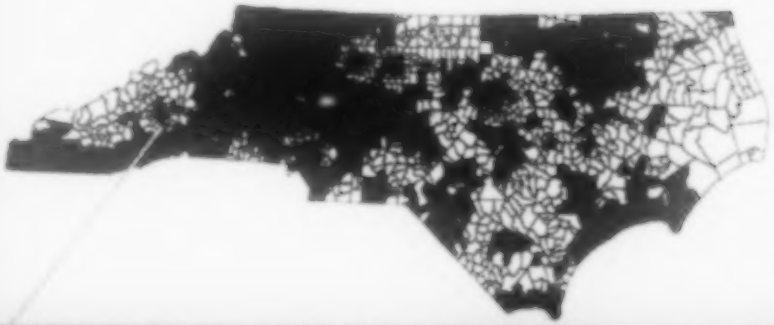
"Clustering of partisans can lead to *natural* packing of such groups in the redistricting process." p.10

"The presence of such spatial patterns can lead to the phenomenon where partisans are more likely to be placed together in the same district, sometimes referred to as *natural* packing." p. 13

"The state's political geography would also seem to naturally favor Republicans in the creation of Congressional districts." p. 26

Asheville Democratic Cluster

Figure 3 North Carolina Partisan Cluster Analysis



Asheville Democratic Cluster

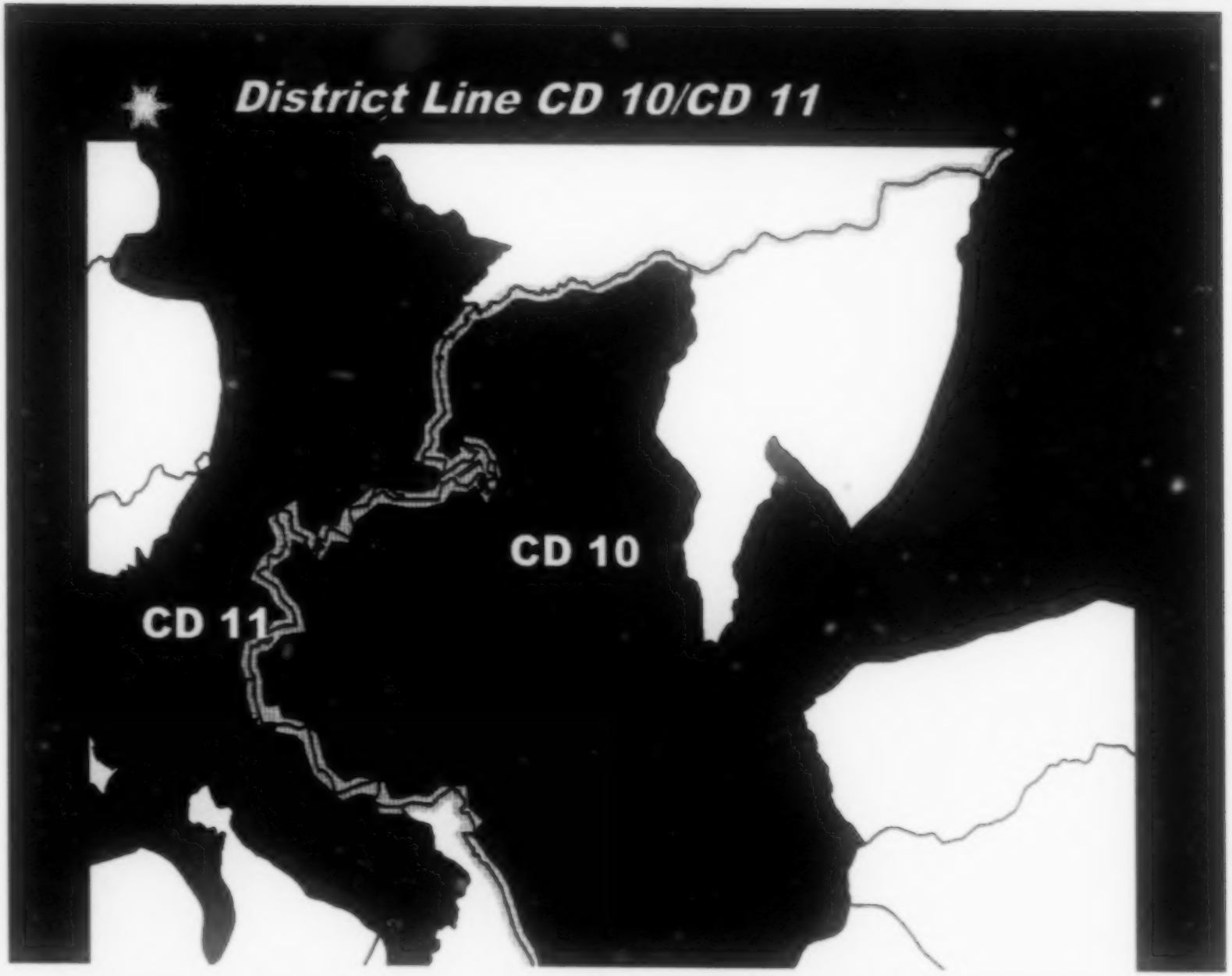
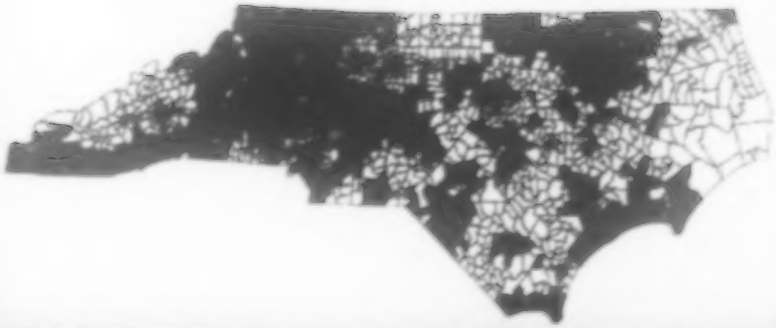

District Line CD 10/CD 11
CD 10
CD 11

Figure 3. North Carolina Partisan Cluster Analysis



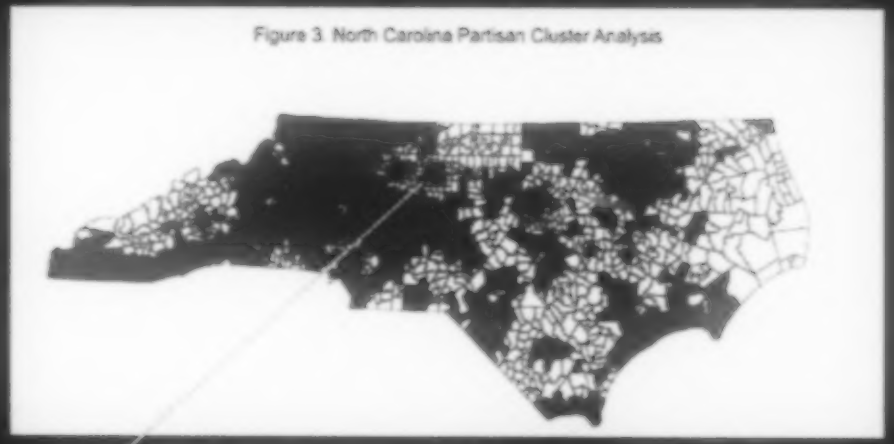
"Clustering of partisans can lead to *natural* packing of such groups in the redistricting process." p. 10

True/False:

What happened in Asheville was the legislative cracking of a Democratic partisan cluster in the redistricting process.

CD 10
CD 11
District 10:
District 11:

Greensboro Democratic Cluster



Greensboro Democratic Cluster

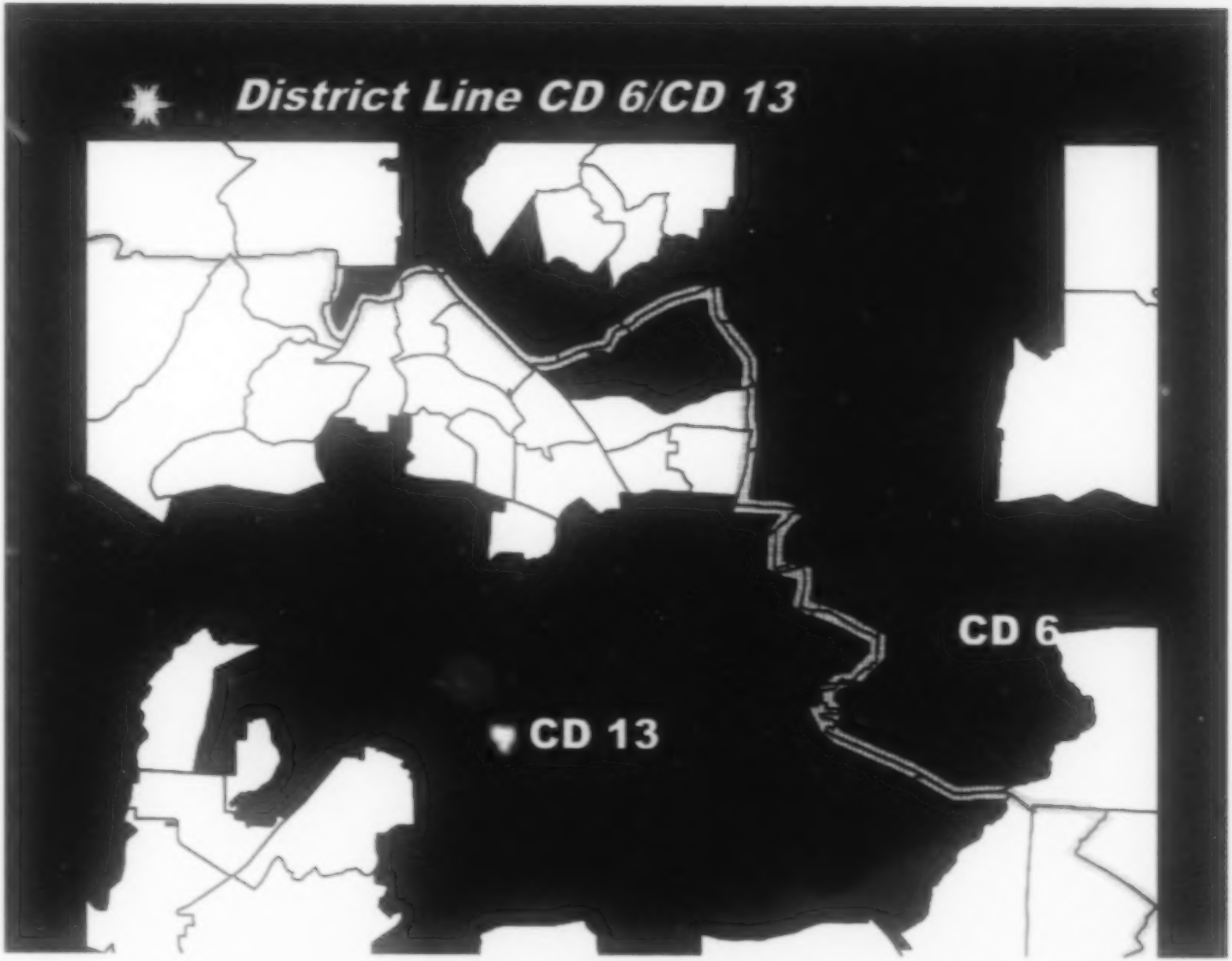
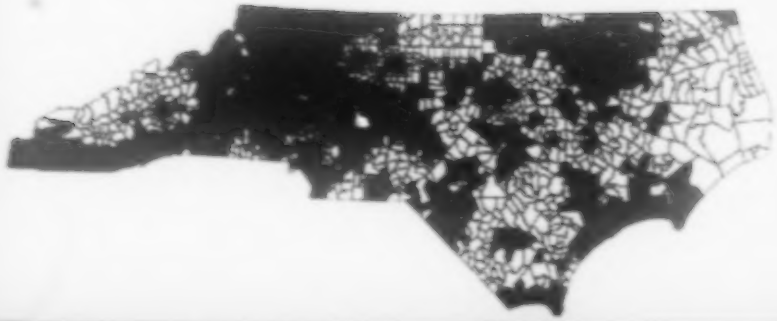

District Line CD 6/CD 13
CD 6
CD 13

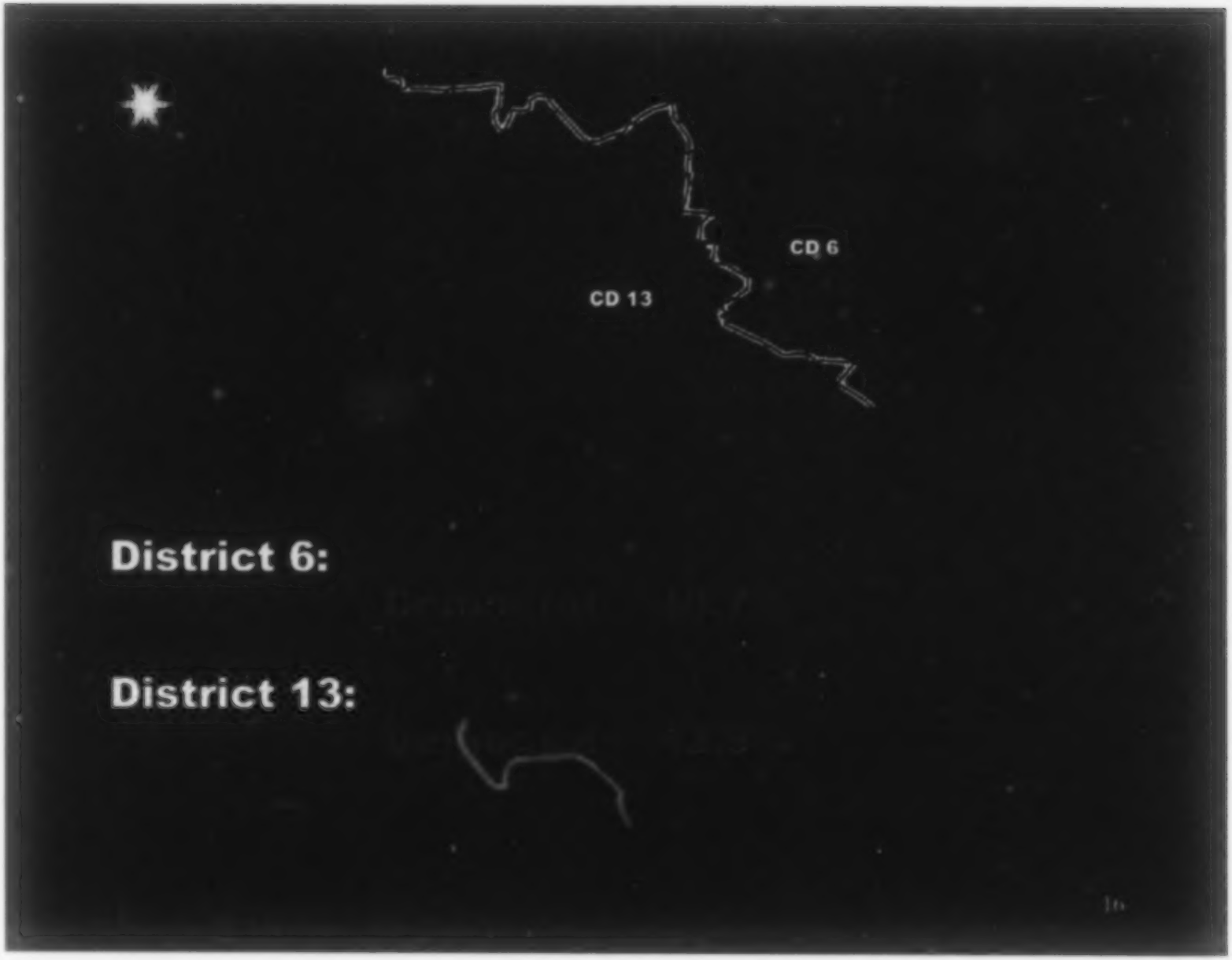
Figure 3. North Carolina Partisan Cluster Analysis



"Clustering of partisans can lead to *natural* packing of such groups in the redistricting process." p. 10

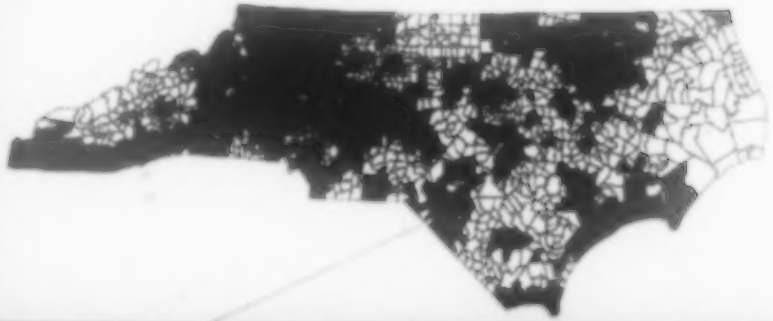
True/False:

What happened in Greensboro was the legislative cracking of a Democratic partisan cluster in the redistricting process.


CD 6
CD 13
District 6:
District 13:

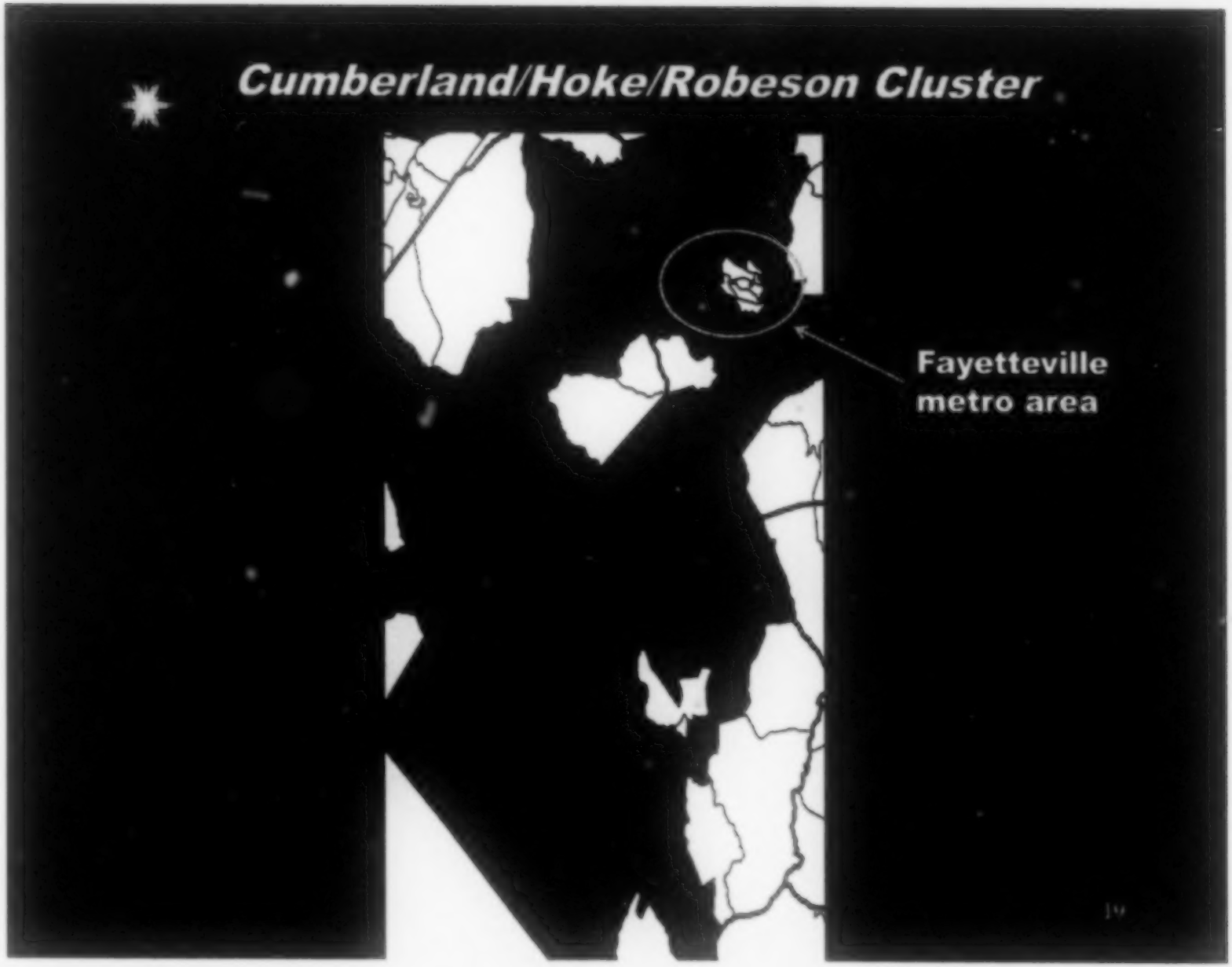
Cumberland/Hoke/Robeson Cluster

Figure 3. North Carolina Partisan Cluster Analysis



Cumberland/Hoke/Robeson Cluster

Cumberland/Hoke/Robeson Cluster



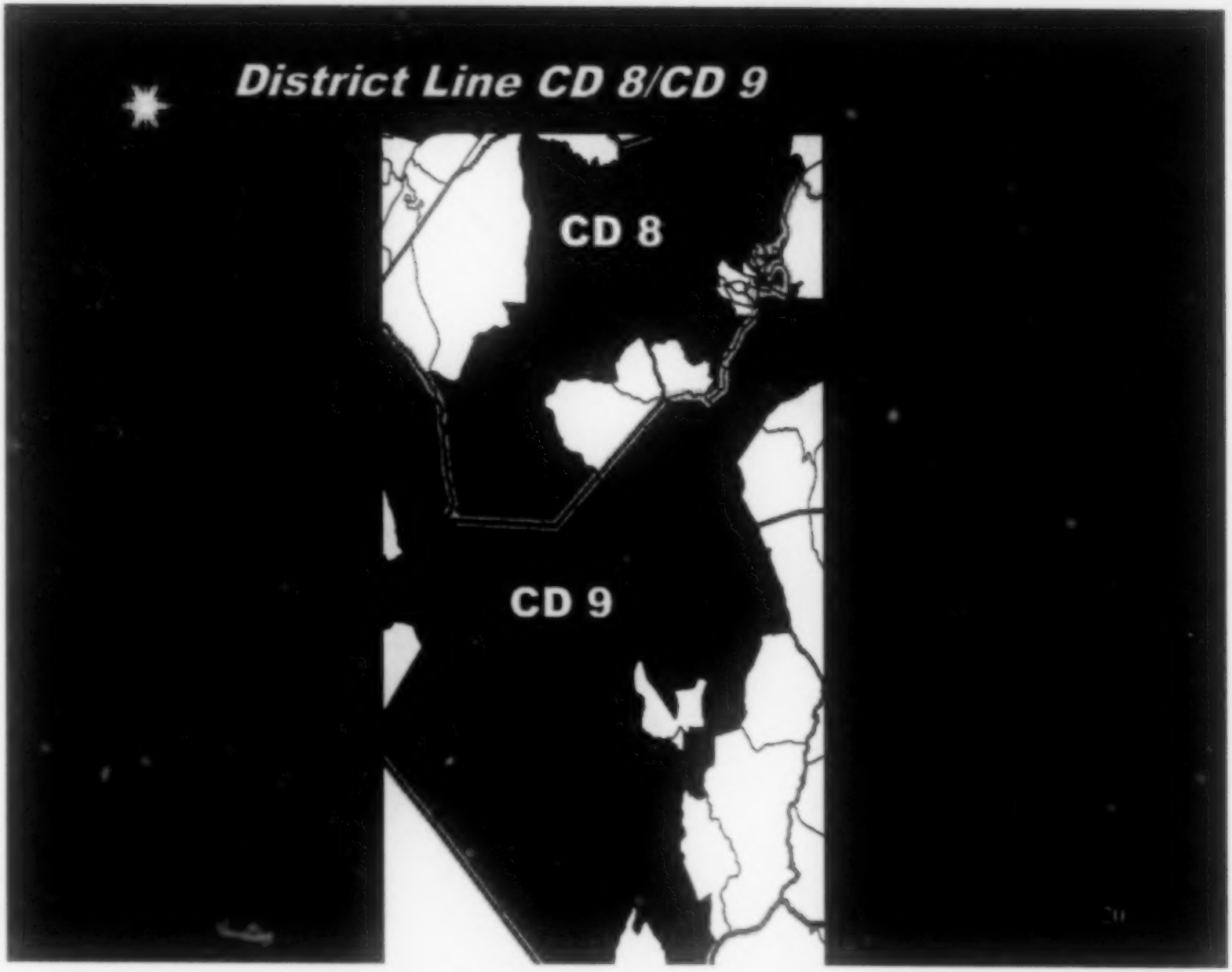
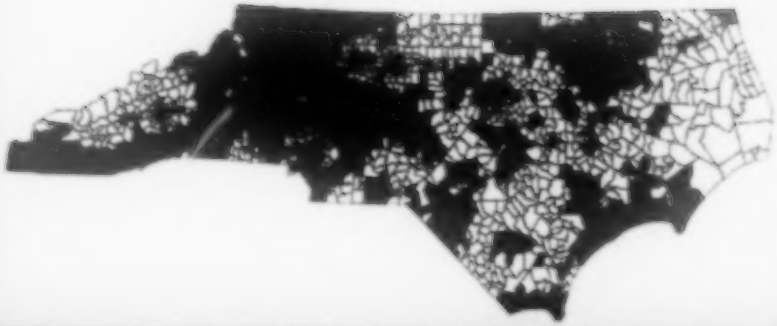

District Line CD 8/CD 9
CD 8
CD 9

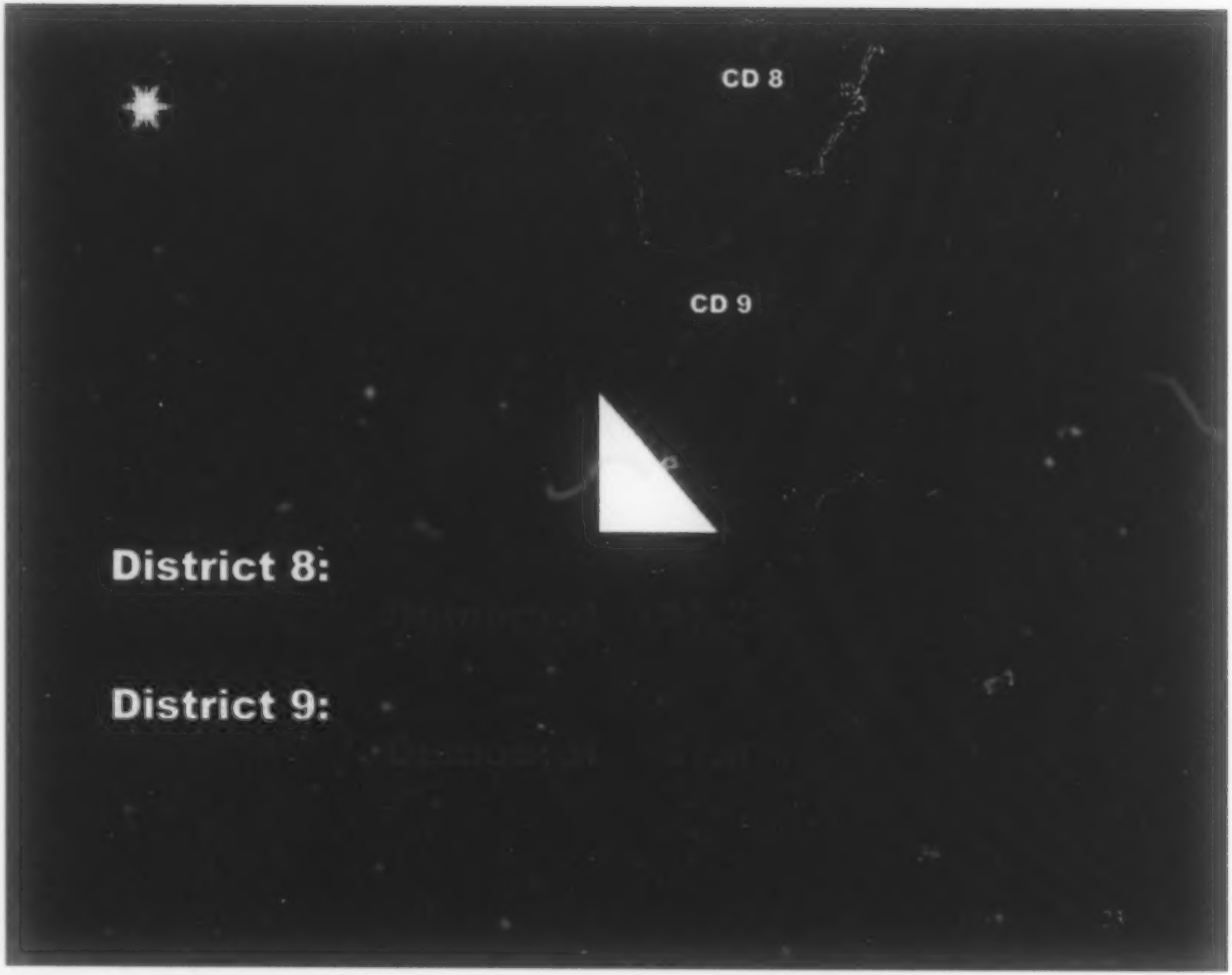
Figure 3. North Carolina Partisan Cluster Analysis



"Clustering of partisans can lead to *natural* packing of such groups in the redistricting process." p. 10

True/False:

What happened in Cumberland/ Hoke/Robeson counties was the legislative cracking of a Democratic partisan cluster in the redistricting process.

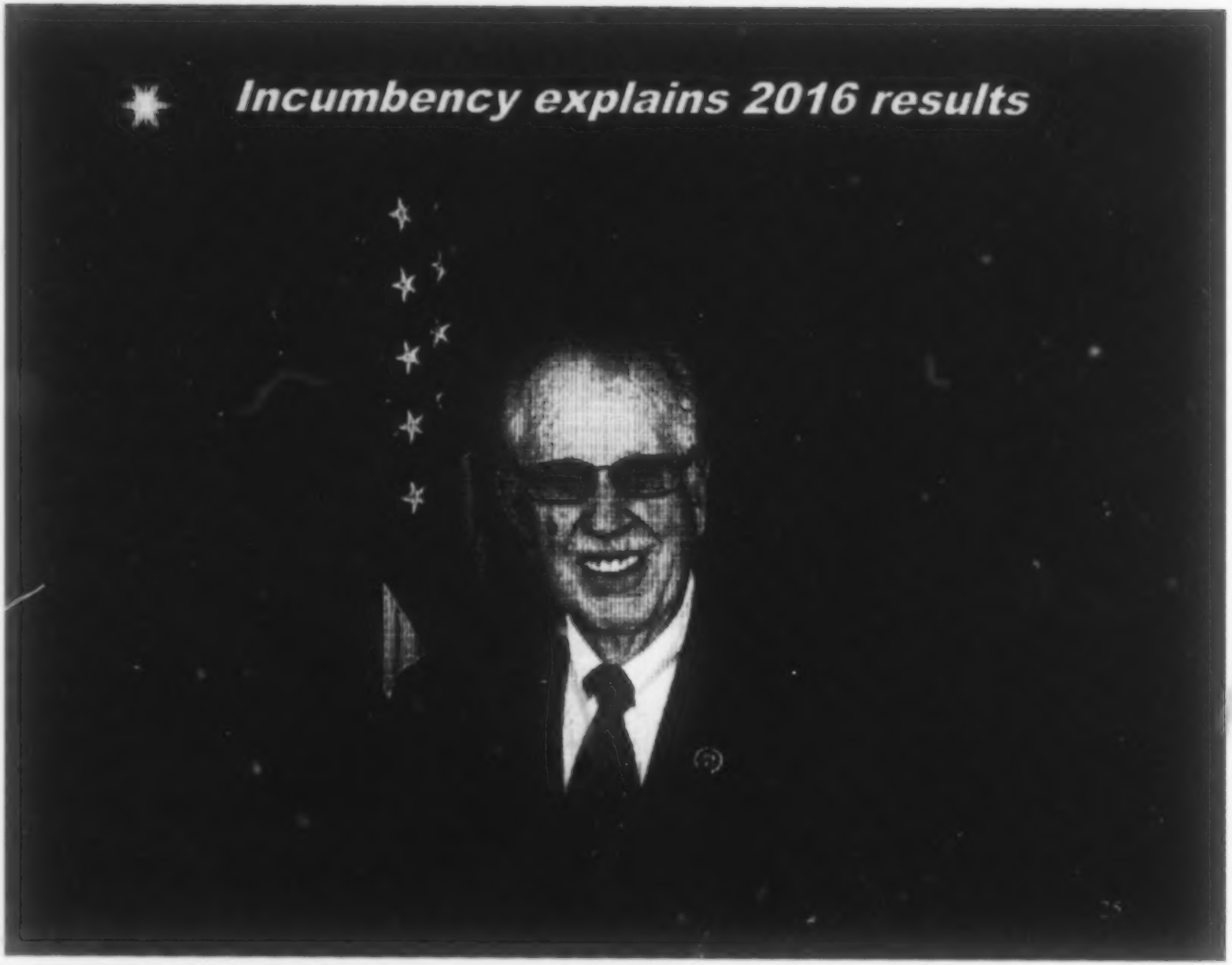

CD 8
CD 9
District 8:
District 9:

Incumbency explains 2016 results

"Incumbents are highly likely to win reelection, especially when faced with challengers of little or no political experience. Of the twelve incumbent races in 2016, 10 (or 83%) featured a challenger with no political experience[.]" p.5

"In every race featuring an incumbent, the incumbent outspend [sic] their challenger by an average of $1.2 million." p. 6

"In conclusion, there is little doubt that factors other than redistricting . . . helped produce the noted ten to three partisan division." p. 7


Incumbency explains 2016 results

Congressman Roscoe Bartlett (R. Md.)
6th District (1993-2013)

District Core Retention

Table 9. 2016 Congressional Districts-Core Retention

District	District Core Retention
1	69.5%
2	56.6%
3	80.6%
4	62.1%
5	73.1%
6	50.0%
7	71.9%
8	42.4%
9	39.3%
10	95.6%
11	96.5%
12	52.1%
13	0.0%
Mean	60.8%

District Core Retention

Table 9. 2016 Congressional Districts-Core Retention

District	District Core Retention
1	69.5%
2	56.6%
3	80.6%
4	62.1%
5	73.1%
6	50.0%
7	71.9%
8	42.4%
9	39.3%
10	95.6%
11	96.5%
12	52.1%
13	0.0%
Mean	60.8%

District core retention
MD CD 6 = 51%

Excerpts from Transcript of Bench Trial, Direct Examination of Dr. Jonathan Mattingly (Oct. 16, 2017)

...

[34] Q And what is the date that that was last published on that archive?

A It's date stamped 8th of May 2017 on the left-hand side on the margin.

Q Is that article that we're looking at behind Tab No. 4 available for anyone in the world who has an internet connection to see?

A Yes, it's publicly available.

Q Is it your intention to publish that article in a referee professional journal?

A Yes.

Q All right. My next questions are going to zoom in on some of the big picture conclusions that you state in that article behind Tab No. 4.

Before we get to the specific conclusions, I would like you to very briefly describe how you and your students went about evaluating the 2012 and 2016 Redistricting Plans adopted by the General Assembly as well as the Judges Plan. What was the means or mechanism to do that?

A So we generated a large number, over 24,000 maps, that adhered to the bipart -- the nonpartisan redistricting criteria laid out in House Bill 92. Then we took each of those maps, and we took the actual vote count from the 2012 or the 2016 elections, and we saw what outcome that map would produce, and then we tabulated all of those statistics, the outcomes of

each [35] of those elections, as well as the partisan makeup of each of the districts, and then we used that to provide a background against which we could evaluate the Judges maps or the 2012 maps or the 2016 maps.

Q Okay. On page 3, in the second full paragraph of your article, "Redistricting, Drawing the Line," you say that the 2012 and 2016 Redistricting Plans produced results that are, quote, extremely atypical. What did you mean by that?

A What I meant was that over 99 percent of the maps we looked at produced more Democratic seats than those maps did.

Q In the next sentence, you say, quote, finer analysis clearly shows that the Democratic voters are clearly packed into a few districts, decreasing their power, while Republican voters are spread more evenly, thus increasing their power, unquote. What did you mean by that?

A So what I meant was that the maps we -- this ensemble of maps you created gave us a baseline, and when you compared the percentages in the most Democratic districts to those -- that baseline, there were clearly many, many more Democrats packed into those Democratic districts; and on the other hand, that allowed there to be many more Republicans in the next group of districts.

Q On page 9 of your article, just before Figure 6, you state that the 2012 and 2016 Redistricting Plans, quote, were precisely engineered and tuned to achieve a partisan goal, [36] unquote, and that, quote, the components of those plans were not randomly chosen, unquote. What did you mean?

A Well, we also did analysis where we moved slightly the boundaries of each of the districts to see how the makeup would change, how the partisan makeup would change, and we saw that when we shifted just as little as 10 percent of the boundary, the makeup of the districts changed dramatically. So if you were just to -- and I should say this is all nearby the actual maps. So if you were just to pick a map randomly nearby those maps, you would find a map that was very, very different.

Q And very different in what way?

A Much, much less advantageous to the Republicans.

Q By the time you concluded your work on this project, Dr. Mattingly, how many simulated plans or maps did you and your students come up with that would have satisfied what you would consider to be traditional redistricting criteria?

A Almost 120,000.

Q And from that, you ultimately selected how many? From that, how many were talked about in your article primarily?

A The main group -- because we started doing the analysis before we had -- the runs had completely finished, we used just over 24,000.

Q And of the 24,000 and of the 120,000, based upon your analysis, how many -- in how many of those plans, whether it was the 24,000 or the 120,000, would Democrats have scored more [37] congressional seats -- would have won more congressional seats than they did in the General Assembly's 2012 and 2016 Redistricting Plans?

A 99 percent -- over 99 percent.

Q Based upon the work that you did with your students, Dr. Mattingly, are you able to address the degree of partisan gerrymandering represented by the General Assembly's 2012 and 2016 Congressional Redistricting Plans?

A Yes.

Q And based upon that same work, are you able to address which of the districts in those plans are most affected by partisan gerrymandering?

A Yes, we can.

Q Dr. Mattingly, have you assisted us in preparing a PowerPoint presentation to help illustrate the work you and your students undertook that led to both your report in this case and to the article that we've been referencing?

A Yes, I did.

Q Is there anything in that PowerPoint that represents new or additional work beyond the work covered in the article, "Redistricting, Drawing the Line," that we were looking at, Exhibit 3004?

A There's not.

Q And would using that PowerPoint today assist you in both condensing and illustrating your testimony?

...

[49] A So we -- we calculated what - - how many - - there you go. We calculated it using the Judges Plan. So the Judges redistricting map, there would've been nine -- I mean, six Democrats elected, excuse me, six Democrats elected.

Q Okay. And what about the North Carolina 2012 Plan?

A There would've been four Democrats elected.

Q All right. And what about the North Carolina 2016 Plan?

A So, again, four Democrats. It's important to remember that we're still using the 2012 votes. We're just using the plan from 2016. So if we used the 2012 votes in the 2016 plan, we would have had four Democrats elected.

Q Okay. Let's go to this next slide, which I think is going to require some more explanation; but before you do, I'm going to read the title. It says: "Analysis of 13 Districts in Simulated Maps, Votes for US House 2012." Now, please take some time and explain to the Court what we're looking at in this slide.

A So the broad picture is we're trying to understand what that background signal was, what -- how -- the geopolitical makeup of North Carolina, both the shape of the state and where the people live, and the partisan makeup of where they live would give us -- would tell us what we would typically see. That's what we're trying to get at.

So to establish that, what we did was we took every map that we generated, every map that we had, and we ran the [50] 2012 elections. So we have 13 congressional districts. There's the most Republican, the second most Republican, the third most Republican, the fourth most Republican, the most Democrat, the second most Democrat. So we ordered those numbers, in other words, what's the percent -- the fraction of Democratic vote -- the percent of

Democratic vote, and we ordered the districts from the most Republican to the most Democrat. So that's these 13 numbers. These are not the numbers associated with the districts as we see them when we talk about District 12 or District 1. These are just the most Republican, the most Democrat.

So we take those 13 numbers for each of our maps, and then we make this plot to summarize those statistics. So what this plot shows you is that if you took the most Democratic map, most Democratic -- I misspoke -- the most Democratic district in each of the 24,000 maps, so if you took the most Democratic district in each of the 24,000 maps and you said what was the fraction of Democrats in that map, the median would be just around 67 percent, and how could that be helpful to you? You might -- somebody might come to you and say, you know, isn't it weird that this district has 67 percent Democrats in it? That seems nefarious, but if, in fact, it was the most Democratic district, that's what you would expect to see. Just typically when you draw maps of North Carolina, that's what you end up with.

[51] And then we did the same for the twelfth most Democratic, the eleventh most, the tenth most, the first most Republican, the second most Republican, the third most, the fourth most Republican.

Now, just to unpack a little bit what this figure shows you is the central line here is the median, which in these cases is identical essentially to the mean. So it's the line that splits 50 percent above and 50 percent below.

Q 50 percent of the 24,000 --

A Yes.

Q Okay.

A And then this box here, this is called a box plot, if you want to look it up later. So this box here holds 50 percent of all the maps. So all the maps had their most Democratic district with a percentage that was in between these two -- these two upper levels of the box.

Q You said "all." Did you mean 50 percent?

A I meant, yeah, 50 percent. I misspoke. Then there are these whiskers, and these whiskers are supposed to demonstrate what are outliers, what are exceptionally far from the mean, and the reason these are chosen, these are 1.5 times this box distance, and that's for the reason that if something was Gaussian, if something was normally distributed, 98 percent over 98 percent would be outside of these whiskers.

Q Okay. Talk about the 50 percent line, that dark in the [52] line. What is that showing us with respect to each of these districts?

A Well, I mean, as we all know, whoever gets the most votes in a district, wins the seat. So this line is the 50 percent line. So if a map had -- each of these maps is a dot going up here, has the number of dots that are above this line is the number of seats the Democrats won, and the number of dots below this line is the number of seats the Republicans won. So we saw in the previous plot it was between six and seven typically, right. And you notice that it's exactly the seventh most Republican district that straddles the 50 percent line. So it's exactly typically split between 50

percent of the time favoring the Republicans and 50 percent of the time favoring the Democrats.

Q And in your box plot, would that be the most competitive district, the seventh most Republican district?

A Yes, this would be the most. I mean, it would be essentially -- depending on the map, it would be 50/50 to be more favoring the Democrats and more favoring the Republicans.

Q Is that always going to be true, or it depends upon the elections -- the votes that you're dropping in?

A It depends upon the election. So, typically, what we see is if this general structure of the box plot looks the same, but in the year when the populous vote is more Republican, then necessarily the whole box plot shifts downward, thereby putting [53] more of the boxes below the 50 percent line, and in a year when the populous vote is more Democratic, the box plot shifts upward, thereby putting more of the boxes above the 50 percent line.

Q In other words, the line always stay -- the 50 percent line always stays in the same place?

A Right.

Q And the box plot is up or down?

A Right.

Q Okay. Which are the least competitive districts in this box plot?

A Clearly, the most Republican usually goes to the Republican Party, and the most Democratic district tends to go to the Democratic. We're separated enough

geographically that we're not mixed in a blender. It's spread evenly over the state.

Q Does this box plot also show you the variability of the outcomes within individual districts?

A Yes. I mean, this says that over different maps, we typically had a variation of this much in the percentage of most Democratic, and, in particular, this one it shows that about half the map favored the Democrats a little bit and about half the map favored the Republicans.

Q Which of these districts on this box plot shows to be the most variable in your ensemble?

[54] A I mean, it's close, but I would say this one. I mean, it both has the biggest outliers and the biggest 50 percent box.

Q And which would be the least variable?

A This sixth most Republican district. It has a very tight 50 percent box and a rather tight outlier box.

Q And just to make sure we're clear on this, the numbers at the bottom on the horizontal axle, the two, the four, the six, the eight, the ten, the twelve, they represent what?

A They do not represent the labeling that we used, the twelve districts. They represent how they order -- how the lines order, whether they're the most Republican, the second most Republican, the third most Republican, the most Democrat, the second most Democrat, the third most Democrat.

Q Okay. Let's move forward now, and you've drawn on this next one the exact same box plot with a

yellow line. Tell the Court, if you would, what the yellow line is representing and what you believe the significance of that yellow line is.

A Well, the yellow line connects all the medians through the center. So this gives you some idea of typically what one would expect to see, given the geography of North Carolina and what -- the distribution of people in North Carolina.

Q Okay. And remind the Court what the inputs were that went into getting a yellow line looks like that.

A So we used the 24,000 maps to tabulate the actual votes from the 2012 election and see how much they varied across maps.

Q And the 24,000 maps were created using what criteria?

A They were created using the nonpartisan criteria laid out in House Bill 92, just population deviation, compactness, not splitting counties and satisfying the VRA, at least at the level of the 2016 congressional maps.

Q And in all of the work that you've done on gerrymandering issues, in your opinion, is the shape of that yellow line significant?

A Yes, I mean, this -- when I started off talking, I said we wanted to understand was the 2012 typical, you know, what would one expect. This gives a much finer detailed structure of what one would typically see. This is kind of the signal in the election, as far as I'm concerned.

Q Of how the voting in the individual districts compare to one another?

A Correct.

Q All right. What would you expect to see if the districts had been gerrymandered to give one party an extreme partisan advantage?

A Well, let's say that they had been biased to the Democrats. You would expect to see a depression here where many Republicans are impacted here, and then some districts where they had been removed from, or, alternatively, if it had done the other way, if it had been given the Republicans an [56] advantage, you would have many more Democrats packed in the most Democratic districts, and then the Republican districts the next set of districts would have many more Republicans because that would bring it down towards the 50 percent line.

Q And what would the line as a whole -- instead of that gradual sloping yellow line, what would that line look like?

A Well, I mean, it would be flatter here, and then it would jump up particularly to a flatness here, so it would have an S-shape there.

Q All right. Go ahead and tell the Court what you've done on this next slide that adds more information.

A So I've added the green dots. Green is always the Beyond Gerrymandering Project with Tom Ross. So these are the districts that the panel of six Republican and six Democrat judges produced, and we see that they're pretty good, especially right here in the middle part. They fall at least sometimes dead center, but usually typically pretty close to the 50

percent box. Definitely none of them are in the outliers.

Q And what criteria did the Beyond Gerrymandering Project use to create their map?

A They -- they just followed House Bill 92.

Q With respect to this issue of gerrymandering, did the green dots tell you anything as to the Judges Plan, what they produced?

[57] A Well, I mean, i t seems to be very typical. It follows very closely that yellow line we had before.

Q Okay. This is -- explain to the judge what we're looking at in this next slide with the red dots.

A So this is now the makeup of the districts for the 2012 Legislative Plan, and you see very much what I was talking about before. You see that these most three Democratic districts have an anomalously large number of Democrats packed into them, and these four or even five districts here have many less Democrats than they would typically see.

Q Okay. And these were actual districts voting in the 2012 election?

A Right. These are where these are -- these box plots are the signal from my ensemble of 24,000, these are the actual makeups of the election results.

Q And when we're looking at the previous slide, which I'll go back to for a second, those weren't actual votes that created those green dots. What were they?

A They were actual votes.

Q I 'm sorry. They weren't actual votes in an election with the judges map?

A No, they were using the votes at the precinct level in the 2012 election, but then assigning them to districts according to the judges maps.

Q Okay. As you did for your ensemble?

[58] A Correct.

Q Okay. Let's go ahead now. What labeling have you added to the horizontal axis on this slide?

A So now we've actually replaced them with the numbers that one usually thinks of Congressional District 1, Congressional District 12, Congressional District 7, 4. So you can see where they fall in this ordering of districts, starting at the most Republican and the most Democratic.

Q The most Republican was?

A The most Republican was District 3.

Q And the most Democratic?

A District 12.

Q The box plot with the whiskers and the box in the middle, are those specific to those districts you see on the horizontal axis?

A No, no, these have nothing to do with these numbers. These are from our redistricting. The number here just applies to this number here, the actual outcome of the 2012 election. So this is --

Q I'm sorry. Are you ready to go to that slide?

A Yes.

Q Okay. All right. So let's go to this next slide in which you've added a whole bunch of additional labeling. Take your time and tell the Court what additional labeling you've added.

A So just to help ground this and make sure that we all [59] understand what we're talking about, I've added the percentages of -- the Democratic percentages in each of the districts. So in that election, the most Democratic, District 12, had 79 percent Democrats. The next one had 76, District 1. The next one had 74, District 4.

And if you compare those to what we would expect from our ensemble, the medians had a difference of plus 11 here, plus 14 percent, plus 15 percent. So there were many more percentage Democrats in these districts than what we typically see, and, conversely, in the next four, there were many less Democrats. In fact, this one had 50 percent Democrats when normally one would expect to see 57 percent Democrats, the next most Republican had 49 percent when one would typically see 55 percent, and then 46 percent when one would typically see 52 percent, and 44 percent when one would typically see 50 percent.

Q Did you consider those differentials that you were just looking at as between the median vote in your ensemble and the actual vote in 2012 significant with respect to this issue of partisan gerrymandering?

A Yes, I mean, this shows that these districts have been moved to become Republican, while these have been made even safer Democratic.

Q What's the relationship between safer Democratic seats and districts that can become more Republican?

[60] A Well, you have to take the votes out of here and move them here, and that's what this clearly shows.

Q Okay. This next slide has added a little bit of more information. Can you tell the Court what additional information is on this slide?

A Right. So what you want to understand, though, is that a typical result? Are there some of our 24,000 elections in my ensemble that have that structure? And what this gives is this tells you -- for instance, each of these numbers here gives the percentage of the maps in the 24,000 ensemble, which had a value above this whisker. So 99.99 percent had values below this whisker, and this is this map, the 2012 map.

None of the maps in my ensemble had values as high as this whisker here, and this is the value for the 2012 map. 99.31 percent had a value below this whisker, and this is the value for the 2012 map. Conversely, you would want to know how many are below this whisker or how many are above. So only 1.5 percent, just over 1 percent, had a value below this whisker, and this one is all the way down here. Similarly, at this whisker, only .43 percent had a value -- had a value or percentage below this one, .04 percent had a value below this whisker, and. 07 below this. We label these as "extreme outliers" one by one.

Q Does this slide, in your opinion, present any evidence regarding partisan gerrymandering of individual districts?

[61] A Yes, I mean, since you can look at these districts, it seems to say that this clump of districts -- for instance, let's start here. This clump of districts here, 4, 1, and 12, actual Districts 4, l, and 12, had significantly more Democrats than one would typically see, even though they are the most Democratic, and

then the next four had many, many less Democrats than what we would expect to see.

Q Dr. Mattingly, did you actually add up how many Democratic votes there were in the three most Democratic districts, 4, 1, and 2, in that election?

A I did.

Q Do you have your cheat sheet telling you how many?

A There were 765,000.

Q Democratic votes?

A Democratic votes in these three.

Q And then for -- well, let me ask you: In your ensemble of maps, 24,000, how many had that many Democratic votes?

A None.

Q Okay. For the next three districts, the ones that are -- on your map, they are District 7, District 9, and District 8. Can you tell the Court how many Democratic votes were in those three in the actual election?

A So these had 665,000

Q I'm sorry. No --

A 765,000, and these three here had only 520,000.

[62] Q How many simulated maps in your 24,000 had that few Democratic votes in those districts?

A None did.

Q And is that significant in your opinion?

A Yes. I mean, it shows that if one were to draw maps using these criteria, it was extremely unlikely to

ever end up with a situation like this. In fact, it was essentially -- it was impossible.

Q In your opinion, could the legislature have created a redistricting plan that yielded those specific results unintentionally?

A No.

Q Okay. Let's go to the next slide. Tell the Court what we're looking at. It says: "Comparison of Results: Ensemble, Judges, NC 2012." What are we looking at, and what do you find significant?

A Well, so, as I said, this yell ow line that connected the medians was my background signal. It's what I would typically expect to see, and you might ask, well, could a set of human beings sit down and draw such a map. Well, the judges did without having access to this. We did this after the fact. So the judges drew the maps that created this green line, which very closely adheres to the yellow line. On the other hand, you see the legislature's maps are very flat here and then take this huge jump and go up here. So for me, when I see anything [63] like this, a plot like this, this kind of S - shape thing, you know, this is what I mean by gerrymandering. This is the signature of gerrymandering.

Q All right. Now, we've just been through the 2012 Plan and looked at the 2012 votes that actually occurred under the 2012 Plan. Did you perform the same exercise for the 2016 Plan and the 2016 votes?

A Exactly the same exercise.

Q All right. Let's go through it, and let's start with what you called the histogram, showing the outcomes in 2016 using the 2016 Plan?

A All right. So, again, we typically had five Democrats elected. So this is a year when there was more -- the vote was more Republican, so 53 percent Republican and 47 percent Democrat. So only five were elected, Democrats, and sometimes four and sometimes six typically.

Q Okay. And what were the percentages of those three?

A Just under 28 percent had four, just over 55 percent had five Democrats elected, and just shy of 16 percent had six.

Q So would it be correct to say that in over 99.3 percent of your 24,000 simulated maps, four or more Democrats would have won congressional races in 2016?

A Yes, that's just adding up the percentages in these --

Q And in over 71 percent of those simulated maps, five or more Democrats would have won?

...

[69] percent, plus 6 per cent, plus 5 percent, and then these next three districts had 44 compared to 54, so minus 10 less Democrats; 51 to 43, minus 8; and 48 to 42, minus 6.

Q Okay. Does this let me back up. Let's go to the next slide -- well, let me sorry, I apologize. Did you consider those differentials at the bottom of the slide to be significant on this issue of partisan gerrymandering?

A Yes, I mean, this is, again, the structure which makes -- this kind of structure like this is the signature of something being gerrymandered.

Q With respect to the numbers at the bottom, the minus 10, the minus 6, what is that telling us on this topic of partisan gerrymandering?

A That these districts had many, many more Democrats than typically is found if one were to draw bipartisan maps.

JUDGE WYNN: Counsel, I'm concerned of the record that's being created here. We don't have a visual of this, and when you say these districts and don't specify where they are, we are not going to have a clear picture of what you're talking about upon review of this. So if you would direct him to be more specific so that we can have the record of this.

MR. EPSTEIN: Thank you, Your Honor.

BY MR. EPSTEIN:

Q Can you be more specific, when you're talking about these districts, what you're referring to?

[70] A So the three most Democratic districts, the one farthest to the right, have many more Democratic votes than one would expect to see if one looked at the medians or the box plots for those three districts that are the most Democratic, and then when you compared the next three most Democratic, that is, the next three after those first three, one sees that they have many less Democratic votes than one would expect when one compares to the medians, that is, the lines in the center of the box plots.

JUDGE OSTEEN: The actual district is down on the bottom, right?

THE WITNESS: Yeah, these are the actual numbers of the districts, so it's the very bottom of the slide.

JUDGE OSTEEN: So I think when you're talking about the most Democratic district, if you'll identify that as CDl, CD4, and CD12 in addition to what else you're going to say.

THE WITNESS: CD?

JUDGE OSTEEN: Or D. You used D.

THE WITNESS: D here is the actual district on the map. So that one just happens to be one. This would be the second most Democratic district, which is labeled District 4 traditionally, if you use the maps. Now, that doesn't mean that it exactly corresponds to the most Democratic district in every one of the ensembles. Where that is geographically can move around, depending on the random map.

[71] BY MR. EPSTEIN:

Q Okay. And I think this next question, Dr. Mattingly, will help orient us to the most Democratic districts. Did you add up how many Democratic votes there were in the three most Democratic districts in 2016, District 12, District 4, and District 1?

A So in the three most Democratic, three farthest to the right, there were just around 750,000 Democratic votes.

Q How many simulated maps in your 24,000 had that many Democratic votes using the 2016 votes in their three most Democratic districts?

A None.

Q Did you add up how many Democratic votes there were in the next three most Democratic districts, which were District 13, District 2, and District 9 in 2016?

A Yes, just shy of 600,000.

Q How many simulated maps in your 24,000 had that few Democratic votes using the 2016 votes in the fourth, fifth, and sixth most Democratic districts combined?

A None of them did.

Q Is that significant in your opinion?

A Yes.

Q Why?

A It means that it's extremely unlikely that one would have produced maps that had that level of packing here and that [72] level of depletion here unintentionally or using nonpartisan criteria.

Q All right. Let's go ahead and look at the next slide. We've added in the information about those whiskers, and be specific, when you're talking about individual district and the whisker, which district you're talking about.

A Okay. Again, now we're going through -- if we look at each of these districts, how atypical was the value of percentage in that district, as high or as low as it was.

So in the first most Democratic district, the one farthest to the right, which had 70 percent Democrat and is above this whisker here, that top whisker, only .61 percent of the maps had a value above that whisker. Similarly, for the next one moving to the left,

none of the maps had a value above this whisker, while the maps from the legislature did. Moving to the third one in from the left, only .07 percent, or, in other words, 99.93 percent, had a value below this whisker, while the maps from the legislature had one just above it.

Then moving to the districts which seemed to have less Democrats in them, the fourth most Democratic district, moving from the left -- from the right, sorry, had -- below the whisker only .19 percent, or 99.81 percent, had a value -- had a value above this whisker. So this was very atypical. It was very much an outlier, and the same thing as with the last two with .53 percent being below this whisker and only .02 being [73] below this whisker. Now, this one falls just above that, but it's still well outside of this box.

Q And what does the information that you've just been through, the whiskers and where the plot points for the Republican Plan comes -- what does that tell you about how likely the result obtained would be if only neutral nonpartisan redistricting criteria had been used?

A Well, based on the ensemble that we generated, these would be essentially impossible to generate randomly. They would be so highly atypical that one would not see it.

Q And in your opinion, could the legislature have created a redistricting plan that yielded the results we're looking at on this slide unintentionally?

A No.

Q All right. Go ahead and tell the Court what we're looking at in this slide with reference to comparing results in the 2016 -- with the 2016 votes.

JUDGE BRITT: Mr. Epstein, let me ask you another question that follows what Judge Wynn said. Do these slides follow some of the drawings in the paper?

MR. EPSTEIN: They do, Your Honor. There's a little bit more precision in them in terms of -- these lines are all there. They're just not -- the plot points aren't connected. They are the same exact graphs and charts as are in the paper with differences. Here the lines are drawn in.

[74] JUDGE BRITT: Well, I was just wondering if it would be helpful for the record, Judge Wynn, for this to be when he's talking about a slide, to refer to a figure in his paper.

MR. EPSTEIN: Your Honor, actually, it might be easier. We have -- I was going to ask at the end to introduce this as an exhibit and have it admitted for illustrative purposes. We have them, and we can hand them to the Court either now or at the end of his presentation, but we do have them.

JUDGE BRITT: At the end would be fine.

JUDGE WYNN: Actually, I think it would be helpful to hand them now, and then we can point to them. Where we're going with this is that when we review this and if you just say "this" and "that," we're going to have some difficulty ascertaining what you mean, and simply all you got to do is point to the particular slide, indicate the figures that you were

talking about, and it's going to be pretty easy. We're smart, but we're not that smart, I don't think.

MR. EPSTEIN: If Your Honor can give me a moment, I can have our paralegal sort through them and hand them out right now.

JUDGE OSTEEN: Let's take about a 10-minute mid-morning recess, and then we'll come back.

(At 11:05 a.m., break taken.)

(At 11:20 a.m., break concluded.)

[75] JUDGE OSTEEN: Before we resume testimony, in terms of exhibits, my normal practice is the witness is handed an exhibit. It's -- the witness identifies the exhibit. We take a moment to see if there are any objections. If not, move the admission of the exhibit, and then we have it in front of us.

Even with the screens, especially with three judges on the bench, it's difficult. So going forward, to the extent we have paper copies for the Court -- I know I asked for zip drives, but if you don't have them for me, don't worry about it; but if you have paper copies, go through that process so we actually have our copy of the exhibit in front of us while you go along .

MR. EPSTEIN: Thank you, Your Honor. At this point, first of all, I would note that we do have zip drives for the Court, law clerks, and everyone, which we'll be happy to distribute at a break, but we would move the admission as an illustrative exhibit Plaintiffs' Exhibit No. 3040.

JUDGE OSTEEN: All right. Any objection to that?

MR. STRACH: No, Your Honor.

JUDGE OSTEEN: Plaintiffs' Exhibit 3040 is admitted.

MR. EPSTEIN: May I ask the witness to resume?

JUDGE OSTEEN: You may.

BY MR. EPSTEIN:

Q Okay. Dr. Mattingly, before we took our break, we were looking at this slide that says "Comparison of Results" and [76] it's Ensemble, Judges, NC 2016, and it's using the 2016 votes. Using your pointer, please, can you walk you us through what you find significant about this slide.

A I think it's probably a good idea if I used the colors. That way it will help everyone know what I'm talking about.

JUDGE BRITT: I'm not getting any feedback from that microphone right now. Can anyone tell me why?

MR. EPSTEIN: Please speak more loudly.

JUDGE BRITT: It was probably my -- it's clear now.

THE WITNESS: Is this too loud, or is this good?

JUDGE BRITT: No, no, it was not your problem. I t was right here.

THE WITNESS: All right. So the yellow line that passes through the centers, that's through the median, and that's what I would -- it's typically typical given what we see in our ensemble, and then the green line, which passes very close to the yellow line, is what the Judges map produced, and this blue line deviates quite a bit. This is the NC 2016 Plan. And so, once again, we see the same kind of S-like structure that we saw before.

BY MR. EPSTEIN:

Q And what is significant about that S-like structure to you?

A Well, it is a signature of gerrymandering in the sense that these have many, many more -- many, many more Democratic [77] votes, that is to say, the right most three, the three most Democratic districts have many more Democratic votes than one would typically see, and the next three have a very flat structure with many less Democratic votes than one would typically see.

Q And for the record, just for the Court, I'll refer to this as Slide 30. I should have been doing that from the beginning, and I apologize for not doing that so the record is little bit clearer.

Dr. Mattingly, did you do any work to validate the results of your work to make sure that they weren't overly influenced by one factor or another?

A We did.

Q What did you do to validate your results, among other things?

A Well, one thing we did was -- you might ask was this enough samples? Di d we sample this distribution on redistrictings well enough? Did we have enough maps? So --

Q Going to Slide 31, can you answer that question?

A Yes. So what I've been describing to you largely is the result of using 24 -- just over 24,000 maps. We also took a longer run of just shy of 120,000 maps, and using those maps, we produced the histograms, the

two we've been talking about, the histogram that shows the election results, and you see that there's essentially no deviation. The blue is the smaller

...

[91] construction. From all of our maps, we had these criteria so they complied with the Voting Rights Act. When you see that typically we get this yellow line, and then the judges, when they drew their maps, which also complied, produced the green line, and so there's no -- there's no -- there's nothing in that that necessitates a structure which would give this S-shape and these packing here and these depletions here, and I should be careful. When I say "here," I mean in the first three to the right on the left - hand panel and the first three to the right on the right-hand side panel, and then the next three in from those three on both panels being depleted, being below the box plots.

Q And let me ask that question in a slightly different way.

What does this slide tell you about whether the need to comply with the Voting Rights Act or to draw two highly populated African-American voting-age population districts could explain the partisan distribution of congressional seats resulting from the 2012 and 2016 Plans and elections?

A It doesn't explain it.

Q All right. Now, Dr. Mattingly, you told us earlier when we started that you began this project with Ms. Vaughn before Mr. Speas ever knocked on your door, trying to figure out if the political geography of North Carolina and the distribution of where voters lived in North Carolina, whether they be

Democrat or Republican, could by itself explain the partisan [92] outcomes of our congressional elections during this decade.

Did you figure out the answer to that question in the work that you've been describing to the Court today?

A We did.

Q And can you use those -- that slide and those graphs in front of you to explain your answer to that question?

A Yes. So by using this ensemble of 24,000, we discovered what the background structure in the geopolitical makeup of North Carolina is, its geography, where its people live, where its voters in each party are distributed, and where the African-American population is, and what that necessitates relative to the Voting Rights Act. And what we see is -- this yellow line and these set of boxes shows what we typically see when we draw in a nonpartisan way, and as you can see, that's very different than this type of packing, this packing here to the most three right in each map, and then this depletion of voters in the next three. That's a very different structure than what one would see just based on the geography and the geopolitical distribution of people in North Carolina.

Q And, Dr. Mattingly, if it's not the political geography of North Carolina that explains the results of our congressional elections over the past decade, what, in your opinion, does explain those results?

A Well, we did another analysis where we looked at the boundaries of the maps, the boundaries of each of the [93] districts, and we moved the boundary

around 10 percent, and we saw that drastically changed the outcomes, the makeup of these districts, and we found that it did for the 2016 and 2012 maps, and it didn't for the Judges. So that seems to say that it was not just randomly chosen from a map that looked like that. It was very specifically tuned.

Q And specifically tuned to do what?

A To develop this type of partisan advantage.

MR. EPSTEIN: Those are all of my questions, Your Honors.

JUDGE OSTEEN: Cross-examination?

MR. STRACH: Yes, Your Honor, thank you.

CROSS-EXAMINATION

BY MR. STRACH:

Q It's still morning. Good morning, Dr. Mattingly.

A Good morning.

Q I'm Phil Strach. We met a couple of times at your depositions. This stuff is fairly complicated, so I'm going to try to keep it as simple as I can keep it, but if I oversimplify something, let me know, okay?

A I will.

Q You've already told the Court this is your first time acting as an expert witness, is that right?

A That is correct.

Q And other than the redistrictings that are generated by

...

Excerpts from Transcript of Bench Trial, Direct Examination of Dr. Jowei Chen (Oct. 16, 2017)

...

[157] MR. STRACH: Not on that, Your Honor.

JUDGE OSTEEN: All right. Dr. Chen is accepted as an expert witness in political geography and redistricting and may offer his opinion as to those matters.

MR. THORPE: Thank you, Your Honor.

BY MR. THORPE:

Q Now, Dr. Chen, just to be very clear about what your task was in the expert testimony that you're going to give here, what have the Common Cause Plaintiffs asked you to evaluate in this case?

A The Common Cause Plaintiffs asked me to evaluate two questions. First, I was asked to evaluate whether partisan considerations were the predominant factor in the drawing of the Enacted 2016 SB2 Plan; and second, the Common Cause Plaintiffs asked me to evaluate the extent to which that SB2 Plan, the 2016 Plan, complied with the nonpartisan portions of the Adopted Criteria as outlined by the Joint Select Committee.

Q And the research question isolated in this report is described at the bottom of page 1 and the top of page 2 of your report, is that correct?

A That's correct, sir.

Q As an overview -- and, of course, we're going to dive into greater detail on this -- how did you go about answering these two questions that you were asked?

A I went about answering these two questions by developing [158] and analyzing a computer-simulation algorithm which I've developed in my own academic research my published academic research that produces a large number of districting plans -- alternative districting plans produced by computer algorithm and this algorithm follows specific nonpartisan criteria that I programmed into the algorithm.

So I conduct a large number of simulations of simulated plans, independent simulations; and I analyze these simulated plans; and I compare them to the Enacted SB2 Plan along a number of measures, including, of course, the nonpartisan portions of the Adopted Criteria, as well as partisan measures.

Q And broadly -- again, we will deal with this in more detail -- what did you find as a result of conducting these simulations and evaluating them as against the enacted plan?

A Broadly what I found was that the partisan goal laid out in the Adopted Criteria, specifically the goal of creating a districting map with ten Republican seats, I found that that partisan goal predominated in the drawing of the SB2 Plan; and I found that the pursuit of that partisan goal, that partisan goal of creating a ten Republican map, not only predominated the drawing of the map, but it subordinated the nonpartisan portions of the Adopted Criteria. Specifically, I found that it subordinated the portions of the Adopted Criteria relating to avoiding the splitting of the counties, keeping counties [159] whole when possible, as well as the geographic compactness of districts.

Q And for your conclusion that partisanship predominated in the drawing of those districts, what is the basis of that conclusion as a mathematical matter?

A Sure. The basis for that conclusion, as I started explaining earlier, was I analyzed a large number of districting maps. So what I found was the SB2 Plan, the Enacted 2016 Congressional Plan, created a partisan outcome, created a partisan distribution of seats that is an extreme statistical outlier in terms of its partisanship, in terms of its creation of ten Republican seats; and that the SB2 Plan in creating this extreme 10 - 3 Republican outcome was creating an outcome that was entirely outside of the range of the sorts of plans that would have emerged under a districting process that adheres strictly to the nonpartisan portions of the Adopted Criteria.

Q To understand how you reached that conclusion, I want to take a step back. When you refer to computer-simulation techniques or to data algorithms, specifically what is it that you are describing?

A I'm describing computer-simulation algorithms that I have developed in my own academic research in which I am able to program a districting process designed to follow certain criteria that I program and ignore criteria that I want the [160] program -- the computer to ignore.

So in this particular case, I programmed in or I had the computer strictly follow the nonpartisan portions of the Adopted Criteria. In following the Adopted Criteria, I had the simulation process or the districting process ignore, for example, race

altogether. I also instructed the computer to ignore partisan considerations altogether.

Q And we'll talk about the criteria that go into those maps, but does the algorithm also generate all the data necessary to visually display an actual map created by that process?

A Yes, sir, it does. It creates actual maps, ones that you can compare to a map, an image, of the SB2 Enacted Plan or any other Congressional Plan that one might want to consider. So it creates actual districting maps for North Carolina, dividing North Carolina into 13 congressional districts.

Q And is Figure 1 in your report, which appears on page 8 of your report, an example of such a map?

A Yes, sir, it is. It is an example of a simulated map.

MR. THORPE: Okay. For the Court's benefit, we would like to introduce as an illustrative exhibit Plaintiffs' Exhibit 3041, which will allow Dr. Chen to explain how the simulation process actually yields something like Figure 1. We would move for admission of that exhibit.

JUDGE OSTEEN: Okay. So the PowerPoint is exhibit what?

...

[170] 1,000 maps, is that correct?

A Yes, sir, that's correct.

Q What criteria did you use to conduct that initial set of simulations?

A So I'll explain the criteria and, broadly, these are criteria taken from the nonpartisan portions of the

Adopted Criteria. What I broadly wanted to do was to hold several redistricting factors constant so that I could evaluate whether or not the as- enacted SB2 map conformed to these or could be explained simply in terms of it being a partisan-motivated map. So the specific criteria that I followed here in Simulation Set No. 1 were taken directly from the Adopted Criteria.

Q And when you say "the Adopted Criteria," Dr. Chen, you are referring to Exhibit 1007, which should appear at the third tab of your binder?

A Yes, sir, that's correct, the 2016 Joint Select Committee Adopted Criteria.

Q And you have referred to these earlier today as the nonpartisan criteria from the Adopted Criteria. What do you mean by that?

A What I mean by that, sir, is that this Joint Select Committee Adopted Criteria document contains both partisan, as well as nonpartisan, factors.

Now, I explained my goal in this expert report; and it was to -- in part, to evaluate the extent to which the [171] Enacted SB2 Plan conforms, adheres to the nonpartisan portion of the Adopted Criteria. So in evaluating that, I, of course, had to ignore the partisan mandates of the Adopted Criteria specifically relating to its mandate of the creation of a ten Republican, three Democrat congressional map. So I certainly ignored that portion.

As well in Simulation Set No. 1, I ignored the Adopted Criteria's mandate of protecting incumbents; and the reason I ignored that part is that even though it's not an explicitly partisan criteria, given that the 13 incumbents as of November 2016 are coming from

an existing the previous congressional map, there ' s certainly the possibility that there is some indirect partisan effect if we were to draw districts explicitly to protect those existing incumbents as of November 2016 given that they arose from the plan drawn for the 2012 and 2014 congressional elections.

So those were the portions of the Adopted Criteria I ignored in Simulation Set No. 1.

Q Dr. Chen, I'll direct you to page 6 and the top of page 7 of your report where you list criteria that the computer algorithm followed. Are these the criteria that you're referring to when you say the nonpartisan portion of the Adopted Criteria that you used to simulate Set One?

A Yes, sir. So I've listed out here on page 6 the five nonpartisan criteria that I factored, that I built into [172] Simulation Set No. 1. Specifically, the Adopted Criteria tell us, obviously, that districts have to be perfectly equally populated; second, that obviously districts have to be geographically contiguous. Those are fairly standard and not very different than for, say, other states, but the Adopted Criteria also give us very specific nonpartisan instructions with respect to No. 3, avoiding county splits.

And so the Adopted Criteria specifically tell us that, number one, if you do split a county, you cannot split it into more than two districts. You cannot split, say, Mecklenburg County or any other county into three districts or four districts. You can only split it, at most, into two districts. More importantly, the Adopted Criteria also tell us that you should avoid splitting counties when possible, that they are to be minimized, and that you can split counties when you

need to do so to create equally populated districts. So that's a third criterion.

Q And where does that criterion appear within the Adopted Criteria because you just outlined several things? I want to be able to point where in the Adopted Criteria that shows up.

A Yes, sir, in the Adopted Criteria, it's the paragraph that's labeled "Compactness."

Q Understood. In addition, your simulation algorithm introduces or, rather, measures compactness by other measures that you previously referenced with Figure 1, correct?

[173] A Yes, sir, that's correct.

Q And what are those measures?

A Sure. I just wanted to mention before I got to compactness, though, that the fourth criterion is minimizing VTD splits and the Adopted Criteria there tells us that you can only split VTDs when necessary to create equal populations, as I mentioned earlier in describing my algorithm.

And then the final one, in response to your question, sir, is about geographic compactness. So the algorithm prioritizes the drawing of geographically compact districts, and I measure that and operationalize that using two standard measures of geographic compactness that scholars of redistricting -- of legislative redistricting use very commonly in the scholarly literature, as well as in court case work. Those two measures are Reock and Popper-Polsby.

Q And those measures are described on pages 6 and 7 of your report, is that correct?

A Yes, sir, that's correct.

Q Returning to the first criterion that you referenced, I just want to be very clear about the instruction that you gave the computer in creating these simulated maps. Did you instruct the computer to conduct simulations that created districts with zero population deviation?

A That is correct, sir, I did and I found that that was very straightforward to do and so all of the districts in all of the [174] 3,000 maps that I produced for this report all have a population deviation of -- sorry -- a population in the district of either 733,498 or 99.

I mean, specifically the way that North Carolina's statewide population breaks down if you divide it across 13 districts is you need exactly four districts with 498 and then the remaining nine districts that have 499. So you're going to have four districts with 733,498 and the remaining are going to be 99. That's just how North Carolina's population breaks down and that is strictly adhered to in every one of my simulated -- 3,000 simulated plans.

Q And so as a result of how you designed that algorithm, it was not necessary on the back end of the simulations to zero out the population to meet this criteria?

A No, sir, I did not go through by hand and do any manual fidgeting with the district boundaries or the assignment of census blocks or anything like that. It was entirely automated by the computer districting process.

Q You have previously conducted other simulations of congressional and legislative redistricting, correct?

A Yes, sir, that's correct.

Q And in those previous either expert engagements or in your academic work, have you always been given a written set of criteria to follow?

A No, sir. This is quite rare.

[175] Q And what does that affect about your approach to the task in this case?

A Well, it meant my task in this particular case was unusually narrow and very mechanical, meaning the following: The Adopted Criteria here in this case give me a very specific set of criteria and my task was to not deviate from the nonpartisan portions of that Adopted Criteria. They were obviously very specific with respect to things like population equality and contiguity, but also county splits, which was quite unusual.

Usually my task in -- either as an expert witness or in my academic research is to make subjective judgments or use my expert as a redistricting expert and make determinations about how traditional districting criteria should apply in this state or that state or this jurisdiction and then try and figure out how to apply them -- how to apply traditional districting criteria given the various quirks of a particular state.

In North Carolina, in this particular case, with the Adopted Criteria as specifically as it is written, I had no subjective judgments like that to make here. My task here was very mechanical, to very strictly

follow the words that I saw on the paper of the Adopted Criteria and to follow those rules by programming them into the computer algorithm. They were even very specific with respect to the hierarchy of these [176] various criteria.

So that's what made this case so unusual in terms of my own normal academic work and expert witness work using redistricting simulations. Here I had no -- very little judgment call in deciding what districting criteria should be in or which ones should apply here. It was all very clearly laid out for me in the Adopted Criteria.

Q Do the adopt criteria also specify which election and/or demographic data is to be used in the construction of these maps or these districts?

A Yes, sir, it does.

Q And where is that specified?

A Well, the Adopted Criteria tells us which elections are to be used. I believe it's the section called "Political Data." But the Adopted Criteria tells us which elections to use in the consideration of the partisanship of the districts in achieving the stated political impact or partisan goal of the Adopted Criteria.

So specifically that "Political Data" paragraph in the 2016 Adopted Criteria tell us that the data we are to use are the following: All the statewide elections from 2000 from 2008 to 2014, but not including the presidential contests. So that is a very specific list of exactly 20 statewide elections.

Q And what you just said you have read from the first [177] sentence under "Political Data" on page 1 of the Adopted Criteria itself?

A That is correct, page 1, the section called "Political Data," and it tells us which elections to use.

Q And does that section also describe any demographic data that may be used in the construction of districts?

A It tells us to avoid using certain demographic data. It tells us to avoid using the racial composition of any of the census geographies or of any data about North Carolina. So that's pretty easy to follow. I just ignore racial data because the Adopted Criteria tell me to ignore racial data.

Q And so specifically it reads: "Data identifying the race of individuals of voters shall not be used in the construction or consideration of districts in the 2016 contingent congressional plan."

Did you follow that in your construction and consideration of the simulated districts in order to follow the nonpolitical portions of the Adopted Criteria?

A Yes, sir. I considered that to be one of the various nonpartisan portions of the Adopted Criteria. So that sentence tells me that racial data, data identifying the race of voters, is not to be used; and so I followed that by completely ignoring all racial data in constructing my computer's districting simulation algorithm.

Q And when I speak of whether you constructed districts [178] based on that result or considered that information, I am referring to the information

contained in your expert report disclosed on March the 1st of 2017?

A Yes, sir, that's correct.

Q So the political data bullet point that you just referenced includes 20 elections. Was that the only election formula that you considered for the purposes of this task?

A It was one of two different formulas that I used. There was a second one as well.

Q What is the other formula? And I will direct your attention to the next tab, which is Joint Plaintiffs' Exhibit 2002.

A This document is a document that Plaintiffs' counsel gave to me and represented to me that it was the formula produced by Dr. Tom Hofeller used for evaluating partisanship of North Carolina congressional districts while he was producing the 2016 Plan. Plaintiffs' counsel gave me this document, told me it was produced by Dr. Hofeller in evaluating the partisanship of North Carolina's congressional districts.

I looked at this formula and I found seven elections and I found it was a very straightforward formula to apply. I saw seven elections and they're really just a subset of those 20 statewide elections I mentioned just a second ago that were mentioned in the Adopted Criteria.

So Dr. Hofeller's formula lists for me seven [179] elections and it creates a very specific formula used to evaluate the partisanship of districts. I looked at it and I saw that I had access to all of this data, all seven of these elections, and I found it to be pretty

reasonable and straightforward to apply, and so I applied it as well.

Q And you've mentioned applying this formula at the district level. Is it your understanding that this formula could only work at the district level?

A No. I understand it to be a formula that was constructed by Dr. Hofeller for the consideration, for the evaluation of the partisanship of any geography. It could be the partisanship of a county or the entire state of North Carolina, of a region in North Carolina. It's just a formula that takes a couple of different elections, puts them together, aggregates the results; and all it simply does is it counts up were there more Republican votes or Democratic votes in this particular district across the seven elections. So it's a very straight forward formula that can be applied to any sort of geography within North Carolina obviously.

Q And this formula could easily be applied at the VTD level as well?

A Yes, sir. I mean, it's all data that's available at the VTD level and it's pretty clear what Dr. Hofeller was creating here.

Q Understanding that these elections were provided to you as

...

[208] BY MR. THORPE:

Q And I'll ask sort of a different version of the question and hope to make that a little bit more clear. The SB2 Enacted Plan that is reflected on all of these charts is not something that, in hindsight, you said,

well, the Republicans won ten seats, so I'm going to put them all at ten; is that correct?

A That's correct, sir. I didn't just put ten there simply because we know that there are ten Republicans elected. That was -- that was not what I did here.

Q Instead, you used the actual districts as constructed under the 2016 Plan and applied the same data that you used to evaluate your simulated districts to determine the Republican vote share for both the simulated districts and the enacted plan?

A Correct, sir. That's what we need for an apples-to-apples comparison here. So, again, I just took the enacted plan, the actual districts of that enacted p l an, and I overlaid -- because this was easily publicly available data. I overlaid the results from all of those 20 Adopted Criteria elections that we discussed some time ago. I overlaid them and calculated how did the Adopted Criteria political data evaluate the partisanship of the districts of the enacted plan, those actual 13 districts of the enacted plan. And I went through those 13 actual districts of the Enacted SB2 Plan one by one and said how does the Adopted Criteria evaluate the [209] partisanship of this district given that the Adopted Criteria already gives us a very specific set of elections to be used in evaluating the partisanship of the districts.

Q And it was your testimony a few moments ago that the districts in which you found Republican vote share exceeded Democratic vote share were, in fact, the same districts in which Republican candidates prevailed in 2016?

A Yes, sir, that's correct.

Q I want to turn your attention to Table 1, which appears on page 12 of your report. And we don't need to go through this in detail because we've largely discussed the information included in it, but is it accurate to say that Table 1 summarizes the simulation set approaches that we have discussed and the results that you -- these simulations yielded?

A Yes, sir. So it's, again, a comparison of Simulation Sets One, Two, and Three, which we've now discussed, and a comparison of those three simulation sets to the Enacted SB2 Plan, and I'm comparing all of these simulations to the Enacted SB2 Plan on a number of nonpartisan criteria listed in the Adopted Criteria.

Q And how does Table 1 display the partisan distribution of seats under both the enacted plan and the various simulation sets?

A So let's go to the very bottom of Table 1, that bottom row, that bottom row there where I've labeled it "number of [210] Republican districts under the Hofeller formula." And just to go back again to what we were talking about a minute ago, I, of course, calculated the SB2 Plan using Dr. Hofeller 1 s formula; and I found that in the SB2 Plan there are ten districts out of 13 that Dr. Hofeller 1 s formula counts as Republican districts. And I did the same formula applied that same formula to all three sets of simulations, to all 1,000 plans, maps, in these three sets of simulations, and I counted up in, say, Simulation Set No. 1, how many plans have exactly five Republican districts, how many plans have exactly six Republican districts.

This is all information that we already reviewed earlier in those histograms and those figures we went through a while ago, but it's laid out here in numerical form again here in this bottom row. So it 1 s telling us that for Simulation Set No. 1 the range of Republican districts calculated using the Hofeller formula is always between 5 out of 13 up to 9 out of 13 Republican districts using the Dr. Hofeller formula; and, of course, that is compared to the ten Republican districts using Dr. Hofeller's formula as calculated in the SB2 plan.

Simulation Set Two, that next column over, is another comparison. It tells us that all of those simulated plans in Simulation Set No. 2 are creating between nine to five -- or five to nine Republican districts; and as we said earlier, most of them are about seven Republican districts. So over half of [211] them are creating exactly seven Republican districts under the Dr. Hofeller formula.

Go to the next column, Simulation Set No. 3. It tells us another distribution like that. Here we see that in this bottom row in the very right column of this Table 1 -- what this Table l tells us there is that in Simulation Set No. 3 the entire range of the partisan seats in these 1,000 simulated plans, these 1,000 districting plans in Simulation Set Three, ranged from four to nine Republican seats; and, again, most plans had six or seven Republican seats, but the entire range went out as low as four and as high as nine, never to ten.

Q What then does Table 1 tell us or summarize about whether, in your 3,000 simulations, there will be conditions that could emerge that would explain a 10-3 Republican plan?

A Well, we evaluated -- or I evaluated a number of different possible explanations or possible alternative explanations for what might possibly justify; and as I said before, in Simulation Set No. 3 I was asking, well, is it possible that the General Assembly's choice to create exactly 13 county splits rather than minimize that number and the General Assembly's choice to protect exactly 11 incumbents, if that unique combination of features could somehow justify or explain or necessitate the creation of a 10-3 Republican map. What these simulation results, as described here in this table, [212] allow us to see pretty clearly is that such unique combinations of features of the Enacted SB2 Plan do not somehow necessitate or justify or explain why it was necessary to create an Enacted SB2 Plan with a 10-3 Republican advantage.

In other words, what it's showing here is that even if you had wanted -- for whatever reason, even if you had really wanted to create a plan with 13 county splits and just protect 11 incumbents but otherwise follow strictly the nonpartisan portions of the Adopted Criteria, even then with that unique combination you still would have ended up with a plan that generally creates six or seven Republican districts under Dr. Hofeller's formula, occasionally five and occasionally up to eight, but certainly never ten.

Q And so I want to be very clear about what this explains. You've referred to certain unique features of the Adopted Criteria and of the enacted plan. To be clear, does your approach account for the political geography of North Carolina voters and where they reside?

A Accounting for political geography of North Carolina voters was very much at the heart of the motivations for conducting all these sets of simulations. The whole point here is that what the computer is doing is it is taking North Carolina's voter geography, as laid out across all of North Carolina's counties and VTDs and census blocks, and starting with those census geographies, given their unique distribution [213] of partisan voters, their unique distribution of Democrat and Republican voters, and saying given those sets of geographies with that particular unique geography of North Carolina, what happens when we build districting plans in North Carolina that strictly comply with the nonpartisan portions of the Adopted Criteria. And so accounting for North Carolina's voter geography is at the very heart of what this analysis is doing.

Q And so are you able to conclude from this analysis that the Enacted SB2 Plan creates a partisan distribution of seats that falls entirely outside the range of outcomes possible in the absence of the partisan criteria in the Adopted Criteria?

A Yes, sir, that's exactly right. What I'm finding here is that regardless of which of these two measures of partisanship that one uses, whether we use Dr. Hofeller's way of measuring the partisanship of districts or the Adopted Criteria of elections for measuring the partisan distribution of seats, one, we see that the SB2 Plan has created ten Republican districts using either one of these measures.

Second, we see that the SB2 Plan's creation of ten Republican seats is an extreme statistical outlier in terms of its partisanship, whether measured by Dr.

Hofeller's formula or by the Adopted Criteria of elections. It's creating an extreme statistical outlier in terms of its partisanship, and that statistical outlier is entirely outside of the entire range of the sorts of plans that would have emerged under a districting [214] process that strictly adhered to the nonpartisan portions of the Adopted Criteria.

Q I will be mindful of the Court's decision to grant the motion in limine and respect that aspects of what I 'm about to discuss are principally going to be introduced by the League of Women Voters Plaintiffs, but on page 23 you begin a section that leads to the end of your report that is entitled "Robustness Checks Using Alternative Measures of Partisanship." Is that correct?

A Yes, sir, that's correct.

Q And speaking generally, what was the purpose of this section of the report?

A Generally, I wanted to conduct some robustness checks that would test and confirm the results in the main part of my report, which is everything that we've discussed up until now, the first main part of my report.

So this second section, this latter section of my report, presents a number of robustness checks that use alternative measures of partisanship of districts, meaning alternative measures in addition to and separate from, completely different from, the measures that we've been talking about with Dr. Hofeller's formula and the Adopted Criteria formula.

The reason I wanted to present these alternative robustness check measures of partisanship is that these are

...

Excerpts from Transcript of Bench Trial, Cross Examination of Dr. M.V. Hood III (Oct. 19, 2017)

...

[36] adhere to the criteria adopted by the General Assembly affect your view of the conclusions he makes in his report?

A Well, because Professor Mattingly did not rely on the criteria, I don't know how reliable his simulations are.

Q All right. And assuming Dr. Mattingly had followed the same criteria as the General Assembly, would that change your mind about the reliability of the simulations he discusses in his report?

A Not necessarily, for this reason. You know, computers are not drawing maps in North Carolina. It's a real person or a set of people that are actually drawing these maps on behalf of the General Assembly; and, again, a computer simulation cannot necessarily get at all the nuances that may be related to the criteria for the General Assembly and everything that goes into that. I don't think Professor Mattingly, for instance, talked to anyone from the General Assembly or talked to map drawers. That might have been very informative -- it might have made the simulations more realistic.

MR. McKNIGHT: I don't think I have any further questions for Dr. Hood at this point.

JUDGE OSTEEN: All right. Cross-examination?

CROSS-EXAMINATION

BY MR. EPSTEIN:

Q Good morning, Dr. Hood.

A Good morning.

[37] Q My name is Steve Epstein.

I don't think we've met before, have we?

A No, we haven't. It's nice to meet you.

Q Pleasure to make your acquaintance as well.

I have gone ahead and put together a PowerPoint to go through some of what will be my cross-examination. I'd like to pull that PowerPoint up if we can, please. Okay. Sir, we're going to start with Figure 3 from your report, the North Carolina Partisan Cluster Analysis. And with respect to Slide 3, you've made some statements, and I'm going to go ahead and read them. You tell me if I'm quoting them correctly if you would, sir. You said: "Looking at the map (Figure 3), one can see that large sections of North Carolina are occupied by either Republican or Democratic clusters." Is that fair?

A Yes.

Q You said: "North Carolina's political geography can affect the manner in which congressional districts are created." You said that, correct?

A Correct.

Q And you said: "Democrats are more likely to be found in urban areas in -- I think it should say and Republicans in rural areas," correct? "Democrats are more likely to be found in urban areas, Republicans in rural areas," which is what you said on page 13.

A Yes.

[38] Q You also said that "Clustering of partisans can lead to natural packing of such groups in the redistricting process." Correct?

A Yes.

Q And that "The presence of such spatial patterns can lead to the phenomenon where partisans are more likely to be placed together in the same district -- correct? -- sometimes referred to as natural packing"?

A Yes.

Q I mean, natural packing is where those clusters wind up in the same congressional district, correct?

A That's the idea behind that term, yes.

Q Okay. And "The state's political geography," in view of all of these things we've just talked about, "would also seem to naturally favor Republicans in the creation of Congressional districts." That's your view, correct?

A I stated that, yes.

Q All right. So I want to go ahead and look at what I'll refer to, and I'll ask if you agree with me, as the Asheville Democratic cluster. Does that green arrow to you appear to point to the Asheville Democratic cluster?

A That is Asheville, yes.

Q Okay. And what we've done, sir, is we have -- in fact, you mentioned Asheville as a Democratic cluster by a name on page 10 of your report, did you not, sir? You can look at it. [39] I'm not trying to --

A Okay.

Q -- make this a memory contest, but you can look on page 10 and see if you'll agree with me that you named Asheville as a Democratic cluster.

A I did, yes.

Q Okay. And what we've done is we've zoomed in on that Asheville Democratic cluster. Would you agree with me that that is the Asheville Democratic cluster? And if you want to take some time to compare it to your map.

A Well, I'll take your word for it.

Q Okay.

A It's quite a zoom-in.

Q If we had an ELMO, we could put your partisan cluster map on the ELMO. So, sir -- and this is I meant to do this earlier. This is Slide 5 -- I'm sorry, this is Slide 6, and for the -- the slides that we've looked at so far, in fact, have had the numbers on them, and I'll start naming the slides because I remember I should do that, for the record.

JUDGE OSTEEN: Is this an exhibit, or is this a guide, or what is this?

MR. EPSTEIN: This is to aid in cross-examination rather than having to continually pull things out. It's going to significantly speed things up, Your Honor.

BY MR. EPSTEIN:

[40] Q Dr. Hood, what we see in Slide 6 is the phenomenon that you, in your expert report, refer to as natural packing, correct?

A Yes.

Q North Carolina's political geography favored natural packing of that Democratic cluster into a

single congressional district. That's what natural packing is, correct?

A Well, I mean, more generally, it's where like partisans are clustered geographically or spatially closer together to one another.

Q And what you told me a second ago, and I can look at the quote again, is that natural packing is the phenomenon where those clusters a l so wind up in the same congressional district, correct?

A Yes, that's certainly possible.

Q Well, it's not possible, it's what you're referring to as natural partisan clustering, correct --

A Yes.

Q -- the natural path of partisan clusters. Okay. In fact, you knew, sir, looking ahead at Slide 7, that the legislature drew a line right through this Democratic cluster to split into two congressional districts; did you not, sir?

A Well, I may have done that at some point. I mean, I didn't -- when I drew my map of the partisan distribution of the state, I wasn't necessarily superimposing congressional [41] districts on it. I was looking at the state as a whole.

Q But what Slide 7 shows is that when the legislature drew its 2016 map, it drew a line through the Asheville Democratic cluster to separate part of it into Congressional District 11 and part of it into Congressional District 10. Would you agree with that, sir?

A Yes, that's what happened.

Q Okay. So you said that "Clustering of partisans can lead to natural packing of such groups in the redistricting process," correct?

A Yes.

Q "True/False: -- looking at Slide 9 -- What happened in Asheville was the legislative cracking of a Democratic partisan cluster in the redistricting process?" True or false?

A The Democratic cluster in this case did not end up in one congressional district.

Q Because it was cracked in two?

A It was split in two, yes.

Q Thank you, sir. All right. Moving forward. Did you -- what happened, looking at Slide 10, is that those two districts were submerged into two safe Republican districts. Isn't that right, sir?

A Those two districts?

Q Those two pieces of the Asheville Democratic cluster when they were cracked, when the Asheville Democratic cluster was [42] cracked in two, those two pieces wound up being submerged into safe Republican districts, isn't that right, District 10 and 11?

A One second. Yes, I have classified Districts 10 and 11 as safely Republican. I just needed to look at that real quick.

Q And, sir, as an expert in political science, as you are, especially in southern politics, including North Carolina, had that Asheville Democratic cluster been packed into a single district, the phenomenon of natural packing you describe in your report, the

district into which that cluster would have been packed would not have had results like we see on this slide, Slide 10, correct?

A Well, so what are we saying? That if the Asheville

Democratic cluster was maintained whole --

Q Correct?

A -- is that fair?

Q We wouldn't have seen results like we see on Slide 10 for the district in which that natural packing would have occurred, would we have?

A Well, the partisan composition of the district in which the Democratic cluster was contained would be different. I mean, that is true.

Q Would have been more likely that a Democrat would have had a chance to win, correct?

A Well, I mean, without looking at numbers, I can just say [43] that the partisan composition would be different.

Q More Democratic, correct?

A I -- that's true. I don't know how -- sitting here, is what I'm saying, how much more Democratic is all I'm saying.

Q All right. Dr. Hood, would you agree that another area of the state in which there is a Democratic partisan cluster happens to be all around us where we are today, Greensboro. Would you agree with that?

A I identified it, yes.

Q You identified it as a Democratic partisan cluster on page 10 of your expert report, correct?

A Yes, I did.

Q All right. And going ahead and looking at Slide 11, that identifies the Greensboro partisan cluster, both finding your map on the top right and then pulling down a blowup of that cluster on the bottom left, correct?

A Correct.

Q And then looking at it closer, would you agree that what we see in this slide is -- which is Slide No. 12 -- is, in your words, "natural packing"?

A Well, it's -- yes, it's certainly clustering of Democrats closer to one another, geographically speaking.

Q And in your words, North Carolina's political geography favored natural packing of that Democratic cluster into a single congressional district, correct?

[44] A I don't think I went quite that far.

Q All right. So you don't think that this would be an area that would make sense to put in a single congressional district because of the natural packing?

A Well, all I'm saying is I didn't make that determination. I just talked about the phenomenon of natural packing generally.

Q Do you happen to know whether this area was put into a single congressional district in the 2016 Enacted Plan?

A Well, I'm going to guess that it wasn't, but I honestly don't know sitting here.

Q Okay. Well, I'm going to show you on Slide 13 that is what happened in the Enacted Plan, that the right half of the natural partisan -- the Democratic partisan cluster wound up in Congressional District 6, and the left half wound up in Congressional District 13. That's news to you today?

A Well, I'm just saying the map I drew didn't have congressional lines superimposed on it. So I'm not shocked by this necessarily. I probably looked at this at some point.

Q Okay. And I'm going to move forward to Slide -- I'm trying to move forward. Can you help me out? There we go. Thank you. Again, you said, "Clustering of partisans -- this is Slide 14 -- can lead to natural packing of such groups in the redistricting process." And by that you're implying into a single district, correct?

[45] A Yes.

Q And going to Slide 15. "True/False: What happened in Greensboro was the legislative cracking of a Democratic partisan cluster in the redistricting process." True or false?

A The Greensboro cluster -- Democratic cluster split between those two congressional districts, yes.

Q It cracked, correct?

A Well, if you want to use that terminology, yes.

Q Okay. And then moving forward to Slide 16, did you note that those two pieces of the Greensboro Democratic cluster were submerged into districts that voted, in District 6, 59.3 percent for Republicans and, *in* District 13, 56.1 percent for Republicans?

A Well, I didn't know that before you just presented that to me.

Q But you did an analysis of the 2016 Plan, and you came to court to tell us that the 2016 Plan was essentially a plan that neutrally protected incumbents and followed the political geography of North Carolina. That's your testimony, isn't it?

A Yes.

Q Not that there was some partisan intent to create a plan that favored Republicans. That's not your testimony, is it?

A No.

Q Okay. Had the Greensboro Democratic cluster been packed into a single district, the district into which that cluster [46] would have been packed would not have had results like we see on this slide, correct?

A Well, again, what I can say definitively is that in that scenario you're offering that the district would have been more Democratic. How much more, I'm not certain.

Q All right. Let's go forward. Let me ask you whether -- before we go to the next slide -- whether another area of the state in which there's a Democratic partisan cluster is and around Cumberland, Hoke, and Robeson Counties. Is there another Democratic cluster there?

A Yes, sir.

Q And I think on page 10 of your report, you refer to that partisan cluster as an area within the black belt area of the state that runs through the southern coastal plain subregion. Did I get that right?

A Yes.

Q Okay. Let's go forward to Slide 17 and take a look. Would you agree that I have accurately pulled out of your Figure 3 that partisan cluster, namely, in Cumberland, Hoke, and Robeson County?

A It looks like it.

Q Okay. And as you say in your report, this is an area of concentrated Democratic strength, correct?

A Yes.

Q Let's go forward to Slide 18. Will you take my word for [47] it that is a tight blowup of that same area?

A I'm going to take your word for it.

Q I appreciate it. And I will tell you that Cumberland is the county on the top right, that Hoke is next to it on the left, and that Robeson is the county on the bottom. All right. Are you with me?

A Yes, yes.

Q Okay. Would you agree that what we see in this slide is, in your words, natural packing?

A It's a cluster of Democratic VTDs, yes.

Q And North Carolina's political geography favored the natural packing of that Democratic cluster into a single congressional district, did it not?

A Well, let me just say this. It could have been put into a single congressional district or not.

Q If you were trying to keep that area together of those partisans, you would have put it into single district, would you not?

A Most likely, yes.

Q Okay. Go forward to Slide No. 19 -- I 'm sorry. I just wanted to added in the Fayetteville Metro area just to help orient you. Would you agree that that appears to be the voting tabulation districts from the Fayetteville Metro area that we circled there?

A I believe so.

[48] Q Okay. Just to give us

A It's not labeled, but, yes, that's about where Fayetteville is.

Q All right. Going ahead to Slide No. 20. Can you see the green line there?

A I can see it.

Q And does it appear the legislature drew a district line right through the Robeson, Hoke, Cumberland Democratic cluster?

A Through the cluster, yes.

Q And separated into Congressional District 8 and Congressional District 9, correct?

A Yes.

Q Again, you said natural packing tends to be used by the legislature in the redistricting process in order to put clusters into the same district, right?

A I don't know that I said it was used by the legislature. I just said this is --

Q It's the political geography, excuse me.

A Yes, that's fair.

Q The political geography favors those kinds of clusters being put into a single district; fair?

A It's possible that clusters of like-minded partisans can be found in the same district, yes.

Q "True/False: What happened in Cumberland/Hoke/Robeson County was the legislative cracking of a Democratic partisan [49] cluster in the redistricting process"?

A That cluster is split between those two districts, yes.

Q And you don't have a problem with the word "crack," do you?

A Well, I don't necessarily put any kind of connotation to terms like "cracking" or "packing," for instance. Those are just terms we talk about in terms of drawing maps a lot of times.

Q Okay. You agree --

A I don't view it as positive or negative is what I'm saying. It's just a term of art.

Q You agree the legislature consciously drew a line right through that Democratic partisan cluster, correct?

A Well, there's -- yeah, there's a line there. That's certainly true.

Q That line didn't show up accidentally. The legislature drew it --

A I agree with you on that.

Q Okay. Thank you. Let's go forward to Slide 23. Did you know that the result of doing that was submerging the two pieces into districts in which Republicans won, in District 8, 56.8 percent of the vote and, in District 9, 58.2 percent of the vote? Excuse me, I think that's 58.8 percent. Did you know that that's happened to those two pieces of the Robeson, Hoke, and Cumberland Democratic cluster?

[50] A So one of these is wrong, I guess, right?

Q Do my numbers add up to more than 100 percent? I don't think so.

A Oh, no, maybe not. Maybe not. Are you asking -- I, you know -- I wasn't aware necessarily -- I mean, I guess I was aware of the congressional election outcome, yes.

Q And District 8 was overwhelmingly a Republican district as the votes turned out, and District 9 was overwhelmingly a Republican district as the votes turned out, correct?

A As the vote turned out. I've got them labeled competitive.

Q All right. And I think my colleague from League of Women Voters may ask you a question or two about that, but I'm going to ask you whether -- if the Cumberland, Hoke, and Robeson County Democratic cluster had been packed into a single district, that district would have seen results like we see on Slide 23?

A Well, no, I don't know what the results would have been, but it wouldn't have been exactly that, no.

Q Republicans wouldn't have won 58 percent of the vote in a district in which that entire partisan cluster was packed, correct?

A The Democratic vote would have been higher. I agree with you there. I just don't know the level necessarily sitting here.

[51] Q All right. I want to shift focus now from the section of your report to the section -- from the section of your report that offers opinions about partisan

clustering, we're going to move away from that topic, to the section of your report discussing the advantages of incumbency. All right?

A Okay.

Q It's your testimony, Dr. Hood, that the advantages of incumbency explain the results of the 2016 congressional elections rather than how the General Assembly drew our congressional districts, correct?

A I think how I would characterize it is that redistricting alone doesn't affect completely the outcome of congressional elections. We have candidates and campaigns, and elections are actually occurring, and the fact that there were a large number of incumbents in that election cycle did affect the outcome of those elections.

Q Doctor --

A I think that's how I would characterize it.

Q And I apologize for interrupting. I think you're actually trying to drive home the point that that was a more powerful influence on the results of the election than the redistricting. Isn't that the point you're trying to drive across?

A Well, it was certainly a powerful influence.

Q All right. You say: "Incumbents are highly likely to win [52] reelection, especially when faced with challengers of little or no political experience." Correct?

A Correct.

Q Let's go ahead and look at the rest of these on Slide 24. You said: "Of the twelve incumbent races in

2016, 10 (or 83%) featured a challenger with no political experience [.]" You made specific note of that, correct?

A Correct.

Q You said that "In every race featuring an innocent, t h e incumbent outspend -- and I think you meant to say outspent their challenger by an average of $1.2 million. 11 correct?

A Yes.

Q And then you concluded: "In conclusion, there is little doubt that factors other than redistricting ... helped produce the noted ten to three partisan division," and the most significant of those factors, you say, is incumbency, correct?

A It's a big one, yes.

Q You think that the type of -- let me ask you this. The type of candidate who might challenge an incumbent doesn't have anything to do with how the legislature draws the district?

A So who emerges to challenge an --

Q Absolutely, sir.

A It could be affected by it; it doesn't have to be.

Q Is that something that you talked about in your report anywhere, that the way the legislature draws a district can [53] have an effect on who might challenge an incumbent in that district?

A I don't believe I talked about that specifically.

Q An entrenched incumbent, you believe, is likely to draw a weak challenger no matter how the legislature draws the incumbent's district. That's pretty much what you're saying, isn't it?

A That's of tentimes the case, just in general.

Q An entrenched incumbent is going to be able to outraise and outspend a politically inexperienced challenger no matter how the legislature draws the incumbent's district, correct?

A Most of the time, yes.

Q All right. I'm going to go to Slide 25. Do you know who the gentleman in this picture is, Dr. Hood?

A I do not.

Q You've been in the redistricting field, you were qualified as an expert in redistricting, and you don't know who this gentleman is?

A I'm sorry, no.

Q All right. Did you know a gentleman by the name of Congressman Roscoe Bartlett from the 6th Di strict in Maryland for 20 years? Do you know who that is?

A I've heard the name.

Q Did you not know that there's redistricting litigation going on in Maryland about that district that's very similar to [54] the litigation you're testifying in today?

A I'm really not familiar with that case.

Q You're not?

A No. I'm sorry.

Q So you don't know what was done to Congressman Bartlett's district by the Democratic-controlled legislature in 2011 through their redistricting process?

A Again, I'm really just not familiar with that case.

Q Okay. Well, I will tell you -- and this is coming straight out of an opinion in that case, and we'll see if this affects any of your opinions -- in the words of Fourth Circuit Judge Paul Niemeyer: The changes that were made to Congressman Bartlett's district resulted in a net reduction of more than 66,000 registered Republicans and a net increase of some 24,000 registered Democrats for a swing of about 90,000 voters. And specifically that's in Docket Entry 202 on page 32. So did you follow those numbers?

A Generally, yes.

Q Okay. Did you know what effect that had on what happened in that race in terms of who challenged Congressman Bartlett?

A I'm just not familiar with this example we're talking about.

Q What would be your speculation about whether that would affect the type of challenge that might be mounted against somebody who had been winning i n a Republican district for 20 [55] years?

A Well, from what you described, I can't remember the exact partisan figures, it would have made the district probably more competitive.

Q Okay. And if a district became more competitive through the redistricting process, would that have had an impact on the type of person that might challenge him?

A It could have.

Q Would that have had an impact on the amount of spending that would occur against him?

A Well, if you have a quality challenger who can mount a more effective campaign, they may be spending more money, yes.

Q Would it surprise you to l earn under that scenario that Congressman Bartlett was outspent three to one in that congressional race despite his 20 years of incumbency?

A I just don't know much about this example.

Q Despite what you say in your expert report, a legislature can actually redraw a congressional district that places an incumbent at a disadvantage; wouldn't you agree, sir?

A That is possible.

Q And, Dr. Hood, just as a legislature can redraw district lines to invite a strong challenger to emerge, as happened to Congressman Bartlett, a legislature can also redraw district lines to discourage a strong challenger from emerging to face an incumbent; wouldn't you agree, sir?

A It's possible.

Q A legislature can insulate an incumbent against a strong challenge by making the district so lopsided in favor of t h e incumbent's party that it would be very difficult to raise money and mount a successful campaign against that incumbent. Surely, you would agree with that, wouldn't you, sir?

A It would be more difficult, yes.

Q Sir, isn't it true that there is a symbiotic relationship between the advantage of incumbency and the redistricting process?

A I'm not saying they're not unrelated.

Q They are related, aren't they?

A Well, again, I'm not saying that redistricting doesn't have any effect on congressional elections.

Q Did you note any of that in your report?

A Well, I noted it in the converse, that there are other factors beyond redistricting that can affect congressional election outcomes.

Q Did you note anywhere in your report that depending upon how the legislature draws those lines, it can influence the very things you mentioned in your report, the type of challenger who mighty emerge, the amount of spending that might occur? Anywhere in your report, did you mention that?

A I don't believe so.

Q When you look at the past voting history associated with [57] the ten Republican leaning districts, in your words, in the congressional delegation in North Carolina -- that was the ten districts that were drawn for Republicans in February 2016 would you not agree that that explains, in large measure, why strong Democratic challengers did not emerge to square off against those Republican incumbents?

A Not completely. Perhaps in some of the districts. I have some of them coded more competitive.

Q And it would also influence the amount of fundraising that the Democrats were able to -- amount

of funds the Democrats were able to raise in t hose districts, that very past voting history that you looked at to form your partisan index, isn't that true?

A Well, fundraising is related to a lot of things, including who might emerge to challenge an incumbent.

Q But it all relates to the likelihood of the success of that challenger, doesn't it?

A Well, again, you know, it's possible, yes.

Q Go ahead and look at Table 2 on page 6 of your report, which you were asked about on direct examination.

A Okay.

Q You made specific mention when asked questions by counsel that there were two districts in which zero dollars were reported as having been spent by Democratic challengers, District 3 and District 5, correct?

[58] A Correct.

Q And in f act, I think your suggestion was, well, I mean, even using data associated with those two districts would be somehow faulty because that implies that there was a real race in those districts, and there really wasn't if no money was spent. That's what you implied in your testimony, correct?

A Well, I think that I think what I said was something more along the lines of it would be harder to mount an effective challenge if no money was being spent on the other side. I think it was stated something like that.

Q Okay. Any idea of what your partisan index would show about how competitive t hose two districts were before we go ahead and look?

A Well, can I look?

Q Well, before we do, the fact that zero dollars were spent, do you think that might have some relationship to how competitive those districts were based upon past voting history?

A Its possible. It also looks like those challengers in those districts had no prior office-holding experience as well.

Q Sir, if I told you that the challenger to Congressman Bartlett, who, by the way, beat him by 21 percentage points, had no prior political experience, would that temper your testimony about how significant prior political experience is?

A No, I'm not saying it's not possible for a political [59] novice to beat an incumbent. That's just not the general pattern.

Q All right. Let's go ahead and look in your partisan index on page 25, Table 12, and just confirm how you classified those two districts in which the Democrat did not spend any money.

A Okay.

Q How did you classify them?

A Those are safely Republican districts.

Q Democrats aren't going to put a lot of money in challenging incumbents in safe Republican districts, are they?

A You mean the national party, for instance?

Q National party, state party, yes, sir.

A Probably not, no.

Q And people who contribute to campaigns tend to contribute to campaigns that have more of a chance of being successful than would have been the case i n Districts 3 and District 5; would you agree with that?

A That's one of the factors, not the only factor.

Q All right. I want to focus us on the topic of district core retention. In a second, we're going to go back to the PowerPoint, so if you can get me back on the slide we were on in the PowerPoint.

District core retention. I want to make sure we're clear on what you mean by "district core retention." That is the percentage of constituents in the new district that were [60] previously in that same district prior to redistricting, correct?

A Yes.

Q The higher the core retention, the more incumbents from 60 those districts are protected. That's your testimony, correct?

A The more -- yeah, the more prior constituents that an incumbent would have.

Q And you believe that other than the newly created 13th Congressional District, the General Assembly did a good job of district core retention in its 2016 Plan, correct?

A I think I said "generally," yes.

Q And I think you testified in your deposition something along the lines that a 50 percent core retention evidences the General Assembly's desire to protect incumbents, correct?

A I don't remember the exact figure.

Q Do you want to look at your deposition?

A No, not necessarily.

Q You can answer that question today. Is it your testimony that a 50 percent core retention is a generally generally a good mark that -- of the district core that's been maintained?

A Yes, that's a good indication that the core's been maintained, yes.

Q And I have Slide 27 up on the screen. That is your Table 9 from your report, correct?

A Right.

[61] Q And you believe that this table actually demonstrates the General Assembly did a good job of retaining district cores of 12 of 13 congressional districts, obviously not 13, correct?

A Right.

Q And that's one of the main reasons why in your opinion all of the incumbents defeated their challengers, correct?

A It's one of the reasons.

Q I'm going to go to Slide No. 28. I'll represent to you, sir, that the 51 percent district core retention for Congressional District 6 in Maryland comes straight out of, again, Judge Nierneyer's opinion in that case; and if you don't want to take my word, we can look at that together, but I will tell you that that's what the opinion says that the district --

JUDGE OSTEEN: Hold on just a second.

(Discussion between judges.)

JUDGE OSTEEN: You can continue.

MR. EPSTEIN: Thank you, Your Honor.

BY MR. EPSTEIN:

Q We were just looking at the 51 percent -- first of all, will you take my word for it that that was what Judge Niemeyer's opinion in that Maryland case said was the core retention for Congressman Bartlett's district?

A Well, I'm going to have to. I'm not familiar with that case.

Q Okay. Assuming that to be true, and assuming that he lost [62] by 21 percentage points in his race as an incumbent of 20 years, would you agree that a number like 51 percent wouldn't necessarily be a good indication that at that level an incumbent is somehow protected or insulated against a strong challenge?

A What I would say is that that -- you know, again, that's a specific example where 51 percent didn't necessarily protect this incumbent. Again, generally, though, the higher the core retention, the more the incumbent's protected. That's the general pattern.

Q So a number like 98 percent or 97 percent, that's a good indication, correct?

A Well, that would be a better indication, yes.

Q Right. But we have in North Carolina in the 2016 Plan, your chart, core retention levels in the 6th District, 50 percent; in the 8th District, 42.4 percent; in the 9th District, 39.3 percent; in the 12th District, 52.1 percent; and in the 13th District, 0 percent. Those are not necessarily badges of a good core retention; would you agree?

A Well, there's a range there, certainly.

Q All right. I want to move into -- and I'm done with the PowerPoint. Thank you. I want to move into your discussion about Dr. Mattingly both today and in your second expert report.

But, first, in your first report, you wrote in your [63] penultimate paragraph that, quote, the question of what constitutes an unconstitutional partisan gerrymander in my opinion is not resolved by running a set of hypothetical districting simulations. That's what you wrote, correct? It's the penultimate paragraph of your initial report.

A Hang on just a second. This is in response to Professor Mattingly?

Q No, your initial report, the penultimate paragraph?

A Sorry. Okay. I see that.

Q Okay. Dr. Hood, you didn't actually look at any of the underlying data Dr. Mattingly used to create his ensemble of 24,518 simulated maps, did you?

A That is correct.

Q The fact of the matter is, you didn't do any analysis one way or another whether running hypothetical districting simulations speaks to the question of what constitutes an unconstitutional partisan gerrymander, did you?

A I did not run any simulations, that's correct.

Q And you didn't do any analysis of whether or not doing so speaks to the question of whether or not there has been a partisan gerrymander, correct?

A Correct.

Q All right. And you, therefore, have no ability to critique the data on which Dr. Mattingly relied or the method by which he created the 24,518 simulated maps, do you?

[64] A Well, I think I can critique the assumptions he made.

Q And we'll look at those.

A Okay.

Q But with respect to the data themselves, you can't critique those, correct?

A I did not look at the data he used.

Q And you can't critique the math or the algorithm or anything like that in terms of whether he ran those functions on the computer in a proper manner, can you?

A That's correct.

Q All right. You are critical of Dr. Mattingly for applying redistricting criteria from House Bill 92 as adopted by one house of the legislature in 2015 rather than the Adopted Criteria from February of 2016, correct?

A Correct.

Q You're critical of him for not using criteria which included an explicit directive to the mapmaker to make reasonable efforts to maintain a 10-3 Republican advantage, correct?

A He didn't build that in, no.

Q You're critical of him for not applying a set of criteria that included as one of its central components that the legislature was going to try and make the plan a 10-3 plan. You think he should have used those

criteria to determine whether or not there was inappropriate partisan gerrymandering?

[65] A I think what I said is he didn't use the incumbency protection component to the plan.

Q You 1 re very critical of Dr. Mattingly for allowing plans in his ensemble to have a population deviation as high as 1 percent. I think you testified to that, correct?

A That is correct.

Q You consider that to be a faulty premise making the inferential value of his 24,000 maps, in your words, highly questionable, correct, page 2 of your report, your second report?

A Okay.

Q Do you agree that's what you said?

A Could you -- I'm on page 2. Just tell me what paragraph.

Q It's the second sentence of the second paragraph. Go ahead and read out loud what you have there.

A The second sentence, the second full paragraph?

Q On page 2, sir.

A To my knowledge?

Q These plans, however -- I'm sorry. It's -- the pages aren't numbered. It's the second page, though, of your -- do you want to get that up on the screen?

A Okay. I'm sorry. I'm on the second page.

Q The second page that says "Response to Professor Mattingly"?

A Yes, yes.

[66] Q We're looking now at the second paragraph, second sentence. Can you read that aloud, please?

JUDGE BRITT: That's the first page, isn't it?

MR. EPSTEIN: Well, there's a cover page, and then there's the first full page.

THE WITNESS: Oh, okay. I was on a different page.

BY MR. EPSTEIN:

Q No problem.

A "These plans, however, are based on a set of faulty premises thereby making their inferential value highly questionable."

Q That's your central position about Dr. Mattingly's work, correct?

A Yes.

Q Did you not see in Dr. Mattingly's report that the more -- that more in the more than 300,000 districts in his ensemble, 300,000 districts comes from 13 times 24,000, the mean population deviation was actually only .16 percent? Did you not see that in his report?

A I believe I saw, that yes.

Q You focused on 1 percent in court today, .16 percent --

A I think that's the parameter he used, from what I remember.

Q And did you not he realize that the General Assembly's enacted plan actually had a population deviation across [67] districts of .68 percent before the VTDs were split in order to achieve equal population?

A Did I realize that?

Q Yes, sir. That was in Dr. Mattingly's report. Did you not read it?

A Yes, I read it.

Q Okay. So his mean population deviation was .16. The General Assembly's population deviation before VTDs were split to finally get to zero was .68, and you believe Dr. Mattingly created an ensemble that was a faulty premise and created, therefore, highly questionable results. That's what you're saying.

A Yes, I don't agree that he used the proper population deviation number.

Q And you know that it's typical for map drawers to draw a plan with a close percentage of equal population and then zero it out. That's the way this process works, isn't it, sir?

A I'm aware of that, yes.

Q And you don't know from talking to people who draw maps whether in their experience the zeroing out process is significant in affecting the outcome of the redistricting?

A Well, I do know that it's -- it is difficult when you get down to the nitty- gritty of a zero deviation plan to -- you' r e essentially sometimes having to split blocks across districts.

Q But in terms --

[68] A I'm just saying it's not as easy as it sounds sometimes.

Q And that really wasn't the focus of my question. The focus of my question is when you get down to that nitty-gritty level, as you've described it, it really has

no difference on the partisan outcome of an entire congressional district, does it, sir?

A Not the entire district. I t's going to change it a little bit one way or another.

Q When we're talking about hundreds of people in a district that has over 700,000?

A Well, you know, again, it depends on how many VTDs you might have to split when you got down to that level.

Q And you also know that Dr. Mattingly did some sensitivity testing around this very question of what would happen to his ensemble as you require the maps to be closer and closer to equal population. You know that, correct?

A I believe I read that, yes.

Q And he reported that those results of that sensitivity testing, quote, support our claim that splitting VTDs to achieve less than a 0.1 population deviation will have a negligible effect on our conclusions. You read that in his report, did you not, sir?

A I believe he stated that, yes.

Q And you have no basis to challenge that assertion, do you, sir?

[69] A Not that assertion he makes.

Q You 1 re also critical of Dr. Mattingly for creating, and I think you said this today, two districts that have BVAPs in excess of 40 percent and in excess of 30 percent, black voting-age population. You're critical of him doing that, correct?

A Yes.

Q You consider that to be one of the faulty premises that make the inferential value of his 24,000 maps highly questionable, do you not?

A Yes, I discuss that.

Q And that's despite knowing that the General Assembly's 2016 Plan that we 1 re here in court about this week resulted in one district with over 40 percent BVAP and another with over 40 percent BVAP, correct?

A That's what it ended up as, yes.

Q And Dr. Mattingly did something wrong by including that exact same set of criteria in his simulated maps?

A Well, again, my understanding is that race wasn't considered as part of the criteria. That's what happened. You're right. That's how it ended up, but he set that parameter up front.

Q And so the fact that the legislature got there through some different way means Dr. Mattingly's maps that achieved the exact same result are somehow defective?

[70] A Well, I just don't agree with the way he did it, no.

Q And Dr. Mattingly actually tested to see if applying h is BVAP threshold changed his result and found that it did not, correct?

A I believe he states that, yes.

Q And you don't have any reason to doubt the accuracy of the analysis he did regarding that, do you?

A I don't have any reason to question what he said there at that point, no.

Q All right. Earlier today, you told us that in deciding how to get the votes into his hypothetical districts in his 24,000 maps that Dr. Mattingly relied on the 2014 and 2016 congress election outcomes. Do you remember testifying to that a few minutes ago?

A Yes, if I -- yes, I was testifying from memory, so I think that's correct.

Q And you were critical of him doing that, in part, because if there was no actual contest in one of those elections, in one of those congressional districts, that would skew the data, correct?

A That would be a problem, yes.

Q So you didn't pick up on the fact that Dr. Mattingly excluded the 2014 congressional election for precisely that reason. You didn't realize that.

A I didn't remember it.

[71] Q And you fault him for applying the actual 2016 votes in congressional races to predict the outcome of what would have happened in congressional races?

A Yes.

Q Instead, he should have applied results from insurance commissioner and agricultural commissioner like you did in your partisan index?

A Well, I created a partisan index, and those were some of the races I used, yes.

Q Your partisan index also assumes that candidates don't matter, isn't that right?

A It assumes that they do matter. But in creating an index, hopefully, these candidate effects are going

to average out so we'll get a pretty good fix on what the partisan composition of an area is.

Q And the likely outcome of elections in each of those areas, correct?

A Well, it's I would say the likely partisan composition of the area, which can affect the election outcome, yes, but sort of one step back from what you're saying.

Q Well, you know, sir, that Dr. Hofeller, who actually was the mapmaker drawing these districts, assembled the results of seven prior statewide elections to decide how to sort voters into districts, correct? You know that?

A Dr. Hofeller created his on partisan index, yes.

[72] Q And you know that Dr. Chen, because you studied his work, concluded that Dr. Hofeller's sorting, using his own index of prior statewide elections, predicted an outcome before the plan was enacted of a 10-3 split in favor of Republicans. You know that, correct?

A I think I read that in Dr. Chen's report, yes.

Q So Dr. Hofeller was able to draw a 10-3 map using past elections data that had nothing to do with the candidates who were actually running in our 13 congressional districts, correct?

A He was not using congressional election data, that's correct.

Q Or the candidates who had anything to do with the 2016 congressional elections, correct?

A Yes, those were different races.

Q And he accurately predicted what the outcome was going to be without knowing that, didn't he?

A Without knowing?

Q Without knowing who the candidate were going to be.

A Well, at that point, yes, we didn't know exactly.

Q But you consider it a flaw in Dr. Mattingly's work to assume that the specific candidates running those districts wouldn't make an appreciable difference in the outcome; that's what you're saying?

A No, I think candidates matter. I think a general -- a [73] general partisan index is better than using the congressional elections in that example is what I'm saying.

Q Sir, you're also critical of Dr. Mattingly for the number of counties split in his 24,000 simulated maps, aren't you?

A Yes.

Q You consider his -- the work he did on county splits to be a faulty premise making the inferential value of his 24,000 maps highly questionable, right? Again, I'm going back --

A I do talk about county splits. That's certainly true.

Q Okay. Did you know that among Dr. Mattingly's 24,000 simulated maps, the median number of counties split was 21?

A I don't think I knew that, no.

Q Do you want to look at his report to see if you'll agree with me on that? We can pull it up.

A Okay.

Q All right. Let's pull up --

A I just said I don't recall that here.

Q I'm sorry. When I say "report," I am referring to -- let me ask you this. Were you not supplied with the May 8, 2017, version of Dr. Mattingly's analysis called "Redistricting: Drawing the Line"?

A Yes.

Q Okay. If you can, please pull up Figure -- it's page 22, Figure 9, and it's the right-hand side. Page 22. There we go. If you zoom in on the right-hand chart there. Thank you.

[74] Looking at that histogram, would you agree -- would you quibble with me i f I told you that the median number of counties split in his 24,000 maps was 21?

A That looks to me pretty close, yes.

Q And you didn't take note of that a t any point in time before just this minute?

A No, I didn't say that. I just said I couldn't recall that number exactly.

Q Okay. Do you think that's too many to make his ensemble a valid ensemble?

A Well, there were fewer in the actual plans.

Q How many plans were split in the 2011 Legislative Plan, sir?

A One second. 2011 Plan? Forty.

Q Okay. And so Dr. Mattingly's ensemble basically sliced that number in half, correct?

A Yes, that would be correct.

Q That's a pretty significant improvement, wouldn't you say?

A It's a 50 percent improvement, approximately.

Q And, in fact, when you discussed county splits in your report, you found that the 2016 Plan was a marked improvement on this measure, isn't that correct? That was how you judged the effectiveness of county splits, it was a marked improvement?

A Over the 2011 Plan, yes.

[75] Q And Dr. Mattingly's 24,000 simulated maps with a meeting of 21 counties a l so represented a marked improvement over the 2011 Plan; would you not agree?

A It was an improvement, yes.

Q Cutting it in half would be a marked improvement; would you not agree?

A Significant improvement.

Q Dr. Hood, are you a college basketball fan?

A More college football. Sorry.

Q My example, because we all associate basketball as being the primary sport around these parts, is that --

JUDGE OSTEEN: Speak for yourself on that, counsel.

BY MR. EPSTEIN:

Q Dr. Hood, if the UNC Tarheels -- they play two games against Duke every year. If they go down to Duke, and they play them in game one, and they get clobbered by 50 points in that first game, and then in game two they come back to Chapel Hill, and on that

game they only lose by, let's say, 25 points, do you think that would be some kind of measure of success that they only lost by 25 points in the second game?

A Well, in sports, a loss is a loss.

Q Well, let 1 s take that analogy and use it to filter -- as a filter to review some conclusions in your report. On page 24 of your report, your main report -- so if you can go there, follow with me.

[76] A Okay.

JUDGE OSTEEN: Before we do this, how much longer do you anticipate?

MR. EPSTEIN: My guess is 5 minutes, somewhere in that range.

JUDGE OSTEEN: Let's finish up.

BY MR. EPSTEIN:

Q All right. So page 24, you state that "Compared to the 2011 Plan, the current districts show considerable improvement in terms of compactness. The current plan also demonstrates significant improvement over its predecessor in terms of maintaining communities of interest and in keeping VTDs intact." Do you see that?

A Yes, yes.

Q You're actually using the 2011 Plan as some sort of benchmark by which to judge the 2016 Plan, are you not?

A I'm making that comparison, yes.

MR. EPSTEIN: May I approach to grab the easel and a blowup, Your Honor? Thank you.

BY MR. EPSTEIN:

Q All right. Let the record reflect I have placed on the easel Plaintiff's Exhibit 2001. Are you familiar with what Exhibit 2001 is, Dr. Hood?

A I believe it's the benchmark plan.

Q 2011?

[77] A Yes, what I would call the benchmark.

Q Okay. And you used it as a benchmark, did you not, sir.

A A comparator, yes.

Q It did a very poor job of creating compact districts, didn't it?

A Many of those districts are not very compact. I've got the numbers in my report.

Q It did a very poor job of keeping counties whole, didn't it?

A There were quite a few county splits, yes. I think -- 40, I think.

Q It did a very poor job of keeping communities of interest intact, didn't it?

A Using counties as a proxy for communities of interest, yes.

Q It also double-bunked four incumbents, all Democrats, didn't it?

A There were some incumbents paired. I can't remember the exact number.

Q Would you accept my word for it that four Democrats in total were double- bunked?

A I don't have any reason to question it.

Q We're actually here this week because that plan had to be redrawn because it contained districts that were held to be unconstitutional, correct?

[78] A That is correct.

Q And, yet, despite all of these significant deficiencies with the plan that we see in front of us, Plaintiff's Exhibit 2001, you actually used it as a benchmark against which to test and judge the reasonableness of the legislature's 2016 Plan, correct?

A Correct. I mean, that's what usually occurs in these kind of comparisons.

MR. EPSTEIN: Thank you, sir. I have no further questions.

JUDGE OSTEEN: All right. Let's take a 15-minute recess. We'll come back.

MR. EPSTEIN: Your Honor, before we do, I'm very sorry. I would like to -- I've marked this exhibit. I would like to hand it to Your Honors. I know it's not our case at this point. But just as a mental note, we would like to come back and move admission of the PowerPoint as a demonstrative exhibit when we return to our case-in-chief, and it's Exhibit 3042.

JUDGE OSTEEN: Is there any objection?

MR. McKNIGHT: We don't have an objection to it coming in as a demonstrative.

JUDGE OSTEEN: Okay. We'll deal with it when we come back.

(At 10:18 a.m., break taken.)

[79] (At 10: 36 a.m., break concluded.)

MS. RIGGS: Thank you, Your Honors.

CROSS-EXAMINATION

BY MS. RIGGS:

Q Good morning, Dr. Hood.

A Good morning.

Q You've been hired by North Carolina State Defendants to defend election laws enacted by a Republican-controlled North Carolina General Assembly before, correct?

A Correct.

Q In *Covington v. North Carolina*, you testified on behalf of the State Defendants who are arguing that the 2011 State Legislative Redistricting Plan was not a racial gerrymander, right?

A Correct.

Q But the Supreme Court unanimously found that 28 of those state legislative districts were unconstitutional racial gerrymanders, correct?

A Correct.

Q In *North Carolina NAACP v. McCrory*, you testified on behalf of the State Defendants who were arguing that the 2013 Election Omnibus Law didn't violate the constitution or the Voting Rights Act, correct?

A Correct.

Q But the Fourth Circuit struck down that law as

...

Excerpts of Deposition Transcript of Thomas B. Hofeller (Jan. 24, 2017)

...

[115] MR. FARR: I would like for it to be marked.

MR. BONDURANT: That suits me. Let's make it 16A.

(WHEREUPON, Plaintiffs' Exhibit 16A was marked for identification.)

BY MR. BONDURANT:

Q Turn to Paragraph 23. Read Paragraph 23 aloud.

A "Political control of the redistricting process can also become an overarching factor. This is especially true when control shifts between the two political parties.

"This was the case in North Carolina when, in 2010, the Republicans took control of both chambers of the General Assembly (since the Governor has no role i n North Carolina redistricting).

"Politics was the primary policy determinant in drafting of the New Plan. The same was true of the Old Plan except that the Democrats political policy choices were different. Professor Ansolabehere did not take any of these [116] factors into account in his report."

MR. FARR: Can I see that, please, before we have questions on it.

BY MR. BONDURANT:

Q I want to focus on a specific sentence. Is it true, as you stated in your first expert report, in 2011, politics was the primary policy determinant in

drafting the New Plan, referring to the 2011 Congressional Redistricting Plan?

A I said it. It's true. I said it. Yes.

Q And your instructions in that regard came from Senator Rucho and Representative Lewis?

A Well, I think this was actually my -- my statement rather than their statement, but politics was certainly a major factor, absolutely. It is in every redistricting.

Q And would you turn to Paragraph 40.

A Thank you.

Q In Paragraph 40, you said, in part:

> "The General Assembly's goal was to increase Republican voting strength in New Districts 2, 3, 6, 7 and 13. This could only be accomplished by placing all the strong Democratic VTDs in either New Districts 1 or 4."

...

[127] concentrating Democratic voting strength in Districts 1, 4 and 12," and you again site Map 3 attached to your report. Did I read it correctly?

A Yes.

Q Was that the strategy which you as the principal architect of the map followed in achieving the Republicans' primary goal?

A In that plan?

Q Yes.

MR. FARR: Objection.

THE WITNESS: Yes.

MR. BONDURANT:

Q And so you had said previously that you wanted to create districts in which Republicans would have an opportunity to elect Republican candidates, correct?

A Correct.

Q And conversely, you want to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate?

A Correct.

Q And you did that by concentrating as many Democratic voters as possible into three specific districts, 1, 4 and 12?

[128] A Correct.

Q And removing as many Democratic voters as you could from the districts that you wanted to create as districts in which Republicans would be elected?

A As many as was reasonably possible, yes.

Q And the Democrats who remained in the districts that you had decided would be Republican opportunity-to-elect districts, those Democrats' opportunities to elect a Democratic candidate of their choice would be diminished, would they not ?

MR. FARR: Objection.

THE WITNESS: It would depend on what their choice was.

BY MR. BONDURANT:

Q Their opportunity to elect a Democratic candidate in the districts in which you increased Republican voting strength would be diminished, would it not?

A Yes.

Q Did you use the same strategy of assigning voters to the districts that you wanted to be Republican opportunity-to-elect districts based on their voting history in the 2016 [129] reapportionment as you did in 2011 ?

A It was a strategy, but it was not the principal strategy.

Q What was the principal strategy?

A The principal strategy was to follow criteria which would draw a plan which would be acceptable to the Court.

Q The criteria that you followed in 2016 were written criteria, were they not?

A The committee in 201 6 -- we're talking about 2016?

Q Yes.

A -- adopted a criteria statement.

Q And did you follow those criteria?

A Yes.

Q Did you have a hand in drafting t hose criteria?

A Not in the formal sense, no. I may have discussed it with probably did discuss it with the chairman.

Q Did you --

A I couldn't have proceeded on the plan without their instructions on what criteria I was supposed to follow.

Q Did you start working on the plan before the criteria were approved by the committee?

...

Excerpts of Deposition Transcript of Rep. David Lewis (Jan. 26, 2017)

...

[170] Q. No, that's okay.

A. Back in your House testimony -- May I ask my attorney a question. I don't mind you listening to what I'm going to say.

It might be possible to ask my staff, Mark, to see if the meeting with the governor's people can be pushed back. I know he's not finished. I don't mind trying to get this done today.

MR. FARR: How much time do you think you need?

MR. THORPE: Significant enough that --

MR. BONDURANT: I think you probably ought to go with the meeting and we'll split it and come back if we need to.

THE WITNESS: Yes, sir, I'll be more than glad to do that.

I'm sorry, I've tried to answer the questions that you have, and I'm sorry that I asked you to stop them.

MR. BONDURANT: You've done the best you can. We work together on this.

BY MR. THORPE:

Q. In your House floor session testimony, which is from the 19th and that we were previously in -- [171] this is on Page 34.

A. Yes, sir.

Q. -- you sort of expand on what you have previously discussed as a rationale f or the partisan advantage criteria. On Line 16 you say:

"I will tell you that the committee adopted the criteria -- adopt criteria, one of which was to seek partisan advantage for the Republicans. Now, if you ask me personally if I think that is a good thing, I will tell you I do.

"I think you are a great man."

You are referring to the person asking the question.

"I think you are a fine public servant. I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country."

Now, earlier you testified that partisan politics is just an inevitable consideration in redistricting. Here it seems like you are testifying that maximizing Republican advantage has a separate benefit.

[172] MR. FARR: Objection to the form.

I also would like to point out that he's referring to Representative Martin. I'd like to make that clear because I think he's a great guy too.

THE WITNESS: So would you ask the question again.

BY MR. THORPE:

Q. Does this testimony provide in your view a reason for partisan advantage as a criteria in the 2016 redistricting?

A. I stand by this statement. I would point out only that it may have been said in a little more cavalier fashion than was dignified on the House floor.

Representative Martin and I, although we're political adversaries, are personal friends. I've been to his home.

This was more the kind of conversation that we should have had outside and not on the floor, but, yes, I mean, I stand by what I said.

Q. And then on Page 37, Line 18, you're asked again by Representative Martin:

"Are there any race s that are not listed on these charts that the mapmakers [173] considered?"

And I assume that Representative Martin is there referring to the stat pack that contains the basket of races we've been discussing; is that correct?

A. He was.

Q. And your response is: "No, sir"?

A. Which is accurate.

Q. And you did not consider any other races and you did not instruct Dr. Hofeller to consider other races?

A. Correct.

Q. Did you instruct Dr. Hofeller to use all of the races that were provided in the stat pack?

A. No, I did not.

Q. At Line 3 of this same page, Representative Martin asks you:

"Representative Lewis, would it be accurate to say that the mapmakers considered every one of the races

that's listed in the charts that were presented at committee several times."

And you respond: "Yes, sir."

Is that correct?

A. I did respond to that by saying "Yes, sir." [174] Looking back, perhaps the answer would have been "I assume so" or "I think so."

Q. When did you learn that not all the races listed in those charts were used in constructing the 2016 maps?

A. Well, to be candid, I don't know that I ever learned that. I'm just saying when I looked at the maps, to make it simpler for me, Dr. Hofeller would just turn on the Tillis-Hagan thing. I don't really know what he looked at.

Q. You did not instruct and the written criteria do not instruct ever y one of the races to be used?

A. That's correct.

Q. You have testified a couple times today that partisanship is an inevitable part of the redistricting process.

Is that a correct assessment of your testimony?

A. Yes, sir.

Q. And -- well, I'll just -- if we could mark as Exhibit 41 a printout of a recent news article that I will ask you about a quote. And then this is on Page 4, but if you want to take a minute to read through the article, I have, of course, no objection.

[175] (WHEREUPON, Plaintiffs' Exhibit 41 was marked for identification.)

THE WITNESS: No, I'm fine.

BY MR. THORPE:

Q. So on Page 4, beneath the large block of space, you are quoted as saying:

"I think partisanship is an inherent part of who we are, and I think it will always have some role in the decisions that we make and that includes redistricting. It should not be a predominant factor, but it will always be a factor. Whether you acknowledge it or not, it will always be a factor, and to not acknowledge that is either naive or dishonest."

Were you accurately quoted in this article?

A. Yes.

Q. And do you stand by that statement?

A. I do.

Q. When you say it's an inherent part of who we are, what do you mean?

A. We're all the sum of our parts. The collective being of my political lens that I apply to taxes [176] or to spending or to whatever is going to largely reflect the Republican label behind my name. So I -- when I make decisions, that is the honest way to reflect the lens or the method by which I make those decisions.

Q. And how does that belief that it's an inherent part of who we are translate to the redistricting process that you reference in this quote?

A. While you only divide -- you know, you've got to do the one-person, one-vote thing. It would be dishonest and naive of me to say that where you put a line in X county may not affect the balance of a congressional district. So if I have a different political

philosophy or I have no political philosophy that I'm willing to acknowledge, still whatever you put a line for whatever purpose will have political impact.

I just -- it would be easy -- believe me, I want to embrace and be able to say that I think the non-partisan thing is a great thing. People love to hear about that.

I think it's more honest to say I'm going to follow the law, and I'm going to follow everything that's required of me by the law, [177] but if there is a -- if there is a discretionary decision to make, I will make it through the lens of an elected Republican.

Q. And do you consider the inclusion of partisan advantage as a criteria in the 2016 Contingent Congressional Plan -- used to adopt the 2016 Contingent Congressional Plan such a discretionary decision?

A. Yes.

Q. Do you consider any of the other criteria in the 2016 adopted criteria a discretionary decision?

A. Largely, yeah. I mean, you can draw -- you know, I chose to apply the definition of compactness that I believe, which is trying to keep as many counties whole as we can. If I had not had that as a goal, I think we could have still drawn a pretty map; it just -- maybe it's just stripes through the state. I don't know.

I think that these -- these -- other than the equal population that these were considered and balanced and harmonized together and produced a map that to the eye of a judge I think they recognized that we tried

to follow the instructions they gave us, which were very limited.

...

No. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

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QUESTIONS PRESENTED

Last Term, while *Gill v. Whitford*, 138 S. Ct. 1916 (2018), was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional districting map as an unconstitutional partisan gerrymander. After resolving *Gill* on Article III standing grounds, this Court vacated the district court's decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the 321-page decision below, the district court largely readopted its previous reasoning and became the first court post-*Gill* to strike down a legislatively enacted map as an unconstitutional partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate generalized partisan preferences, the court concluded that they had standing. The court then purported to discern judicially manageable standards for adjudicating partisan gerrymandering claims in the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clauses of Article I. The court found that the 2016 Map violates each of its newly articulated tests and enjoined the State from using the map after the November 2018 midterm elections.

The questions presented are:

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Common Cause; North Carolina Democratic Party; Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; Morton Lurie; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; Russell G. Walker, Jr.; League of Women Voters of North Carolina; William Collins; Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; Willis Williams

Defendants:

Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Representative David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; A Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of

the North Carolina State Board of Elections; North Carolina State Board of Elections; State of North Carolina

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INTRODUCTION

Fifteen years ago, a majority of this Court declined to wade into the political thicket of refereeing claims that legislatures organized along partisan lines were too partisan in their redistricting. The past two years have confirmed the wisdom of that decision. Since a federal court in Wisconsin became the first court in decades to identify and invalidate an unconstitutional partisan gerrymander (only to have this Court vacate its decision for want of standing), three more maps have been invalidated, at least six more have been challenged, five judges have been threatened with impeachment over a partisan gerrymandering case, and nearly a dozen pleas for intervention in such cases have reached this Court. All of that is in the waning years of the decennial cycle, and without a clear signal from this Court that such claims are justiciable.

Predictably, this onslaught of litigation has done nothing to bring courts any closer to discerning judicially manageable standards to guide legislatures and reviewing courts. Instead, like so many before them, the latest courts to take up that misguided charge cannot even agree on a single test. The decision below is a case in point: A two-judge majority of a three-judge district court in North Carolina laid out *four* separate theories as to how partisan gerrymandering purportedly violates four separate provisions of the Constitution. And not one of those tests provides anything close to a manageable standard for answering the original unanswerable question of how much politics is "too much."

The reason for that failure is not a lack of judicial effort or imagination. Rather, the repeated failures to articulate judicially manageable standards are a direct result of the absence of any constitutional text that limits the partisanship of state legislatures or suggests any judicially administrable line for courts to enforce. To the contrary, the framers textually committed this politically fraught task elsewhere—to politically accountable state legislatures subject to supervision by Congress. That delegation reflected not only the judgment that this inherently political task is appropriate for politically accountable legislatures, but also the view that the task is inappropriate for federal courts that need institutional independence from politics to discharge their core functions. Thus, the failure to discern judicially manageable standards for the claims here is not some judicial failing, but the framers' design.

The decision below is wrong across the board. Indeed, the court did not even get the threshold standing question right. But the decision below also confirms the more fundamental reality that courts simply do not have any business making value-laden judgments about how much politics is too much in a process that will never be free of politics. This Court should declare partisan gerrymandering claims nonjusticiable once and for all and put an end to the effort to reassign the inherently political task of districting to the federal courts.

OPINION BELOW

The district court's decision is reported at 318 F. Supp. 3d 777. JS.App.1-348.

JURISDICTION

The district court issued its decision on August 27, 2018, and appellants timely appealed. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant constitutional provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Historical and Legal Background

"Political gerrymanders are not new to the American scene." *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality op.). They are as old as—indeed, older than—the Republic. *See, e.g.*, Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21 (2013). The first documented gerrymander on this side of the Atlantic occurred in the early 1700s in Pennsylvania, where the surrounding counties colluded to suppress the city of Philadelphia's political power. *See* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26-28 (1907) ("Griffith"). A few years later, in 1732, an "occurrence of the gerrymander, of especial interest, appeared ... in the colony of North Carolina," where "the governor was engaged in dividing precincts" in an effort to "secur[e] a majority of the members of the lower house or a minority sufficiently strong to block legislation." *Id.* at 28.

Partisan gerrymandering thus was "alive and well (though not yet known by that name) at the time of the framing." *Vieth*, 541 U.S. at 274 (plurality op.). The framers likewise were acquainted with the broader tendency of political legislatures to tailor

electoral regulations to benefit favored candidates or factions. James Madison, for instance, expressly acknowledged that legislatures could "take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *The Records of the Federal Convention of 1787* 241 (M. Farrand ed. 1911) ("*Records*"). Theophilus Parsons, a delegate at the Massachusetts convention, likewise expressed concern that legislatures "might make an unequal and partial division of the states" for political gain. 2 *Debates on the Federal Constitution* 27 (J. Elliot 2d ed. 1836) ("*Debates*").

The framers' response to these concerns was not to assign the delicate task of districting to a less politically accountable body that depended on its independence from partisan politics to discharge its primary function. In other words, the framers did not give either primary responsibility or a secondary policing function over this politically fraught task to the federal judiciary. Instead, the framers responded just as they did in so many other parts of the Constitution: They countered ambition with ambition, with a structural system of checks and balances that attempted to harness the political nature of legislatures, rather than put the judiciary in the impossible position of determining when legislatures acted too much like legislatures. Specifically, the Constitution gave state legislatures the power to prescribe "[t]he times, places and manner of holding elections for Senators and Representatives," but gave Congress the power to "at any time by law make or alter such regulations." U.S. Const. art. I, §4.

Giving the federal legislature a check on a power assigned to state legislatures was by no means uncontroversial—though not because anyone thought the proper repository for the federal supervisory role was the federal courts. South Carolina's delegates to the Constitutional Convention sought to "strike out the federal power," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015), contending that "[t]he States" alone "could & must be relied on," 2 *Records* 240. Madison and others responded that Congress must have "the power to check partisan manipulation of the election process by the States." *Vieth*, 541 U.S. at 275 (plurality op.); *see also* 2 *Debates* 27 (statement of Parsons that, "[w]ithout these powers in Congress, the people can have no remedy" for partisan districting). No one even intimated that the federal courts should provide the check on the States' "partisan manipulation" or that their essential independence could survive the assignment. From the very beginning, then, the Constitution has recognized that any federal remedy for partisan gerrymandering of congressional districts lies with Congress, not with the courts.

Of course, partisan gerrymandering did not end with the ratification of the Constitution. "[T]he notoriously outrageous political districting in Massachusetts that gave the gerrymander its name" occurred in 1812. *Vieth*, 541 U.S. at 274 (plurality op.). And by 1840, gerrymandering had become such a "recognized force in party politics" that it "was generally attempted in all legislation enacted for the formation of election districts." Griffith 123. Congress was not blind to these practices. To the contrary, many of the traditional districting criteria that govern

state districting today trace their roots to federal legislation enacted in the mid-1800s to check partisan gerrymandering.

For instance, in the Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." *See also* Griffith 12 (noting that this law was "an attempt to forbid the practice of the gerrymander"). Congress imposed the same requirement again in the Apportionment Act of 1862, 12 Stat. 572, and in 1872 Congress added the restriction that districts must "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, §2. These enactments on either side of the Reconstruction Amendments underscore that just as no one at the framing thought that the federal courts were the proper entity to police partisan gerrymandering (or that the independence of the Article III courts would long survive the assignment), no one during the debates over the Reconstruction Amendments identified them as reassigning authority over partisan gerrymandering to the federal courts. And while those amendments undeniably limited the consideration of race by state actors, no contemporaneous voice suggested that they identified limits on how much partisan advantage is too much.

Rather than signaling some transfer of authority to federal courts, congressional efforts to limit redistricting abuses continued after Reconstruction. The 1872 Act was followed by the Apportionment Act of 1901, in which Congress imposed a compactness requirement. 31 Stat. 733. The contiguity, compactness, and equal population requirements were

repeated in 1911 legislation, 37 Stat. 13, but were not thereafter continued. Today, at the federal level, only the single-member-district requirement remains. *See* 2 U.S.C. §2c. But contiguity, compactness, and equal population requirements are now commonplace among state constitutions and districting laws. *See Redistricting Criteria*, Nat'l Conference of State Legislatures (Jan. 21, 2019), https://bit.ly/2SyGCgJ.

This Court has repeatedly recognized that partisan gerrymandering remains a reality. And while the Court has never articulated justiciable limits on partisan gerrymandering, it has repeatedly stated that a degree of partisan gerrymandering can be constitutional. For example, in a case involving a racial gerrymandering challenge to a North Carolina congressional district, this Court held that "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541 (1999). In a subsequent decision in that same litigation, this Court upheld that same district because "the State ha[d] articulated a legitimate political explanation for its districting decision"—namely, "the creation of a safe Democratic seat." *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 239, 242 (2001). In more recent years, including in cases that presaged this very litigation, members of this Court have reiterated that partisan gerrymandering is constitutional, even if one finds it "distasteful." *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part). In short, this Court has never embraced the proposition that partisan gerrymandering is *malum in se*, or that the Constitution wholly forbids the political

body to which it assigns the drawing of districts from drawing districts to try to achieve political gain.

B. North Carolina's Congressional Map

This case arises from the most recent round of congressional redistricting in North Carolina. In February 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map were unconstitutional racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455. In defending those districts, the General Assembly tried to reprise its successful strategy in *Cromartie II* (which involved an earlier iteration of one of the very same districts) by arguing that it was the product of partisan rather than racial considerations. The district court rejected that argument—not because it found a partisan motive no more constitutional than a racial one, but because it deemed the record insufficiently clear that the legislature was actually motivated by politics rather than race. *See id.* at 614-22. The court then gave the General Assembly 14 days to draw a new map. *Id.* at 627.

That two-week deadline made time of the essence. The chairmen of the most recent redistricting committee—Senator Robert Rucho and Representative David Lewis—promptly engaged expert mapmaker Dr. Thomas Hofeller to assist in drawing a new map. JS.App.14-15. They instructed Dr. Hofeller to comply with traditional districting criteria and all state and federal districting requirements and made clear that he should not

consider racial data at all. JS.App.15. In response to the district court's holding that the consideration of politics must be evident in the record, they instructed Dr. Hofeller to consider political data and to endeavor to draw a map that would likely preserve the existing partisan makeup of the congressional delegation. JS.App.15-16.

Meanwhile, the General Assembly appointed a new districting committee, which adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable"; ensuring contiguity and compactness by, among other things, avoiding county splits; and making "reasonable efforts" to avoid pairing incumbents. JS.App.19-20. The committee also adopted two criteria addressing racial and political data. Having just been faulted by the district court with continuing jurisdiction for unduly considering race and not having political considerations evident in the record, the committee endeavored not to make the same mistakes twice. First, the committee adopted a criterion expressly stating: "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan." JS.App.20. Second, the committee adopted a criterion labeled "Partisan Advantage," which provided: "The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation." JS.App.20.

During the committee hearing that preceded the adoption of this criteria, Representative Lewis made sure that it was "clearly stated and understood" that, "to the extent we are going to use political data in drawing this map, it is to gain partisan advantage," and not because of any correlation between political data and race. JA313. He thus "acknowledge[d] freely that this would be a political gerrymander," which he explained "is not against the law." JA308. Unsurprisingly, that candid and accountable expression drew objections from many Democratic members—including "some of the same" members who had drawn the acknowledged Democratic partisan gerrymander that this Court upheld in *Cromartie II*. JA315. When one senator asked why trying to preserve a 10-3 balance was "fair," Representative Lewis joked, "because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." JA310. When another senator urged the committee to try to increase the number of Democratic seats to 5 or 6, Representative Lewis pointed out that trying to achieve a 5-8 or 6-7 split would just be a different partisan gerrymander. JA313.

Ultimately, the committee adopted five of the seven districting criteria nearly unanimously and adopted the two dealing with racial data and partisan advantage on a party-line vote. JS.App.23. The committee approved the map by a party-line vote, and the General Assembly enacted the map ("2016 Map") with minor modifications, on party-line votes. JS.App.24.

As a matter of traditional districting criteria, the 2016 Map compares favorably to every congressional

map North Carolina has used over the past 25 years. The 2016 Map divides only 13 (out of 100) counties and splits only 12 (out of more than 2000) precincts across the entire State. JS.App.25. Moreover, no county is split between more than two districts. By contrast, the 1992 map divided 44 counties (seven of which were trifurcated into three districts) and split 77 precincts. JA326. The 1997 map divided 22 counties, the 1998 plan divided 21, the 2001 map divided 28, and the 2011 map divided 40. JA326. The 2001 map divided 22 precincts, and the 2011 map divided 68. JA326-27. The 2016 Map likewise is more compact "[u]nder several mathematical measures" than the 2011 map, and it paired only two incumbents. JS.App.25.

The *Harris* plaintiffs nonetheless filed objections to the 2016 Map, including a partisan gerrymandering challenge, but the district court rejected them. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 138 S. Ct. 2711 (2018) (mem.). The 2016 Map took effect in June 2016 and has governed the past two election cycles.

C. Pre-*Gill* District Court Proceedings

1. Shortly after the *Harris* district court approved the 2016 Map, two groups of plaintiffs filed the two lawsuits that give rise to this appeal. In August 2016, Common Cause, the North Carolina Democratic Party, and 14 individual voters filed suit against appellants (Senator Rucho, Representative Lewis, and two additional legislators) and various other state defendants alleging that the 2016 Map is an unconstitutional partisan gerrymander. JS.App.26-27. A suit brought by the League of Women Voters

("League") and 12 individual voters followed the next month. JS.App.27.

Both complaints alleged that the map violates the Equal Protection Clause and the First Amendment. JS.App.27. The Common Cause plaintiffs further alleged that the map violates both §2 and §4 of Article I. JS.App.28. Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Map as a whole, and the Common Cause plaintiffs claimed "standing to assert ... district-by-district challenges" to every district. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 609 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679 (2018).

The cases were assigned to a three-judge district court. The court consolidated the cases and originally scheduled them for trial in June 2017, but subsequently postponed trial on its own motion. Amidst the pretrial proceedings, this Court agreed to hear *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.). Appellants asked the district court to stay proceedings pending resolution of *Gill*, but the court refused, forging ahead with a four-day bench trial in October 2017. JS.App.29.

2. Three months later, the district court issued a divided opinion authored by Judge Wynn holding that plaintiffs had statewide standing to press their claims and finding the 2016 Map unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. JS.App.33-34. The majority immediately enjoined the State from using the 2016 Map in future elections and again gave the General Assembly a mere two weeks to pass a new congressional map. JS.App.34. After the court

refused to stay its order, appellants filed an emergency stay application with this Court. JS.App.34. This Court granted that application and stayed the order pending the filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.).

On June 18, the Court issued its decision in *Gill*, concluding that the plaintiffs had not demonstrated standing to bring their statewide challenge to Wisconsin's districting map. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). This Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Gill*. JS.App.34.

D. Post-*Gill* District Court Decision

Two months later, the district court issued a 321-page divided opinion once again invalidating the 2016 Map. The majority opinion, again authored by Judge Wynn, concluded that plaintiffs have standing to press their partisan gerrymandering claims, that such claims are justiciable under the Equal Protection Clause, the First Amendment, and §2 and §4 of Article I, and that the 2016 Map violates all four provisions. JS.App.35-313.

1. Starting with the equal protection claims, the court acknowledged that *Gill* rejected the "statewide" standing theory that plaintiffs had previously asserted. JS.App.41-43. The court further conceded that Common Cause and several individual plaintiffs lacked standing because they failed to claim anything other than a statewide injury. JS.App.65-67 & n.15. Nonetheless, the court concluded that individual "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts" had standing to

press vote-dilution claims under the Equal Protection Clause. JS.App.50.[1]

The court concluded that these "dilutionary injuries" afforded these same plaintiffs standing under the First Amendment. JS.App.69-70. In addition, the court concluded that various individual plaintiffs had standing to press "non-dilutionary" claims under the First Amendment because, for example, they "had difficulty convincing fellow Democrats to 'come out to vote.'" JS.App.69-70.[2] The court reasoned that, "because these injuries are statewide, such Plaintiffs have standing to lodge a First Amendment challenge to the 2016 Plan as a whole." JS.App.74.

Finally, the court concluded that the Common Cause plaintiffs have standing to press their Article I claims. JS.App.74. Those claims, the court posited, are "premised on federalism," and so "do not stop at a single district's lines." JS.App.74-75. Although the court acknowledged that such "structural harm does not absolve litigants from ... alleg[ing] particularized injuries," it found that requirement satisfied because at least one plaintiff in each district alleged "dilutionary injuries," and because plaintiffs had proven adequate "non-dilutionary injuries"—*e.g.*, "difficulty encouraging people to vote on account of

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[1] The court concluded that the North Carolina Democratic Party had organizational standing to challenge each district, and that the League, "at a minimum," had organizational standing to challenge one district (CD9). JS.App.64-65 n.14.

[2] The court concluded the North Carolina Democratic Party, the League, and Common Cause suffered non-dilutionary injuries too. JS.App.72-74.

widespread belief that electoral outcomes are foregone conclusions." JS.App.76, 78. "[B]ecause these structural and associational harms have statewide implications," the court continued, they "are sufficient to confer standing on a statewide basis" under the Elections Clauses. JS.App.83.

2. Turning to justiciability, the court deemed itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to conclude that partisan gerrymandering claims are justiciable. JS.App.86-88; *but see Gill*, 138 S. Ct. at 1929 (noting that the justiciability question is "unresolved"). The court independently saw "good reason" to hold such claims justiciable, maintaining that partisan gerrymandering is "contrary to the republican system put in place by the Framers." JS.App.88-89, 92. As for the thorny problem of identifying a judicially manageable standard for determining how much consideration of politics is too much, the court declared that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in ... partisan gerrymandering" at all. JS.App.118.

3. Proceeding to the merits, the court began by purporting to discern a judicially manageable standard for adjudicating plaintiffs' equal protection claims. To prove such claims, the court concluded, a plaintiff must demonstrate (1) "discriminatory intent" and (2) "discriminatory effects," at which point the burden shifts to the defendant to prove that (3) those "discriminatory effects are attributable to the state's

political geography or another legitimate redistricting objective." JS.App.138-39. As to intent, although the court had just concluded that *any* amount of districting for partisan advantage is impermissible, it insisted that its equal protection analysis "*does not rest*" on that conclusion. JS.App.119. Instead, the court "assume[d]" for the sake of argument that plaintiffs must show that "a legislative mapdrawer's predominant purpose ... was to 'subordinate adherents of one political party and entrench a rival party in power.'" JS.App.145-46. The court then found its "assume[d]" intent standard satisfied in all but one district (CD5) based on a variety of "statewide" and "district-specific" evidence. JS.App.155, 223, 273.

As to discriminatory effects, the court concluded that a plaintiff proves discriminatory effects whenever "the dilution of the votes of supporters of a disfavored party in a particular district ... is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." JS.App.152. Based on its review of assorted "partisan symmetry" metrics—including the "efficiency gap," "partisan bias," and the "mean-median difference," JS.App.191-92, 209—the court found "'strong proof' of the 2016 [Map]'s discriminatory effects" based on statewide evidence. JS.App.214. The court also found "district-specific evidence" of discriminatory effects in all but CD5. JS.App.227-74. The court then determined that no legitimate redistricting objective could justify the "dilution of ... voters' votes," and so held that "each of those twelve districts constitutes an invidious

partisan gerrymander in violation of the Equal Protection Clause." JS.App.273-74.

As to the First Amendment claim, the court acknowledged (with considerable understatement) that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." JS.App.282. But the court purported to discern a judicially manageable "three-prong test": (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan ... burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." JS.App.286.

Discarding its assumption under the Equal Protection Clause, the court concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment. JS.App.287. It further concluded that, under prong two, a plaintiff need only show more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, which could be satisfied by testimony such as "[i]t was really hard to try to galvanize people to participate," as well as evidence that Democrats had trouble "translat[ing] their votes into seats." JS.App.287-88, 290, 294. Finding its novel test satisfied, the court held that the 2016 Map as an undifferentiated whole "violates the First Amendment." JS.App.299-300.

Finally, the court concluded that the 2016 Map violates the Elections Clauses. The court did not (because it could not) cite any decision from any court that had found justiciable partisan gerrymandering standards in the Elections Clauses. Regardless, it concluded that partisan gerrymandering violates §2 of Article I because it deprives "the People" of their right to elect Representatives, JS.App.306, and violates §4 because it "exceeds" the States' "delegated authority" to draw districts, JS.App.303. While the §4 violation was in part derivative of the majority's §2, equal protection, and First Amendment holdings, *see* JS.App.303, the court justified both of its Article I conclusions on the theory that partisan advantage is a categorically unconstitutional motivation for government action, *see* JS.App.303-13.

5. Judge Osteen concurred in part and dissented in part. As to standing, he concluded that plaintiffs who live in "packed" districts and "concede[] election of the candidate of his or her choice" lack standing because they lack an injury that affects them "in a [particular] and individual way." JS.App.327, 330-31. He also "disagree[d]" that plaintiffs "have standing to assert a statewide claim as to the statewide collective effect of any political gerrymandering." JS.App.327-28. He further concluded that the organizational plaintiffs have standing "only to the extent they challenge the districts on the basis of district-specific injury to individual members." JS.App.332-34.

On the merits, Judge Osteen expressed doubt that "there is a constitutional, and judicially manageable, standard" under the Equal Protection Clause "for limiting partisan political consideration by a partisan

legislative body." JS.App.322 n.1. He rejected the suggestion that "the Constitution does [not] permit consideration by a legislative body of both political and partisan interests in the redistricting process." JS.App.337. He expressed similar skepticism regarding the justiciability of plaintiffs' First Amendment claims, and lamented that the majority's test would "foreclose all partisan considerations in the redistricting process." JS.App.322 n.1, 343. Moreover, he disagreed that plaintiffs had shown First Amendment injury, noting that they remain "free under the new [districting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." JS.App.344. Finally, Judge Osteen rejected the notion that the Elections Clause "completely prohibits" States from districting for partisan advantage. JS.App.347.

6. After concluding that the 2016 Map violates every constitutional provision plaintiffs invoked, the majority enjoined the State from using the map in future elections after November 2018 and gave the General Assembly three weeks to draw, consider, debate, and vote on a new congressional map. JS.App.318-19. The court announced that it was open to enjoining use of the 2016 Map in the November 2018 midterm elections. JS.App.314-15. But after plaintiffs agreed with appellants that such a remedy would be inappropriate, and further agreed with appellants that the court should stay remedial proceedings pending this Court's review, the district court entered a stay. JS.App.361.

7. In November 2018, the State conducted the 2018 congressional elections. Republican candidates won seats in nine districts, and Democratic candidates won seats in three districts.[3] The race in one district that the district court held was an unconstitutional pro-Republican gerrymander (CD9), JS.App.259, remains so close that the State has not yet certified a winner.

SUMMARY OF ARGUMENT

While this Court has struggled for decades to find a judicially manageable standard to adjudicate partisan gerrymandering claims, the court below purported to find four different and perfectly administrable tests lurking within four different constitutional provisions. That conclusion is every bit as implausible as it sounds. In reality, plaintiffs do not even have standing to vindicate their partisan preferences in federal court, and their claims suffer from the even more basic flaw that they seek to have the courts adjudicate grievances that the framers wisely delegated elsewhere.

The first problem with plaintiffs' claims is that they lack standing to bring them. The claims here predate *Gill*, and at bottom are complaints about the partisan composition of the statewide congressional delegation. Although plaintiffs did their best to retrofit their claims in light of *Gill*, they still lack standing. The district court found it sufficient that certain plaintiffs' votes purportedly could have carried

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[3] *See* N.C. State Board of Elections & Ethics Enforcement, *11/06/2018 Unofficial Local Elections Results—Statewide*, https://bit.ly/2JD5HjT (last visited Feb. 7, 2019).

more weight in hypothetical, alternative districts—even if their candidates of choice were still projected to lose (or win) in those hypothetical districts. That is precisely the kind of "vote dilution" theory that this Court found lacking in *Gill*. And plaintiffs' purported "non-dilutionary" injuries—things like having a hard time convincing other Democrats to vote—are even less concrete and particularized than the generalized grievances that this Court rejected in *Gill*.

Plaintiffs' partisan gerrymandering claims fail for the more fundamental reason that they are nonjusticiable. This Court has identified two critical factors that render a claim nonjusticiable—a textual commitment to another branch and the lack of judicially discernible and manageable standards. Both factors make clear that partisan gerrymandering claims are not justiciable. First, the framers wisely delegated primary responsibility for the politically fraught task of redistricting to state legislatures subject to congressional oversight. That delegation reflects that this task is appropriate for politically accountable legislatures and affirmatively inappropriate for federal courts that depend on their independence and insulation from politics to discharge their core responsibilities. Second, three decades of judicial efforts have made only one thing clear: A judicially manageable test for adjudicating partisan gerrymandering claims does not exist. Those failed efforts are no accident. The Constitution does not impose affirmative limits on the partisan motivations of legislatures or provide any textual basis for developing administrable tests. Courts have been reduced to testing for an "intent" that is not constitutionally forbidden and for "effects" that look

for deviations from a proportional representation baseline with no grounding in the Constitution.

The absence of judicially manageable standards is borne out by the decision below, which proposed four separate tests grounded in four different constitutional provisions. Each test is more sweeping and less forgiving than the last, and most purport to outlaw politics from districting entirely. Indeed, the district court all but conceded that there is no way to decide how much partisan motivation is "too much" when it announced at the outset that its own view is "any." That, of course, would provide an administrable test at the expense of rewriting the Constitution. The framers expressly delegated districting to the available entity perhaps most liable to influences of party and faction, subject to supervision by the branch of the federal government most susceptible to those same influences. To assert a judicial role to keep partisan politics—whether some or all—out of that process is to substitute contemporary sensibilities for the framers' design.

In all events, even if there were an identifiable constitutional line for extreme partisan gerrymandering, the 2016 Map would not cross it. By design, the 2016 Map fares well when measured by traditional districting criteria. It outperforms any recent North Carolina congressional map in terms of divided counties or split precincts. To be sure, the General Assembly was quite candid about its partisan objectives, but it had just been faulted by a federal court for lacking a clear record of political, rather than racial, motivation. It also had been reassured by this Court that at least some degree of intentional partisan

gerrymandering is permissible. Those reassurances were correct, and the time has come for this Court to make clear that the Constitution does not provide courts with the tools or the responsibility to say how much partisan motivation is too much.

ARGUMENT

I. Plaintiffs Lack Standing To Press Their Partisan Gerrymandering Claims.

1. The first problem with plaintiffs' partisan gerrymandering claims is that they lack standing to bring them. Indeed, plaintiffs' lack of standing reflects their lack of any justiciable constitutional injury, as interests that neither translate to real-world pocketbook-type injuries nor are protected by clear constitutional prohibitions are too abstract to constitute the requisite "concrete and particularized" injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). For example, a plaintiff claiming an injury in the denial of the benefits of a republican form of government, as opposed to a concrete dilution of his vote, has a standing problem as well as a justiciability problem. And unlike plaintiffs bringing one-person-one-vote or racial gerrymandering claims, plaintiffs cannot point to a concrete dilution of their vote or a particularized injury from being sorted on the basis of their race.

It is not surprising, then, that this Court concluded that the plaintiffs in *Gill*—who identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates"—failed to establish standing to challenge Wisconsin's entire districting map as a partisan gerrymander. 138 S. Ct. at 1923. In reaching

that conclusion, the Court first rejected the argument that injuries based on a "statewide harm to [the plaintiffs'] interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking'" satisfy Article III. *Id.* at 1931. As the Court explained, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* An "abstract interest in policies adopted by the legislature," by contrast, is "a nonjusticiable 'general interest common to all members of the public." *Id.* "To the extent" the plaintiffs claimed injuries through "the dilution of their votes," the Court continued, "that injury is district specific" and does not entitle a plaintiff to bring a statewide challenge. *Id.* at 1930.

Second, the Court concluded that the plaintiffs had not proven that they actually suffered any district-specific injuries. The lead plaintiff, for example, lived in a district that, "under any plausible circumstances, [was] a heavily Democratic district," *id.* at 1924, so the alleged gerrymander "ha[d] not affected [his] individual vote for his Assembly representative," *id.* at 1933. And while some plaintiffs had alleged district-specific harms, they had not "meaningfully pursue[d]" those allegations, but "instead rested their case ... on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1932. That underscored "the fundamental problem" with *Gill*: The case was about "group political interests" and "generalized partisan preferences" that this Court has no "responsib[ility]" to "vindicate." *Id.* at 1933.

2. This case suffers from the same basic flaws. The case was brought long before this Court's guidance in *Gill* and has always been a statewide complaint about the partisan nature of the North Carolina congressional map and the partisan composition of the congressional delegation. As the Common Cause plaintiffs explained in their complaint, their claimed injury arises from their belief that the 2016 Map "has made it more difficult[] ... for a Democratic candidate to be elected in the general election to the House of Representatives." JA229. The League plaintiffs—who, like the *Gill* plaintiffs, self-identified as "Democrats who support the public policies espoused by the Democratic Party and Democratic Party candidates"—similarly alleged that they and "other Democratic voters across the State" have standing to challenge the 2016 Map because it purportedly "impairs" their "ability to elect their preferred congressional candidates"—*i.e.*, more Democrats. JA238, 241; *see also* JA233 (complaining that the 2016 Map "dilut[es] the electoral influence of one party's supporters").

To be sure, plaintiffs attempted to retrofit their complaints to the teaching of *Gill*. But neither of the two theories on which the district court found that they have standing survives scrutiny. The court first found that certain individual Common Cause plaintiffs suffered district-specific "dilutionary" injuries because their votes could "carry more weight" in districts under their "hypothetical" proposed plans, including Plan 2-297. JS.App.49-50 & n.10, 63

(alteration omitted).[4] In the court's view, these "dilutionary" injuries entitled plaintiffs to press all four of their constitutional claims. JS.App.63, 68-69, 77-78. In reality, however, most of these purported "dilutionary" injuries suffer from the same flaw this Court identified in *Gill*: Plaintiffs failed to prove that any alleged partisan gerrymandering "affected" their "ability to vote for and elect a Democrat in [their] district[s]." *Gill*, 138 S. Ct. at 1925.

Consider plaintiff Alice Bordsen, who resided in CD4 and was among the majority's leading examples of someone suffering "dilutionary" injury. JS.App.54. In both the 2014 and 2016 elections—the only two elections she lived in CD4[5]—Bordsen's candidate of choice *prevailed*. Dkt.101-15:12-13. And by plaintiffs' own expert's telling, in hypothetical elections conducted under their proposed "neutral" plan, the Democratic candidate would win even more of the two-party vote—63.22%—than the 62.32% won under the 2016 Map. JA275. Thus, like the lead plaintiff in *Gill*, Bordsen's district would have been "heavily Democratic" "under any plausible circumstances." 138 S. Ct. at 1924. Bordsen is not alone in this regard.

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[4] After this Court vacated the district court's decision in light of *Gill*, the League plaintiffs claimed standing in 12 districts, either through "individual voter plaintiffs and/or League members." Dkt.139:14-17. But with the exception of two of those districts, the League never provided any specific information about the identities of these individuals, or what they believed their injuries to be. Meanwhile, the district court concluded that numerous individual voter plaintiffs named in the League's complaint lacked standing. JS.App.66-67.

[5] Bordsen moved to the heavily Democratic area of Chapel Hill in 2013. Dkt.101-15:9-14.

The district court found that other plaintiffs living in Democratic districts had standing on a "dilutionary" theory even though their districts would remain majority-Democratic under their own proposed maps. *See* JS.App.51-52, 61-62 (plaintiffs Larry Hall and John Gresham in CD1 and CD12); JA275. Such plaintiffs suffer no cognizable injury, dilutive or otherwise, under *Gill* or any other viable theory.

The district court also committed the same error in reverse. For instance, Richard and Cheryl Taft—residents of CD3—live in a Republican-leaning district. Under the 2016 Map, the Republican candidate in their district was projected to win 54.92% of the two-party vote share and ultimately prevailed. JS.App.237; JA275. Under plaintiffs' proposed plan, the "expected Republican vote share" in the Tafts' district was 54.43%. JS.App.238; JA275. Thus, regardless of the supposed "gerrymander," the Tafts would live in a Republican district represented by the same Republican Congressman who has represented CD3 for nearly 25 years. Underscoring the absence of any concrete and particularized injury, the Tafts themselves voted to re-elect the incumbent. Dkt.101-10:18; Dkt.101-11:15.

Tellingly, the League plaintiffs have agreed that the Tafts suffered no "dilutionary" injury, and they concede, contrary to the district court's conclusions, that *no* plaintiff has standing to challenge CD3. Mot.24. They likewise concede that no plaintiff has standing to challenge CD10 and CD11, Mot.9, districts that (along with CD3, CD6, and CD7) were projected to remain majority-Republican districts under plaintiffs' proposed plan. JA275. Indeed, of the 13

districts that the district court invalidated as partisan gerrymanders, there are only three that plaintiffs claim would have changed hands under their proposed map. JS.App.48 n.10.

Even as to those, plaintiffs lack a legally cognizable injury. After all, plaintiffs are not complaining that their votes *actually* carry less weight, as is the case in a malapportionment claim. Nor are they complaining that they were placed in their districts on the basis of an impermissible consideration like race. They are just complaining that they want to live in districts that make it easier to elect their preferred candidates. But every voter would like to live in a district that produces the voter's ideal candidate in election after election, and no one does. Partisan identity is just one of the many aspects of a candidate that pleases or frustrates any particular voter, and voters do not have a legally protected interest in being able to vote for candidates they like. If each vote is counted and counted equally, and no one is sorted by race or another invidious basis, then individual voters lack an Article III injury. This Court has never embraced "the extraordinary proposition that voters have a legally protected and judicially cognizable interest in the particular political composition of their districts." Br. for United States as *Amicus Curiae* 16, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016).

3. The district court's alternative holding—that plaintiffs have suffered "non-dilutionary" injuries that allow them to challenge the *entire* map under the First Amendment and the Elections Clauses—is even more deeply flawed and inconsistent with *Gill*, as it would

give essentially every voter in the State the right to challenge every district in the State. Take League plaintiff Elizabeth Evans, a resident of heavily Democratic CD1. The district court found that Evans *lacked* standing to raise an equal protection challenge because she expressly disclaimed any district-specific injury. *See* JS.App.66-67 ("I have a problem with the plan statewide[.]"). The court nonetheless concluded that Evans *did* have standing on a "non-dilutionary" theory because she testified that, in "the most recent election, a lot of people did not come out to vote" "[d]espite my calling them." Dkt.101-7:16; JS.App.70. The court further concluded that these "non-dilutionary" injuries "do not stop at a single district's lines," but rather empowered Evans to challenge the map "as a whole." JS.App.74.

The League plaintiffs have declined to defend this radical theory, and rightly so. *See* Mot.21-25 (asserting only a "dilutionary" theory). As Judge Osteen explained, these kinds of exceedingly generic injuries implicate nothing more than a general "interest 'in the[] collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Gill*, 138 S. Ct. at 1931. Calling that a First Amendment injury (or, worse still, an Elections Clause injury) does not change the fact that it is a "'general interest common to all members of the public.'" *Id.*

Indeed, recognizing such an abstract interest as a sufficient basis for a federal lawsuit may be even more dangerous than opening up federal courts to partisan gerrymandering claims. The latter claims are at least limited to relatively rare districting legislation, while

all manner of ordinary legislation could be said to make it marginally harder to rally fellow citizens to vote, organize, or take to the street. The answer to all that legislation is more constitutionally protected speech, petitioning, and other effort, not a lawsuit based on nothing more than a grievance that a Republican-controlled legislature that could have drawn a map with six Democratic-leaning districts drew one with only three. That does not give rise to a concrete and particularized injury, let alone violate any cognizable constitutional protection.

II. Partisan Gerrymandering Claims Are Not Justiciable.

Plaintiffs' claims suffer the deeper defect that they are nonjusticiable. Indeed, much of the difficulty that plaintiffs here and in *Gill* have had in identifying a concrete and particularized injury stems from the lack of a justiciable underlying claim. For most of the history of the Republic, the notion that the answer to partisan gerrymandering would lie in the federal courts would have been quite remarkable. And, in contrast to one-person-one-vote and racial discrimination claims, this Court has never been able to settle on an administrable standard for adjudicating such claims.

Fifteen years ago, a plurality of this Court concluded that this is because judicially discernible and manageable standards for resolving partisan gerrymandering claims do not exist. *See Vieth*, 541 U.S. at 281-82 (plurality op.). That conclusion was correct then, and it is even more obviously correct today. The framers, in their wisdom, delegated the sensitive task of federal oversight of state-enacted

congressional districting legislation to Congress, not the federal courts. In part because of that delegation, there are no judicially manageable standards to discover. The many "years of judicial effort with virtually nothing to show for it," both before and after *Vieth*, confirm "that the judicial department has no business entertaining" partisan gerrymandering claims. *Id.* at 277, 281.

A. The Framers Delegated the Delicate Task of Federal Oversight of State Regulations Concerning Congressional Elections to Congress, Not Federal Courts.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court identified six factors relevant to determining whether a claim is nonjusticiable. More recent cases have focused on the first two of those factors—textual commitment to a coordinate branch and lack of judicially manageable standards—as the most salient. *See, e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Nixon v. United States*, 506 U.S. 224, 228 (1993). In *Zivotofsky*, for example, the Court limited its analysis to these two factors, and the plurality in *Vieth* observed that the *Baker* factors "are probably listed in descending order of both importance and certainty." 541 U.S. at 278. Here, the first two factors both point in the same direction: Claims that congressional districting maps constitute unconstitutional partisan gerrymanders are not justiciable.

The framers hotly debated whether some part of the newly formed federal government should have a supervisory authority over state laws regulating the

times, places, and manner of congressional elections. Some wanted to give the exclusive authority to regulate congressional elections to the newly created federal Congress, while others wanted to give plenary authority to state legislatures with no possibility of a federal override. That debate took place in terms familiar to contemporary debates over partisan gerrymandering. The framers understood that the composition of the new federal Congress would differ from that of the state legislature in ways that might favor one faction over another. *See, e.g.*, 2 *Debates* 26-27.

The framers ultimately reached a compromise reflected in the Elections Clause of Article I, §4, Clause 1, in which state legislatures would have primary authority to set the regulations for the "times, places, and manner" of congressional elections, including district lines, but "Congress may at any time by law make or alter such regulations." In reaching that compromise, it was not lost on the framers that state legislatures might try, as colonial legislatures did before them, "to mould their regulations as to favor the candidates they wished to succeed." 2 *Records* 241. But the framers countered ambition with ambition, giving state legislatures the power to draw congressional districts, and textually committing the power to override their districting laws to Congress.

Three aspects of this textual delegation to Congress are notable. Each underscores that partisan gerrymandering claims are not justiciable.

First, it is telling that at no point during this debate did it occur to anyone that the federal courts were the proper entity to oversee election regulations

to ensure they did not give undue advantage to any one party or faction. To be sure, the principal axis for the discussion was a vertical debate about federalism, not a horizontal debate about which branch of the federal government would perform the supervision. But that is the point. It was obvious to the framing generation that the whole business of regulating the times, places, and manner of congressional elections was so inherently political and so fraught with temptations for partisan manipulation that the only branch suitable for a supervisory role was the federal Congress. As the plurality put the point in *Vieth*, "[t]he Constitution clearly contemplates districting by political entities, see Article I, §4, and unsurprisingly that turns out to be root-and-branch a matter of politics." 541 U.S. at 285. The idea that federal courts should be dragged into the business of refereeing disputes about whether election regulations were too nakedly political recommended itself to no one.[6]

Second, the framers' decision to delegate this supervisory authority to Congress reflected not only that such a role was appropriate for a legislative body, but also that the role was wholly antithetical to the

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[6] To be sure, the textual delegation to Congress in the Elections Clause is limited to congressional elections. But that does not suggest that partisan gerrymandering claims concerning the districts drawn for state and local elections are any more justiciable. To the contrary, the primary debate over the Elections Clause was a federalism debate, and a justification for federal intrusion into state and local elections, as opposed to congressional elections, did not even occur to the framers. Instead, the framers left that authority with the States and did not *sub silentio* transfer it to the federal courts. *Cf.* U.S. Const. amend. X.

independence necessary for the Article III courts to discharge their core function. Needless to say, since the idea of giving the new federal courts a partial office in supervising election regulations never occurred to anyone in the framing generation, there is no direct discussion of why doing so would be a bad idea. That said, the framers did give passing thought to assigning other politically fraught tasks to the new federal courts, and they rejected such assignments in an effort to preserve the necessary independence of the Article III courts.

Take, for example, the debate over where to locate the power to try impeachments, which this Court surveyed in *Nixon*. The framers struggled with where to lodge that awesome power and briefly considered assigning it to this Court. But beyond the presiding role of the Chief Justice in presidential impeachment trials, the framers rejected a judicial role for a host of reasons, including that judicial involvement in such a politically fraught task was inconsistent with the core judicial role, the composition of the Court, and the independence of Article III courts. *See Nixon*, 506 U.S. at 233-36. In particular, the framers thought this politically charged role should be discharged by a more numerous body that was politically accountable, and worried that judicial involvement in impeachment would compromise the ability of courts to consider any related criminal proceedings impartially. *Id.* More broadly, the framers were concerned that involvement in such a politically divisive task could undermine the Court's reputation in ways that prohibited it from discharging its core functions. All of those same concerns would apply in spades to judicial oversight designed to ensure that election regulations are not

unduly partisan or do not favor one party over another too much.

Third, Congress has exercised its authority and continues to actively debate measures to address concerns with partisan gerrymandering. As noted, *see* pp.6-7, *supra*, Congress has long employed its Election Clause authority to dictate how States undertake congressional districting. For many decades, Congress imposed requirements of compactness and contiguousness. *See* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1911, 37 Stat. 13. In addition, Congress has always possessed, and sometimes exercised, *see* 55 Stat. 761, 762 (1941), the power to essentially moot issues of partisan congressional districting by providing for statewide elections, rather than single-member districts.

The power to address partisan gerrymandering has not been lost on more recent Congresses. During the last Congress, legislators introduced numerous bills and resolutions seeking to do just that. *See* S. 3123, 115th Cong. (2018); H. Res. 364, 115th Cong. (2017); H. Res. 343, 115th Cong. (2017); H. Res. 283, 115th Cong. (2017). And the very first bill introduced by the House of Representatives in the current Congress seeks to do the same. *See* H.R. 1, 116th Cong. §2400 *et seq.* (2019). The League plaintiffs' own counsel has professed confidence that this bill "*is* going to be passed by the House," and that, "[i]f Democrats win unified control of Washington in 2020, it's also likely that some or all of H.R. 1 will become law." Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, Election Law Blog (Jan. 9, 2019), https://bit.ly/2RSEj86.

The ultimate success or failure of such initiatives will depend on the decisions of politically accountable legislators, which is precisely what the framers intended. The idea that similar limits should be imposed by designedly independent judges who would be forced into the political thicket time and again pursuant to mandatory appellate jurisdiction should be a non-starter. The framers delegated this delicate and politically fraught task to Congress for good and sufficient reasons, and this Court should decline the invitation to reassign the authority to itself.

Finally, it bears emphasis that nothing in the Reconstruction Amendments suggests a revisiting of the original allocation of authority to Congress. Those amendments plainly altered the federal-state balance in important respects, and even more obviously made clear beyond cavil that the use of race by state actors stands on a different footing from the consideration of all other matters, including partisan politics. But nothing in those amendments revisits the Election Clause or suggests that federal courts should become involved in the dangerous business of trying to determine how much partisan motivation is too much when it comes to districting or other election regulations.[7]

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[7] In light of the Reconstruction Amendments, the textual commitment to Congress in the Elections Clause does not mean that all claims concerning congressional districting, including one-person-one-vote or racial gerrymandering claims, are nonjusticiable. To the contrary, the central lesson of *Baker* is that whether a claim is justiciable turns on the precise nature of the claim and the constitutional provision invoked. *See* 369 U.S. at 208-37 (finding one-person-one-vote claim justiciable under

B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims.

Partisan gerrymandering claims plainly flunk the second critical test for justiciability. Time has proven that there are no judicially manageable standards waiting to be found.

1. While partisan gerrymandering is as old as the Republic, this Court's history with such claims is unproductive, revealing, and short. For most of the Nation's history, it did not even occur to anyone that a distinct judicial remedy for this inherently political problem existed. While litigants might assail partisan motivations as part of their rhetoric in bringing claims under state constitutions or the Guarantee Clause, claims that a gerrymander was unconstitutional simply because it was too partisan were unheard of. This absence of "partisan gerrymandering" claims was not for lack of partisan gerrymandering. To the contrary, some of the most egregious partisan gerrymanders in our history, including the redistricting that lent its name to the practice, took place in the early years of the Republic. What is more, the scope for partisan gerrymandering was even greater before this Court began policing equal population requirements. Nonetheless, for roughly 150 years, filing a lawsuit complaining that a partisan gerrymander was unconstitutional because it was too partisan was seen as a *non sequitur*.

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the Fourteenth Amendment without overruling cases finding comparable claims under Guarantee Clause nonjusticiable).

This Court's decision in *Baker v. Carr* provided the impetus for litigation attacking partisan gerrymandering, but it was not until 1986 that a majority of the Court declared itself not "persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided." *Bandemer*, 478 U.S. at 110. Nonetheless, that same majority failed to agree on what those judicially discernible and manageable standards might be, and subsequent efforts by lower courts and this Court have proven no more successful. In *Vieth*, for example, the plurality surveyed the efforts of the lower federal courts in the wake of *Bandemer* and found "[e]ighteen years of judicial effort with virtually nothing to show for it." 541 U.S. at 281. Moreover, in *Vieth* itself, the four Justices who would have held partisan gerrymandering claims justiciable "c[a]me up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed" by the challengers there. *Id.* at 292.

The search for a judicially administrable standard has proven no more successful in the years since *Vieth*. The first court to perceive that it had identified the elusive standard had its efforts vacated by this Court for the lack of standing. *See Gill*, 138 S. Ct. at 1933. In the wake of *Gill*, partisan gerrymandering claims have proliferated, but what has become crystal clear is not an administrable standard but the institutional costs of this litigation to the integrity and independence of the courts. Since *Gill*, maps in three States (North Carolina, Pennsylvania, Maryland) have been invalidated in whole or in part, and partisan gerrymandering claims remain pending in

Ohio, Michigan, Wisconsin, and North Carolina (now challenging the state map). Predictably, these claims target States where voters are closely divided and politically motivated challengers have the most to gain from a victory in the courts. Predictably, these inherently political cases tax the federal courts' reputation for independence; indeed, one of the state court decisions promptly produced threats to impeach the judges involved. Predictably, every single one of these cases has already found its way to this Court at least once, and such cases would continue to pile up on this Court's mandatory appellate docket if they are given this Court's imprimatur. Yet what all of these cases have still failed to produce is any consensus on how to resolve them.

2. The courts' persistent inability to discern any manageable standards for adjudicating partisan gerrymandering claims is no accident. The difficulty is not the failure to perceive a judicially manageable test that lies just beyond the judicial grasp. The problem is far more fundamental: Partisan gerrymandering is simply not amenable to a judicial solution. The framers understood the political nature of this issue and attempted to address it structurally by imposing Congress as a check on state legislatures. But nothing in the Elections Clause or any constitutional amendment since gives the courts the tools to address this problem or the text from which to derive an administrable test. In the absence of such text, the courts are simply being invited to invent a test for determining when political branches organized along partisan lines and deliberately assigned an inherently political task engage in "too much" partisan activity. The Constitution provides no

basis for a judicial answer to that question, and forging ahead nonetheless threatens to undermine the independence and integrity on which the Article III courts depend in adjudicating questions where the Constitution provides clear but unpopular answers.

The fundamental absence of judicially administrable standards is well illustrated by the shortcomings in the elements of the tests commonly proposed. Ever since *Bandemer*, tests for undue partisan gerrymandering typically have combined three elements: intent, effects, and some effort to measure the extent of partisan advantage or distortion. Each of those elements is misguided and exposes the more fundamental problems with identifying a judicially manageable standard.

Intent. Intent tests are a standard feature of constitutional law, but they are generally employed because government action taken with a certain intent is constitutionally forbidden. The most obvious example is racial discrimination. This Court's cases focus on discriminatory intent precisely because intentional discrimination on the basis of race is verboten in all but the narrowest of circumstances. But while intentionally dividing voters on the basis of race is constitutionally suspect, it is not open to this Court to say that "the purpose of segregating voters on the basis of [politics] is not a lawful one" under the Constitution. *Vieth*, 541 U.S. at 286 (plurality op.). "[P]artisan districting is a lawful and common practice." *Id.* Thus, from the beginning of its efforts to police partisan gerrymandering, this Court has acknowledged that a degree of partisan motivation is

inevitable, understandable, and constitutionally acceptable.

Bandemer, for example, acknowledged that "[p]olitics and political considerations are inseparable from districting and apportionment." 478 U.S. at 128 (plurality op.). It could hardly be otherwise. It would be quixotic to believe that a motivation that is inherent in political bodies organized along partisan lines is somehow constitutionally suspect. If it were, all manner of legislation, not just or even especially redistricting legislation, would be imperiled. To take just the most recent example, it is hard to understand the various legislative and executive actions that contributed to the extended government shutdown as free from partisan motivation. That may make the actions frustrating, but that hardly makes them unconstitutional.

But if some partisan intent is permissible, then the real question is "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.). An intent test that is satisfied by any degree of partisan motivation does nothing to answer that question. As the *Bandemer* plurality candidly admitted, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129. And as the *Vieth* plurality recognized, an inquiry into partisan intent that will always be satisfied does nothing to advance the ball. Simply identifying some degree of intent does not even raise a yellow flag, let

alone reveal what degree of intent crosses a constitutional line.

Effects. In most areas of constitutional law, an effects test is embraced because a constitutionally forbidden motivation is difficult to prove. For example, race-based government action is both a constitutional anathema and difficult to prove, and so the Constitution sometimes invalidates laws with discriminatory effects even when concrete proof of discriminatory intent is lacking. *See Vill. of Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252, 266 (1977). In partisan gerrymandering cases, the effects test serves almost the opposite function. Partisan intent or motivation is so easy to prove that an effects prong is desperately needed to reduce the universe of false positives to respectable numbers. But, of course, attempting to identify the impermissible effects of a sometimes-benign motive is a fool's errand. Thus, the best that can be said for an effects test is that, like the intent inquiry, it elides the critical question of how much partisan effect is too much—a question on which the Constitution is utterly silent.

The effects inquiry suffers a deeper flaw. To be coherent, an effects inquiry needs a baseline, and that baseline needs to be grounded in constitutional law. Racially discriminatory effects can be measured against a baseline of race-neutrality. Population inequality can be measured against a one-person-one-vote baseline. There is no comparable constitutionally grounded baseline in partisan gerrymandering cases. Instead, nearly every effects test implicitly or expressly assumes a baseline of "some form of rough proportional representation." *Bandemer*, 478 U.S. at

145 (O'Connor, J., concurring). A congressional map has an impermissibly partisan effect because partisan results under the map deviate too much from the overall partisan makeup of the State. But this Court's cases "clearly foreclose any claim that the Constitution requires proportional representation." *Id.* at 130 (plurality op.). It is, after all, "inherent in winner-take-all, district-based elections" that the distribution of seats may vary wildly from statewide vote totals. *Id.* Indeed, under a highly competitive map, "even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Id.*

Measuring Distortions. Efforts to measure the extent of partisan distortion suffer from the twin problems that they assume without constitutional grounding that some extent is too much and that deviations from proportional representation tend to evidence the problem. But even beyond those basic flaws, efforts to measure the problem underscore that this whole undertaking is not a judicially manageable task. Take, for instance, the vaunted "efficiency gap." The efficiency gap looks back at actual elections and treats every vote cast for a winning candidate "in excess of what the candidate needed to win," and every vote cast for a losing candidate, as a "wasted" vote. JS.App.192. At the outset, that fundamentally misunderstands how politics works. Votes cast for the losing candidate may entice the winner to "adopt more moderate, centrist positions," while a landslide may give the winner a mandate to seek more sweeping policy changes. *Whitford v. Gill*, 218 F. Supp. 3d 837, 954 (W.D. Wis. 2016) (Griesbach, J., dissenting).

But the efficiency gap suffers from even more serious problems, as it routinely identifies "bipartisan districting plans or districting plans drawn by courts or nonpartisan commissions" as egregious partisan gerrymanders. JS.App.203. That is no small embarrassment. Proponents of the test dismiss those false positives and suggest hopefully that commissions and judges would never engage in intentionally partisan gerrymandering. But that is no answer to the false positives produced by the test, which are particularly problematic given that the same intent test that proponents would use to weed out the judicially drawn maps will be automatically satisfied any time a legislature—the constitutionally preferred agent—draws the map.

In truth, the false positives produced by the efficiency gap and comparable tests reflect the reality that, in many States, Democratic voters are concentrated in or near urban areas while Republican voters are more evenly distributed. As a result, the pre-existing political geography of the State will tend to produce more "wasted" Democratic votes than Republican votes as long as the mapdrawer follows traditional districting principles like compactness, contiguity, and preserving communities of interest. The first prerequisite for any judicially administrable test in this area is partisan neutrality. Yet the efficiency gap test has a built-in bias that causes it to condemn Republican gerrymanders as impermissible more readily than Democratic gerrymanders.

Despite its many flaws, the efficiency gap analysis at least has the virtue of analyzing actual elections. The "partisan bias" and "mean-median difference"

metrics, by contrast, require "calculat[ing] the number of seats each party would win" in a hypothetical election under a hypothetical map. JS.App.206-07; *see* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of A Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1510 (2018) (noting that "hypothetical election[s]" are "explicit in partisan bias and implicit in the mean-median difference"). This Court has long been "wary" of any test that would "invalidate[] a map based on unfair results that would occur in a hypothetical state of affairs." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.). For good reason, as neither courts nor social scientists have proven particularly adept at predicting the results of hypothetical elections.

Indeed, "[f]or all the confidence political experts may have in their predictions of future election results, *Vieth* itself stands as a stark reminder that they can be wrong." *Gill*, 218 F. Supp. 3d at 937 (Griesbach, J., dissenting). While the plaintiffs in *Vieth* insisted Pennsylvania's congressional map was "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republican," Democrats proceeded to win a majority of the seats under that map in the next two elections. *Id.* Likewise, two years after *Bandemer*, the supposedly disadvantaged Indiana Democrats won half the seats under the challenged map, and they won a majority the following election.[8] And in the lone case to find a partisan gerrymander before *Gill*, a district

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[8] *See Election History for Indiana*, Polidata.org, https://bit.ly/2SfIR9n (last visited Feb. 7, 2019).

court "concluded that North Carolina's system of electing superior court judges on a statewide basis" would wholly exclude Republican candidates for years to come—only to see every single Republican on the ballot prevail in an election held a mere five days later. *See Republican Party of North Carolina v. Hunt*, No. 94-2410, 1996 WL 60439 (4th Cir. Feb. 12, 1996) (per curiam).

These predictive failings reflect the realities that real elections turn on the qualities and foibles of real candidates, and "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality op.). The broader failure to identify an adequate test is not the product of insufficiently advanced political science, but of the "'more fundamental[]'" problem that partisan gerrymandering simply does not map onto "'any cognizable constitutional claim.'" *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring) (quoting *Baker*, 369 U.S. at 337 (Harlan, J., dissenting)). As the *Vieth* plurality explained, "[b]efore considering whether [a] particular standard is judicially manageable," courts must determine "whether [the standard] is judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 287-88. After all, "[n]o test ... can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. And "[t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." *Id.* at 295. The search for a judicial manageable test for identifying partisan gerrymandering claims has failed for the most basic reason of all: The claims do not implicate any discernible constitutional right.

III. The District Court's Tests Are The Antithesis Of Judicially Discernible And Manageable Standards.

The conclusion that partisan gerrymandering claims are nonjusticiable is only reinforced by the amorphous tests that the district court adopted. Indeed, "the mere fact" that the court "c[a]me up with [four] different standards"—each more sweeping and less forgiving than the last—"goes a long way to establishing that there is no constitutionally discernible standard." *Id.* at 292.

1. Equal Protection Clause

The district court began where most efforts to discern a judicially manageable test have begun, concluding that a districting plan violates the Equal Protection Clause whenever (1) it was passed with "discriminatory intent" and (2) produces "discriminatory effects" (3) that cannot be attributed to "another legitimate redistricting objective." JS.App.138-39. That test possesses all the flaws identified above and then some.

The district court began by positing that *any* amount of districting for partisan advantage violates the Equal Protection Clause. Thus, rather than immediately attempting to answer the unanswerable question of how much is too much, the district court asserted that any amount will do, disclaiming the need to "distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." JS.App.118. That proposition is flatly at odds with decades of decisions from this Court concluding that not all partisan gerrymandering violates the Constitution. *See, e.g., Cromartie I*, 526

U.S. at 551 (a "jurisdiction may engage in constitutional political gerrymandering"); JS.App.339 (Osteen, J.) (collecting cases). Indeed, even Justices who have found partisan gerrymandering claims *justiciable* have readily acknowledged that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *see also id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164-65 (1986) (Powell, J., concurring in part and dissenting in part). Simply put, the Constitution cannot be read to foreclose something that it plainly contemplates.

Perhaps recognizing that this extreme theory is a nonstarter in this Court, the district court alternatively "assume[d]" that, to satisfy the intent prong, a plaintiff must prove that "a legislative mapdrawer's predominant purpose ... was to 'subordinate adherents of one political party and entrench a rival party in power.'" JS.App.145-46. But a majority of this Court has already rejected a predominant intent test as both "dubious and severely unmanageable." *Vieth*, 541 U.S. at 286 (plurality op.); *see also id.* at 306-07 (Kennedy, J., concurring).

The predominant intent standard sounds comfortingly familiar because it is borrowed from the racial gerrymandering context. But there, it plays a very different role. In the race context, the predominant intent standard allows a generally prohibited intent—government action based on race—to escape strict scrutiny if that racial intent does not predominate. *See Miller v. Johnson*, 515 U.S. 900 (1995). Here, by contrast, the district court would take

a generally permissible intent—partisan advantage—and subject it to demanding consideration because it predominated. But that begs the questions why a motivation that is permissible in small doses becomes unconstitutional in larger doses, and what dosage makes partisan intent predominant.

The district court embraced an equally untenable "discriminatory effects" test, requiring a plaintiff to "show that the dilution of the votes of supporters of a disfavored party ... is likely to persist in subsequent elections such that an elected representative from the favored party ... will not feel a need to be responsive to constituents who support the disfavored party." JS App.152. That test purports to protect "that minimal degree of representation" to which a voter "is constitutionally entitled," *Vieth*, 541 U.S. at 297 (plurality op.)—*viz.*, the representative must not be so partisan that she will not "feel a need" to respond to the voter.

At the outset, this Court does not share the district court's apparent view that a sufficiently "safely" elected candidate will not be responsive to constituents who supported her opponent(s). Instead, "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district"—"even in a safe district where the losing group loses election after election." *Bandemer*, 478 U.S. at 132 (plurality op.). Nor does "[t]he Constitution ... share" the district court's "alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives." *Vieth*, 541

U.S. at 288 n.9 (plurality op.). "[W]hether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are 'effectively' distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts)" is a dispute in which "[n]either Article I, §2, nor the Equal Protection Clause takes sides." *Id.*[9]

But even accepting the district court's dubious premises, the court failed to identify any judicially manageable standard for "show[ing] that the dilution of the votes of supporters of a disfavored party ... is likely to persist in subsequent elections." JS.App.152. *How much* dilution must occur to trigger constitutional scrutiny? *How likely* must the dilutive effect be to persist, and *for how long*? *What evidence* suffices to prove any of this? "[T]he devil lurks precisely in such detail." *Vieth*, 541 U.S. at 296 (plurality op.). Yet rather than answer those critical questions, the court announced that plaintiffs may rely on all manner of social-science metrics—district-specific or statewide, including metrics that measure deviations from proportional representation—to try to prove a "discriminatory effect" under "that test most beloved by a court unwilling to be held to rules (and

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[9] Moreover, if anything, partisan gerrymandering would seem to ameliorate the district court's non-responsiveness concern. Presumably "non-responsiveness" would be most acute in districts where majority-party voters outnumber minority-party voters by large numbers. Partisan gerrymandering, however, tends to avoid the concentration of majority-party voters in a small number of districts. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

most feared by litigants who want to know what to expect)," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting): a nebulous totality-of-the-circumstances approach. JS.App.214. The district court should not be able to hide its utter failure to identify the circumstances that actually matter by saying the outcome turns on the totality of them.

Moreover, the court's test's focus on the persistence of partisan advantage in future elections necessarily rests on the kind of predictions about what election "results ... would occur in a hypothetical state of affairs," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), that this Court has questioned and experience has proven unreliable. This Court need only look at CD9 to see that this problem persists. Just two months after the district court invalidated CD9 as a purportedly entrenched pro-Republican gerrymander, JS.App.259, the Democratic and Republican candidates were locked in such a tight race—139,246 votes to 138,341 votes—that a winner *still* has not been certified. *See supra* n.3. Even if the Republican prevails, it is fanciful to suggest he will not "feel a need" to respond to voters of the opposing party. *See Gill*, 218 F. Supp. 3d at 954 (Griesbach, J., dissenting) (legislators "will of necessity be more responsive to the 49% of the electorate that did not vote for them").

Finally, the "justification" prong of the district court's test does nothing to solve the problems with the first two prongs; instead, it simply reverses the normal burden of proof for establishing a constitutional violation. Indeed, a test that combines an intent prong that is essentially satisfied as long as the mapdrawer

is a legislature with an effects prong that turns on the totality of barely adumbrated circumstances and a third prong that is an affirmative defense might as well require the legislature to come to court and justify itself. That test may make the plaintiffs' burden eminently manageable, but it hardly amounts to a judicially manageable standard for determining how much partisan advantage is too much.

2. First Amendment

The district court's First Amendment test is even more problematic, as it would essentially ban consideration of *any* political data in redistricting. According to the majority, to prove a First Amendment violation, a plaintiff must show: (1) "the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party," (2) "the districting plan burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." JS.App.286. That is not so much a test for identifying partisan gerrymandering as it is an effort to eradicate all consideration of politics from districting.

After all, any map drawn with any partisan considerations in mind (which is to say, virtually any map drawn, as the Constitution contemplates, by a legislature) is "intended to favor or disfavor individuals or entities that support a particular candidate or political party" in some sense. Take the map this Court upheld in *Gaffney v. Cummings*, 412 U.S. 735 (1973). The legislature "'wiggle[d] and

joggle[d]' boundary lines" to try to ensure that candidates associated with particular political parties would win. *Id.* at 752 n.18. The district court's test would view that map as fundamentally flawed, yet this Court unanimously upheld it. The time-honored practice of protecting incumbents likewise is invariably intended to ensure that some voters in a district "will lose any chance to elect a representative who belongs to their party." *Bandemer*, 478 U.S. at 154 (O'Connor, J., concurring). In short, *every* map favors or disfavors someone, and "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129 (plurality op.).

The problems do not end there. The majority overcame the considerable hurdle that congressional districting enactments look nothing like a law abridging free speech by concluding that First Amendment rights are "in fact" burdened whenever the legislature's political considerations have anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. JS.App.288. The court then underscored how truly *de minimis* that standard is by finding it satisfied by testimony that, *e.g.*, "a lot of people did not come out to vote"; "[i]t was really hard to try to galvanize people to participate"; and people "believed they could not have a democratic—small 'D'—democratic impact." JS.App.290. The court proceeded to conclude that a districting map can "adversely affect ... voters' First Amendment rights" "even if the speech of voters who support [purportedly disfavored] candidates [is] not *in fact* chilled." JS.App.294. Instead, it is enough that a map "makes it easier for supporters of [one party's]

candidates to translate their votes into seats." JS.App.294.

That is exactly "the kind of undifferentiated, generalized grievance about the conduct of government that [this Court] ha[s] refused to countenance in the past." *Gill*, 138 S. Ct. at 1931. Indeed, the district court did not tether this novel test to any district-specific injury; it instead concluded that these "non-dilutive" First Amendment "injuries" can be suffered statewide. Moreover, once the district court's minimal intent and effects prongs are satisfied, there is no real way for a legislature to avoid liability, as the court's circular "causation" prong asks only whether the impacts of the legislature's intent to favor or disfavor some voters can be explained by something other than its intent to favor or disfavor some voters. JS.App.299.

"Perhaps the most telling indication of the severe constitutional problem with" the district court's First Amendment theory "is the lack of historical precedent" for it. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010). Partisan gerrymandering is as old as the Republic, yet it has never been treated as a First Amendment problem. And with good reason, as the majority's boundless test proves the wisdom of the *Vieth* plurality's observation "that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294. If all legislating for partisan advantage is a species of viewpoint discrimination, then all legislative mapdrawing will be suspect. And why stop there? Legislative redistricting is hardly the only kind of

lawmaking motivated by partisan interests and resulting in *de minimis* impact on First Amendment values. A test "ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 306 (Kennedy, J., concurring).

3. Sections 2 and 4 of Article I

Not content with an equal protection test that would leave courts with unfettered discretion and a First Amendment test that would eradicate all political considerations from districting, the district court ended with the extraordinary conclusion that partisan gerrymandering violates not one, but two, of the Constitution's Elections Clauses—one of which expressly grants authority over districting to legislatures. That is the *ne plus ultra* of doctrinal incoherence.

Section 2 of Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, §2, and §4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," *id.* §4. In the district court's view, partisan gerrymandering violates §2 because it deprives "the People" of their right to elect Representatives, JS.App.306-07, and it violates §4 because, *inter alia*, §4 does "not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts," JS.App.303. No court has ever reached such conclusions, and it is little wonder

why. As the *Vieth* plurality explained (without objection from any Justice), "neither Article I, §2, nor ... Article I, §4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305.

Undeterred, the district court held that *any* amount of districting for partisan advantage violates §2 because such districting transgresses a "core principle of republican government"—*viz.*, "that voters should choose their representatives, not the other way around." JS.App.309. There is, of course, a clause of the Constitution that speaks directly to preserving a "republican government," and it is not the Elections Clause. It is the Guarantee Clause, and this Court has consistently found claims under that Clause nonjusticiable. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912). Reprising such claims under a provision that at best indirectly safeguards such principles does not make them any more justiciable.

The district court's §4 analysis fares no better. Much of its reasoning makes §4 claims entirely derivative of Equal Protection Clause and First Amendment claims, and so adds nothing to the analysis. JS.App.303. The balance simply advances highly debatable theorems—*e.g.*, that §4 does not "empower" legislatures to "disfavor the interests of supporters of a particular candidate or party in drawing congressional districts"—and then suggests that any degree of legislative intent to disfavor the opposing party is constitutionally suspect. That preference for entirely non-partisan mapdrawing and

legislating may be au courrant in certain circles, but it was not en vogue in Philadelphia in the summer of 1787. Rather than view the influence of faction as something that could be rooted out by federal judges, the framers viewed it as inevitable and something that could be effectively harnessed and controlled only through structural checks and balances.

That preference for structural checks is manifest throughout the Constitution, including the very clause the district court would use to empower the judiciary. Far from deeming any partisan motivation off limits, the framers delegated responsibility for regulating the times, places, and manner of election to the body most susceptible to partisan influences, subject to supervision by the federal entity most liable to partisan influence. One can question that judgment, but one cannot seriously think that the font for the long-elusive judicially manageable standards for partisan gerrymandering lies in a clause textually delegating responsibility for districting to the political branches.

IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander.

Even if this Court were inclined to wade into this "political thicket," *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring), this would hardly be the case in which to declare for the first time ever an unconstitutional partisan gerrymander. This is not a case in which the legislature drew a map "in a way unrelated to any legitimate legislative objective," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), or "subverted" "all traditional districting criteria" to blind pursuit of maximum partisan advantage, *id.* at

318 (Stevens, J., dissenting), or "paid little or no heed to ... traditional districting principles," *id.* at 348 (Souter, J., dissenting). To the contrary, in crafting the 2016 Map, the General Assembly's redistricting committee adopted and carefully adhered to traditional districting principles designed to preserve communities of interest, including "[c]ontinguity," "[c]ompactness," and "[e]qual [p]opulation." JS.App.19-21.

Indeed, plaintiffs never alleged that the 2016 Map ignored any of these principles. *But cf. Vieth*, 541 U.S. at 272-73 (plurality op.) ("[T]he complaint alleged that the districts created by Act 1 were 'meandering and irregular,' and 'ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage.'"). Nor could they, as the 2016 Map more closely conformed to traditional districting principles than any congressional map North Carolina has seen in the past quarter-century. As the district court recounted, the 2016 Map divided only 13 (out of 100) counties and split only 12 (out of more than 2000) precincts across the entire State, and no county was split between more than two districts. JS.App.25. Those statistics stand in stark contrast to maps from the 1990s and 2000s. For example, the 1992 map divided more than three times the number of counties and more than five times the number of precincts. JA326. The 2001 map—which the League plaintiffs have touted as an exemplar of one that purportedly

"did not favor either party,"[10] JA233—divided 28 counties and 22 precincts. And the 2011 map divided 40 counties and 68 precincts. JA326. Furthermore, the 2016 Map is more compact "[u]nder several mathematical measures" than the map that immediately preceded it, and it paired only two incumbents. JS.App.25.

Those results are no accident. The redistricting committee adopted contiguity, compactness, and equal population metrics that themselves acted as constraints on partisan gerrymandering. JS.App.19-21. To be sure, the committee was perfectly candid that one of its criteria was "[p]artisan [a]dvantage," and that it would "make reasonable efforts ... to maintain the current partisan makeup of North Carolina's congressional delegation" while still complying with traditional districting criteria. JS.App.20. But the reason for that candor is perfectly plain. The General Assembly had just been faulted in its effort to defend its 2011 Map as a product of politics, not race, because its political motivations were insufficiently clear in the record. Given that experience and this Court's repeated reassurance that a "jurisdiction may engage in constitutional political gerrymandering," *Cromartie I*, 526 U.S. at 551, there is nothing sinister in the General Assembly's candor.

Moreover, the committee plainly did not set out to pursue partisan advantage at all costs. It sought only

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[10] In the 2010 congressional elections held under the 2001 map, "Republicans won 54 percent of votes statewide" but secured less than half of the State's 13 seats. JS.App.9.

to "make reasonable efforts ... to maintain *the current* partisan makeup of North Carolina's congressional delegation." JS.App.20 (emphasis added). Plaintiffs object to that criteria because the partisan makeup of North Carolina's congressional delegation in 2016 was heavily Republican. But the bare fact that the map *could* be drawn in a manner more favorable to candidates from their preferred political party does not give them a right to insist that the map be politically gerrymandered more to their liking. If it did, then "the reapportionment task [would] recurringly [be] removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs." *Gaffney*, 412 U.S. at 749. That result simply cannot be reconciled with the reality that the Constitution assigns the inherently policy-laden task of redistricting to state legislatures.

* * *

This case exemplifies all the problems with partisan gerrymandering cases. Plaintiffs have not suffered any constitutionally cognizable injury, let alone one that courts could actually identify and remedy. Instead, their grievance is a fundamentally political one that the framers delegated to the political branches and that Article III courts lack the power or the competence to vindicate. If this Court nonetheless wades into such disputes unarmed with administrable tests grounded in constitutional text but saddled with appellate jurisdiction, it will be exceedingly difficult to extricate itself. The costs will be measured not just in frustration in being unable to answer an

unanswerable question, but in the public's inability to understand the judicial role as distinct and apolitical. The framers wisely insulated this Court from all that by delegating this politically fraught responsibility elsewhere. This Court should resist the invitation to reassign that responsibility to the Article III courts.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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February 8, 2019

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U.S. Const. art. I, §2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

....

U.S. Const. art. I, §4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

....

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether the District Court correctly held that Appellees have Article III standing to challenge the 2016 North Carolina Congressional Plan and its individual districts as partisan gerrymanders?

2. Whether the District Court correctly held that, on the facts of this case, Appellees' claims are justiciable and not "political questions"?

3. Whether the District Court correctly held that the 2016 Plan and 12 of its 13 individual districts violate the First Amendment, Equal Protection Clause, and/or Article I?

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INTRODUCTION

The 2016 North Carolina Congressional Plan ("2016 Plan" or "Plan") is the most overt, and likely the most extreme, partisan gerrymander this Court has ever seen. The official written criteria that governed its creation expressly dictated pursuit of "Partisan Advantage" for the Republican Party and specified a quota of "10 Republican" districts and just "3 Democrat[ic]" ones—despite a near-equal split among the State's voters. To implement this directive, the map-drawer admittedly "packed" as many Democrats as possible into three overwhelmingly blue districts and "cracked" the remainder across ten red ones. The heads of the Joint Redistricting Committee, Appellants here, publicly declared that the Plan enshrined into law their view that "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan is] a political gerrymander." As the District Court noted, with appropriate distaste, Appellants "d[id] not argue—and never have argued—that [this] express partisan discrimination advances any democratic, constitutional, or public interest." J.S. App. ("A") 110.

Unsurprisingly, the resulting map was extreme in every respect—whether viewed statewide or district-by-district. The only reason the Plan did not contain even fewer Democratic districts, one Appellant admitted, was because it was "not ... possible to draw [such] a map." By using computers to generate and analyze thousands of alternative districting plans, *Common Cause* Appellees' experts confirmed that it was all but impossible for a 10-3 split to arise under neutral districting criteria. Just as importantly, they confirmed that the particular districts where the

Common Cause voter-plaintiffs live were extraordinarily packed and cracked. Indeed, the votes of many of those plaintiffs would have carried greater weight in *over 99%* of alternative maps.

Appellants barely even pretend to defend the challenged Plan. They take no issue with any of the District Court's fact-finding and largely ignore the evidence that *Common Cause* Appellees adduced below. Their brief also contains no meaningful discussion of applicable First Amendment, Equal Protection, or Elections Clause doctrine, let alone any attempt to square those doctrines with the obviously illegal features of the Plan. Perhaps this is understandable: for Appellants, the Plan itself is beside the point. This appeal is merely a vehicle for their policy arguments seeking a green-light for *all* partisan gerrymanders.

But Appellants pay a price for ignoring the facts. Justiciability turns not on abstract arguments, but on "the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962). And on the facts of this case, judicially manageable standards are easy to articulate and understand. Indeed, in last Term's gerrymandering cases, counsel for all parties acknowledged before this Court that a plan constructed under an *express* policy to favor one party—as the 2016 Plan was—would be unconstitutional. As Justice Alito recognized at the time, that is a "perfectly manageable standard." To hold that the 2016 Plan must nevertheless remain in effect because other cases with other facts might present more complex issues would be the opposite of the judicial caution and minimalism that Appellants profess to value.

Appellants' "political question" arguments also fail on their own terms. On countless occasions, including *Baker* itself, this Court has rejected the notion that the Elections Clause is a textual bar to judicial review of State election regulations. And this Court's existing precedents provide perfectly "discoverable and manageable standards" for adjudicating partisan-gerrymandering claims. Specifically, by burdening the political expression and associational rights of *Common Cause* Appellees, including the North Carolina Democratic Party and individual voters, based on viewpoint and identity, Appellants violated the First Amendment. By intentionally discriminating against Appellees without adequate justification, Appellants violated the Equal Protection Clause. And by nakedly seeking to dictate the outcomes of federal elections, Appellants exceeded the Elections Clause's limited grant of power to the States.[1]

None of these principles is novel, and nothing in this Court's jurisprudence suggests that they are inapplicable to redistricting, alone among all forms of State election regulation. To the contrary, it has long been settled that "[a] statute which is alleged to have worked unconstitutional deprivations of [plaintiffs'] rights is not immune to attack simply because the

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[1] *Common Cause* Appellees' method of adapting these generally applicable standards to the present context differs in some respects from that of *League of Women Voters* Appellees. That is to be expected given the "unsettled ... contours" of this Court's case law. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). *Common Cause* Appellees believe in their own approach, but either of Appellees' approaches would provide a "manageable standard," grounded in the Constitution, for resolving partisan-gerrymandering claims.

mechanism employed by the legislature is a redefinition of [political] boundaries." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

In the end, Appellants' argument for judicial abdication comes down to this: partisan-gerrymandering claims are "politically fraught," and entertaining them would therefore lead the public to view the Court as a partisan body. App. Br. 60-61. Appellants have it backwards. Elected officials of *both* parties commit this sin. *Cf. Lamone v. Benisek*, No. 18-726. And ordinary Americans of *both* parties detest it. *See* Lake Research Partners & WPA Intelligence, *Partisan Redistricting – New Bipartisan National Poll*, Sept. 11, 2017, https://bit.ly/2T24muW (finding that supermajorities of both parties favor this Court acting against partisan gerrymandering, "even if it means their party might not win as many seats").

If Appellants' warning sounds familiar, it should: the exact same argument was made for judicial inaction in *Baker*. *See* 369 U.S. at 267 (Frankfurter, J., dissenting) (asserting that "public confidence" in the Court requires "abstention from ... the clash of political forces"). Fortunately, the *Baker* Court rejected that argument and upheld a nonpartisan constitutional principle that virtually all Americans now embrace. As a result, "[n]ational respect for the courts" was greatly "enhanced." *Id.* at 262 (Clark, J., concurring). The Court should do the same here.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is a true "purple state," its voters split almost equally between Democratic and Republican congressional candidates. A13-14. Its delegation once reflected this, often dividing 7-6 or 6-7. That changed markedly when the Republican Party captured the General Assembly in 2010, "giving [it] exclusive control over" redistricting. A10. On a party-line vote, it adopted a new map (the "2011 Plan") that yielded a 9-4 Republican supermajority in the 2012 election, even though Democratic candidates received more votes statewide. A13. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the vote. A13-14.

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which alleged that two districts were racially gerrymandered. The State's "defense" was that the 2011 Plan was a *partisan* gerrymander, not a racial one. The map-drawer, Dr. Thomas Hofeller, testified that partisanship "was the primary ... determinant in the drafting" of that plan, both overall and on a district-specific basis. Hofeller explained that his "primary goal" was "to create as many districts as possible in which GOP candidates would be ... successful[]" and "to minimize the number of districts in which Democrats ... [could] elect a Democratic candidate." A180. Before this Court, the State's counsel explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out [of them]." Oral Argument Tr.,

Cooper v. Harris, No. 15-1262 (Dec. 5, 2016) at 10-11 (argument of Paul D. Clement).

This Court affirmed the judgment invalidating the two challenged districts as predominantly race-motivated, without disputing the State's admission that its intent regarding the remaining districts and the 2011 Plan overall was "primar[ily]" partisan.

2. Creation Of The 2016 Plan

In February 2016, the District Court in *Harris* ordered a remedial map. The heads of the Joint Redistricting Committee, Rep. David Lewis (R) and Sen. Robert Rucho (R), instructed Hofeller to remedy the two invalidated districts' racial infirmities while "maintain[ing]" a predetermined partisan split of "10 Republicans and 3 Democrats." A14-15; *see also* JA331-32; 336-37.

Hofeller used past election results "to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate." A16, 157-58. As he testified, this variable is highly predictive of future voting patterns. *Ibid.* Hofeller then used that partisanship index to guide his line-drawing, with the goal of "crack[ing]" and "packing" Democrats to minimize their voting strength. A17, 158-59; *see also* JA315. Proceeding district-by-district, Hofeller "divide[d] counties and communities of interest along partisan lines, and join[ed] sections of the state that have little in common." A252.

Lewis then presented for the Joint Redistricting Committee's retroactive approval a set of written "cri-

teria" that Hofeller had employed. A19-21. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated that "the Committee shall make reasonable efforts to construct districts ... to maintain" a "partisan makeup ... [of] 10 Republicans and 3 Democrats." JA329. Another criterion, labeled "Political data," stated that "[t]he only data other than population data to be used ... shall be election results in statewide contests since January 1, 2008...." JA329; A20. The Committee adopted these partisan criteria on party-line votes. A23. The 2016 Plan, Hofeller agreed, "adhered" to them. JA457; A23.

Lewis proclaimed the intentions behind the Plan on the record, both during Committee hearings and on the House floor:

- "[W]e want to make clear that ... to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage."
- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."
- "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."
- "I acknowledge freely that [the 2016 Plan] would be a political gerrymander, which is not against the law."

JA313, 310, 460, 308. Rucho agreed, stating that there is "nothing wrong with political gerrymandering" because "[i]t is not illegal." JA337; A22-24.[2]

Based on these statements, both chambers of the General Assembly then approved the 2016 Plan, also "by party-line votes." A24. All these findings of the District Court are undisputed.

3. Effect Of The 2016 Plan

In the 2016 election, Republicans prevailed in all ten cracked districts where the mapmakers "intended and expected [them] ... to prevail," and Democrats prevailed in all three packed districts drawn to be "predominantly Democratic." A26. Republican candidates thus won 77% of the total seats despite receiving just 53% of the statewide vote. *Ibid.*

The 2016 Plan's intentional packing and cracking harmed the *Common Cause* voter-plaintiffs by diluting their voting strength in the districts where they live. A51-65, 74, 82-83. The extensive proof of cracking and packing and its resulting dilutive effect was uncontroverted at trial, and the District Court's findings accepting this proof are not challenged on ap-

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[2] Appellants now contend that these damning admissions were made "[i]n response to the district court's holding" in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). App. Br. 9. Appellants never made this argument below, and it is baseless. In *Harris*, as a defense to the charge of racial gerrymandering, Appellants argued—without success—that politics, not race, dictated the boundaries of the two relevant districts. *Ante* at 5-6. But no court instructed Appellants to execute an invidious partisan gerrymander, and no court "faulted" them for failing to make their invidious intent "evident in the record." App. Br. 9.

peal. *See* A188-91 (statewide findings), 209-14 (same), 223-74 (district-specific findings).

For example, *Common Cause* Appellees Coy E. Brewer, Jr. and John McNeill are Democratic voters in the heavily Democratic Fayetteville area. A57-59. The Plan intentionally cracked that area (shown in blue on the map below) and submerged the pieces within heavily Republican Congressional Districts ("CDs") 8 and 9:

Appellants' own expert "conceded ... that [this] area constituted a 'cluster of Democratic' [voters], that the 2016 Plan 'split,'" and that absent this "crack[ing],"

either CD8 or CD9 "would not have been a safe Republican district." A252-53. Due to this cracking, Brewer was relegated to CD8 and McNeill to CD9, intentionally diluting their votes. A57-59, 251-55.

Similar district-specific harms were visited on *Common Cause* voter-plaintiffs across the State. For example, both Appellant Lewis and Appellants' expert conceded that the 2016 Plan "split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between [safe-Republican] Districts 10 and 11" (first map below), A25, and "'cracked' ... the Democratic city of Greensboro between Republican Districts 6 and 13" (second map below), A158, 186-87, 216-17, 271.

Common Cause Appellees residing in the resulting districts had their votes diluted, including Democratic voters Robert Warren Wolf (CD10), Jones P. Byrd (CD11), Melzer A. Morgan, Jr. (CD6), and Russell G. Walker, Jr. (CD13). A56-57, 60-61, 62-63, 70, 243-48, 259-66, 270-73.

The 2016 Plan, and the shape of its individual districts, also caused Appellees "associational injury." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring). This proof, too, was uncontroverted at trial, and the District Court's findings accepting it are not challenged on appeal. A69-71. The Plan made it more difficult for the voter-plaintiffs living in cracked districts to raise money, recruit candidates, and enlist volunteers for activities like canvassing.[3] The burden on the North

[3] *See, e.g.*, Deposition of Elizabeth Evans, ECF 101-7, at 12-16; Deposition of Melzer Morgan, ECF 101-16, at 23-27; Deposition of John Quinn, ECF 101-22, at 24, 38; Deposition of Douglas

Carolina Democratic Party was even greater. Its representative gave unrebutted testimony that "the way the congressional districts were drawn ... ma[de] it extremely difficult" to "get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts." 30(b)(6) Deposition of N.C. Democratic Party, ECF 110-07, at 97-98. He also testified that the way the Plan's districts were drawn made it "harder to recruit candidates" to run in those districts, "given that the deck seems to be stacked." *Id.* at 27; *see also id.* at 41-42 (identifying specific districts in which the Party had difficulty recruiting candidates), 56-57 (identifying fundraising burden), 65-66 (identifying organizational and direct electoral burden). Indeed, in the 2018 election cycle, the Party was unable to recruit any candidate willing to run in the cracked CD3, and so the Republican ran unopposed. *See* N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

B. Proceedings Below

1. Trial and Appeal

In August 2016, *Common Cause* Appellees—15 voters from all 13 districts in the 2016 Plan, the North Carolina Democratic Party, and the nonpartisan organization Common Cause—filed a challenge to the Plan under the First Amendment, Equal Protection Clause, and Article I, §§ 2 and 4. JA205-31. The

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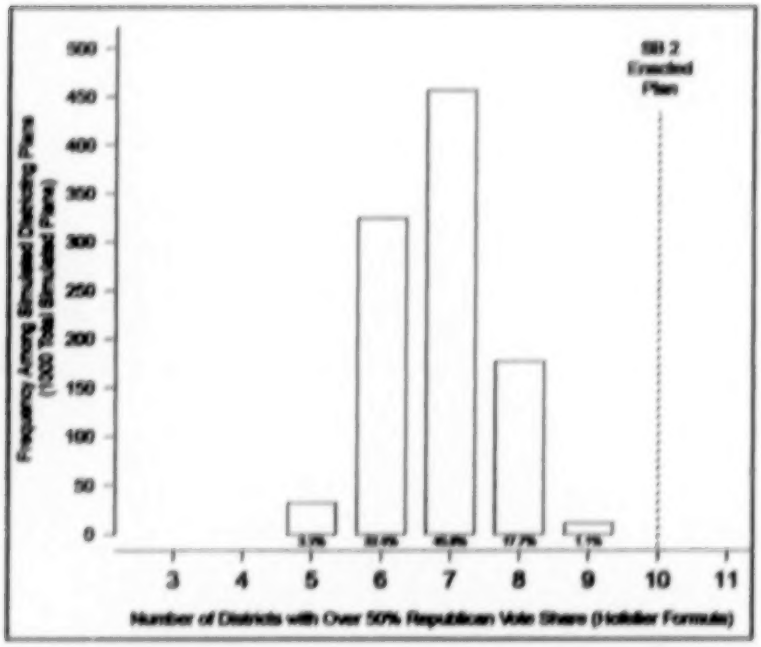
Berger, ECF 101-8, at 6-7, 73-74, 79; Deposition of John McNeill, ECF 110-09, at 21-27.

case was consolidated with *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.) ("*League*"). JA232-66.

In October 2017, the District Court held a four-day bench trial. As the facts were essentially undisputed, the trial focused on experts. *Common Cause* Appellees presented testimony from Dr. Jonathan C. Mattingly, a mathematician at Duke University, and Dr. Jowei Chen, a political scientist at the University of Michigan. A160, 167; JA364-412 (excerpted testimony). Drs. Mattingly and Chen used computer algorithms to generate thousands of alternative districting maps using only traditional criteria and disregarding partisan data. They then used actual election results from each precinct in North Carolina to simulate elections under each alternative map. The results of these analyses were striking, demonstrating the extreme nature of Appellants' gerrymander. *See* Brief of Eric S. Lander as *Amicus Curiae* (discussing Mattingly's methodology and findings).

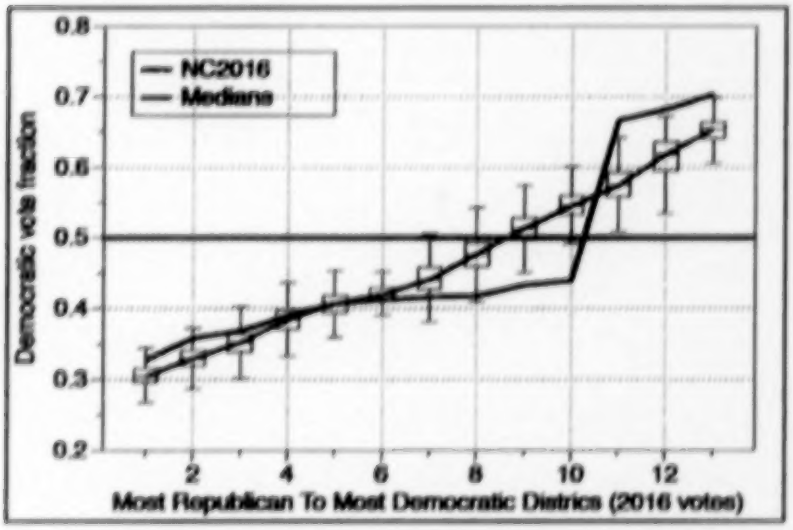
Dr. Chen generated 3,000 alternative maps, under which the composition of North Carolina's delegation formed a bell curve (shown below), mostly split 7-6 or 6-7. JA278. *None* of the 3,000 maps yielded a Republican advantage as great as the 10-3 split of the 2016 Plan (shown by the dashed red line). A167-71; JA276.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. Thus, on a statewide basis, the 2016 Plan was literally off the charts—an "extreme statistical outlier" that could not be explained by reference to traditional districting criteria. A162, 171; JA378, 395, 410-11.

Dr. Mattingly's work also confirmed the cracking and packing of individual districts. He showed this by plotting the partisan vote share of each district on a graph, with the most Republican on the left and the most Democratic on the right. With no packing or cracking, the median map in Dr. Mattingly's simulation set yields a straight line (in yellow below). By contrast, the plot for the 2016 Plan (in blue) resem-

bles an "S" curve, with Democratic voters packed into overwhelmingly Democratic districts at the top of the "S" or cracked across safe Republican districts at the bottom. A163-66; JA360. Dr. Mattingly explained that this "S" curve is the "signature" of gerrymandering. JA380, 382, 389.



This analysis showed the extreme nature of the gerrymander on a district-specific level. As Appellants conceded, they intentionally packed Democrats into CDs 1, 4, and 12. On the chart above, those districts appear on the far right, as they are the three most Democratic. As reflected by the blue line's placement well above the yellow line for those three districts, the percentage of votes cast for Democratic candidates in the packed CDs 1, 4, and 12 was significantly *higher* than the percentage of votes that would have been cast for Democratic candidates in the corresponding districts in the overwhelming ma-

jority of Dr. Mattingly's 24,000 neutrally-drawn maps. The gerrymander, in other words, rendered those packed districts extreme outliers. A163, JA378-80, 389.

The same is true for the Plan's cracked districts. Consider the blue line's location well below the yellow line for the next three districts from the right (corresponding to the cracked CDs 2, 9, and 13, which had the fourth-, fifth-, and sixth-highest Democratic vote shares). This shows that the percentage of votes cast for Democratic candidates in these Plan districts was, as Appellants intended, significantly *lower* than in the corresponding districts in the vast majority of Dr. Mattingly's 24,000 alternative maps. A163-64.

This district-specific proof was coupled with Appellants' admissions of district-specific cracking and packing, including admissions of cracking "natural Democratic clusters" in CDs 6, 8, 9, 10, 11, and 13. A216. The original trial record thus demonstrated widespread district-specific cracking and packing—and therefore, vote dilution—in districts where the *Common Cause* voter-plaintiffs reside.

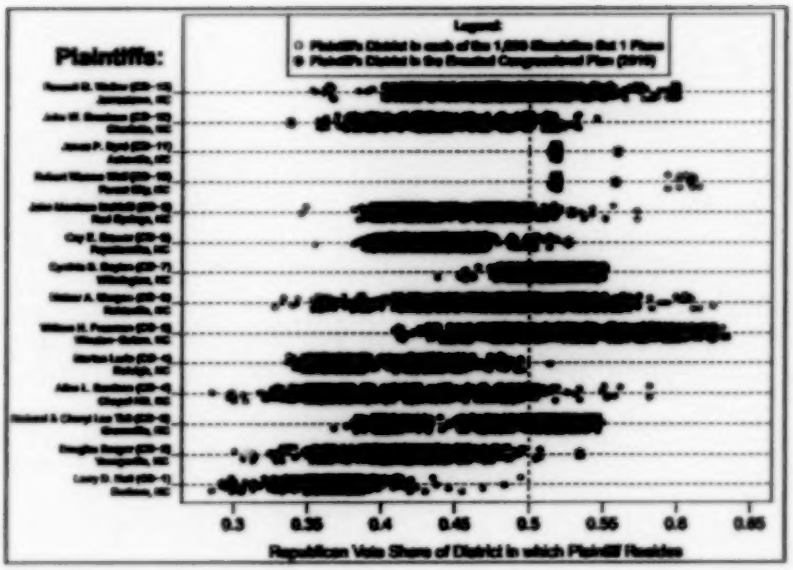
In January 2018, the District Court held the Plan an unconstitutional partisan gerrymander. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). This Court stayed that judgment pending appeal. On June 25, 2018, this Court vacated and remanded for further consideration in light of *Gill*.

2. Remand

On remand, the District Court requested briefing on *Gill*'s impact. *Common Cause* Appellees highlight-

ed the ample evidence of district-specific packing and cracking already in the record—as admitted by Appellants and Dr. Hofeller, and as testified to by Dr. Mattingly. They also submitted a supplemental declaration from Dr. Chen. JA265-75. He used each *Common Cause* voter-plaintiff's residential address to determine the district in which that plaintiff would have resided in 2,000 of his alternative maps. He then determined how the partisan vote split of each plaintiff's actual district under the 2016 Plan compared to the vote split of the array of "hypothetical district[s]" in which he or she might have been placed. A51 (quoting *Gill*, 138 S. Ct. at 1931).

The results for one set of 1,000 maps are shown below. JA269. For each plaintiff, the gray horizontal band—actually 1,000 individual gray circles—depicts the range of vote splits across all the alternative districts containing that plaintiff's residential address. The dotted vertical line represents a 50% Republican vote share, with the gray band to the left of that line representing minority-Republican alternative districts and the gray band to the right of that line representing majority-Republican alternative districts. Lastly, the red star indicates the vote split of each plaintiff's *actual* district under the 2016 Plan.



This analysis provides further evidence of the extreme packing and cracking of the 2016 Plan and links it directly to each *Common Cause* voter-plaintiff. The Plan's packed districts (CDs 1, 4, and 12) are identified by red stars to the left of the dotted vertical line. As indicated by the relative positions of these red stars and the corresponding gray bands, each of the *Common Cause* voter-plaintiffs who resides in a packed district under the 2016 Plan would have resided in a less Democratic-leaning (*i.e.*, less packed) district in almost all alternative maps. A51-52, 54, 62; JA270-71, 274. Larry Hall, who lives in CD1, would have been placed in a less Democratic-leaning district in all but three of Dr. Chen's 2000 maps—*i.e.*, 99.95% of the time. A51-52. John Gresham, who lives in CD12, would have been placed in a less Democratic-leaning district over 99% of the time. A62. And in CD4, Alice Bordsen would have been

placed in a less Democratic-leaning district approximately 80% of the time. A54. This shows that the votes of the *Common Cause* voter-plaintiffs in these packed districts were diluted—essentially wasted—exactly as Appellants intended.

The results for the Plan's cracked districts were just as egregious. Each of the *Common Cause* voter-plaintiffs placed in a majority-Republican district under the 2016 Plan (where the red stars are to the right of the dashed line) would have resided in a more Democratic-leaning (*i.e.*, less cracked) district in the overwhelming majority of alternative maps. A52-53, 57-59, 61; JA270-74. And again, for most of these plaintiffs, their actual districts are extreme outliers. For example, Jones Byrd (CD11) would have been placed in a more Democratic-leaning district in *all* 2,000 of Dr. Chen's alternative maps. A61. Douglas Berger (CD2) and Coy Brewer (CD8) would have been placed in more Democratic-leaning districts in 99% of those maps. A53, 57-58. Similarly, Robert Warren Wolf (CD10) would have been placed in a more Democratic-leaning district in 98% of Dr. Chen's alternative maps; John McNeill (CD9), in 97%; Richard and Cheryl Lee Taft (CD3), in 95%; and Russell Walker (CD13), in 90%. A58-59, A53, A62.

Indeed, the chart above shows that many of these cracked voter-plaintiffs would likely have been placed in Democratic-*majority* districts had neutral criteria been used. For each plaintiff's row on the chart, consider how much of the gray mass lies to the left of the dotted 50% line. Each gray circle to the left of that line represents a Democratic-majority district in which the voter-plaintiff would have been placed un-

der one of Dr. Chen's neutrally drawn alternative maps. To take one example, John McNeill, who lives in CD9, was placed in a district gerrymandered to have a 53% Republican vote share. But had neutral criteria been used, he would have been placed in a Democratic-majority district over 80% of the time.

On August 27, 2018, the District Court issued a new opinion. The majority held that at least one plaintiff had standing to challenge each of the Plan's 13 districts under a vote-dilution theory and that the plaintiffs further had non-dilutionary standing to challenge the Plan as a whole. A3. Judge Osteen agreed that at least one plaintiff had standing to challenge 10 of the Plan's 13 districts under a vote-dilution theory, but disagreed that voters living in packed districts suffer dilutionary injury. A330. The District Court also held unanimously that Appellees' claims were justiciable under this Court's precedents. A33-35.

On the merits, the majority held that 12 of the Plan's 13 districts (all except CD5) violate the Equal Protection Clause, because they were drawn with the predominant intent to discriminate against Democratic voters, and did so, without any legitimate justification. A227. Judge Osteen agreed that the nine of those 12 districts that were cracked violate the Equal Protection Clause. A365 n.4. The majority also held that the Plan violates the First Amendment because, *inter alia*, it constitutes viewpoint discrimination without legitimate justification. A283. Finally, the Court held unanimously that the Plan violates Article I, §§ 2 and 4, because it was nakedly intended to "dictate [federal] electoral outcomes." A303.

Because it was impracticable to redistrict in time for the November 2018 elections, the District Court stayed its judgment on the condition, accepted by Appellants, that this appeal be pursued expeditiously.

C. The 2018 Election

The 2018 election was a nationwide "blue wave." Democrats added 40 seats in the House of Representatives, their largest gain since the Watergate election of 1974, and a larger gain than the wave elections of 1982 and 2004. The Democratic popular-vote margin was 8.6%, the greatest on record for a party in the minority heading into an election.[4] But the red wall in North Carolina largely stood fast, thwarting democratic self-correction; election-night returns indicated yet another 10-3 result.[5] *See* Brief of Political Science Professors as *Amici Curiae* (discussing 2018 election results in gerrymandered states).

Later, however, irregularities emerged regarding CD9, where the Republican was initially reported to have prevailed by just 900 votes. On February 21, 2019, the election was set aside and a new election was ordered as to CD9. This will give *Common Cause* Appellee John McNeill another chance to vote for the candidate of his choice (albeit with the deck still stacked against him). Meanwhile, Mr. McNeill has no representative in Congress. But for the 2016 Plan's

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[4] Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5.

[5] N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

extreme partisan gerrymandering, this situation is unlikely to have occurred, as Mr. McNeill would have been placed in a Democratic-majority district over 80% of the time.

SUMMARY OF ARGUMENT

As the District Court correctly held, *Common Cause* Appellees have standing to bring their claims; those claims are justiciable; and the 2016 Plan—as a whole and in all but one of its individual districts—is unconstitutional.

Standing. Appellants' standing argument boils down to ignoring this Court's unanimous holding in *Gill* and ignoring *Common Cause* Appellees' evidence.

Gill held that an individual establishes vote-dilution standing by showing that he was "place[d] in a 'cracked' or 'packed' district" so that "his vote ... carr[ies] less weight" than it would have carried in an alternative, neutrally-drawn district. 138 S. Ct. at 1930-31. Appellants admitted—indeed, bragged—that the Plan intentionally packed and cracked Democratic voters, and *Common Cause* Appellees proved it was true. Using only traditional, neutral criteria, their experts generated tens of thousands of alternative maps and showed that the Plan's individual districts were extreme statistical outliers, causing extreme dilution of the voter-plaintiffs' votes. *Gill* approved of this technique; the District Court found the evidence compelling; and Appellants do not challenge it here. Indeed, they do not mention *Common Cause* Appellees' expert analyses at all.

As the *Gill* concurrence recognized, partisan gerrymanders also inflict cognizable burdens on voters' and political parties' rights of expression and association. *Common Cause* Appellees, who include the North Carolina Democratic Party, provided unrebutted evidence of these harms. These included markedly diminished ability to fundraise and to recruit candidates and volunteers. Indeed, North Carolina's CD3 was so extreme that, in 2018, no Democrat was willing to run in it.

Justiciability. Without saying so directly, Appellants argue that the Court should overrule its holding in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan-gerrymandering claims are justiciable. They maintain that the Court may not hear this case—or any other case challenging a partisan gerrymander—pursuant to the "political question" doctrine. But this argument is unmoored from the doctrine as this Court defined it in *Baker* and has applied it since. In particular, the doctrine provides no license for the Court to turn away claims because (in Appellants' words) they are "politically fraught" or "divisive." App. Br. 34. Nor does it permit a preemptive bar on entire *categories* of disputes—*e.g.*, "partisan-gerrymandering cases"—without a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217.

Appellants argue that partisan-gerrymandering claims present political questions because the Elections Clause (Art. I, § 4) "textually commits" the remedying of unconstitutional districting plans to State legislatures and Congress alone. But the Court has rejected this argument, either expressly or implicitly,

every time it has reviewed a State election regulation since *Baker* and *Wesberry v. Sanders*, 376 U.S. 1 (1964). Accepting it now would not only turn partisan-gerrymandering claims out of court; it would raze this Court's election-law jurisprudence *in toto*.

Appellants also argue that this case presents a political question because there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. But whatever may be true in other cases, the claims in *this* case could not be simpler or more "manageable." As Justice Kennedy observed in *Vieth*, and as oral argument in last Term's gerrymandering cases demonstrated, extreme districting plans such as the 2016 Plan that require partisan discrimination *on their face* are *per se* unconstitutional.

More broadly, "discoverable and manageable" standards *do* exist in partisan-gerrymandering cases: namely, this Court's well-settled precedents under the First Amendment, Equal Protection Clause, and Elections Clause. The "standards" that *Common Cause* Appellees offer here are just as understandable and applicable as those that this Court applies in any number of constitutional and statutory contexts. And the types of evidence that *Common Cause* Appellees offered to satisfy those standards—alternative maps and probability distributions derived from such maps—are both objective and familiar.

Appellants have one central "manageability" argument that they return to time and again: the District Court's tests do not draw a bright line between a permissible amount of politics and "too much" politics. App. Br. 2, 22. But this complaint misconceives

Common Cause Appellees' claims. The infirmity in the 2016 Plan is not that "political considerations" *per se* played an "excessive" role in its creation. It is that the Plan, and its individual districts, were drawn with the predominant intent to *discriminate invidiously* on the basis of political expression and association. The question, in other words, is not one of degree (how much "politics" is "too much?"), but one of kind (were political considerations used for invidious ends?). If invidious intent is present, harm sufficient to establish standing is all that is required. Contrary to Appellants' claims, while the Court has permitted benign uses of political data in districting, it has never blessed *invidious* political discrimination in districting in any amount—let alone where it predominates over all other motivations, as it did here.

Merits. The 2016 Plan is unconstitutional under three different bodies of well-established case law. The Plan's express imposition of burdens on the basis of political expression and association violates the First Amendment. Its intentional invidious discrimination violates the Equal Protection Clause. And its naked intent to "disfavor a class of candidates" and "dictate electoral outcomes" violates the Elections Clause. Appellants do not even engage with this Court's substantive doctrine on these issues, let alone distinguish the binding precedents on which the District Court properly relied.

ARGUMENT

I. *COMMON CAUSE* APPELLEES HAVE STANDING

The District Court correctly held that *Common Cause* Appellees, including both individual voters and the North Carolina Democratic Party, have standing. First, the voter-plaintiffs pleaded and proved that 12 of the Plan's 13 districts were packed or cracked, establishing vote-dilution injury under *Gill*. A3. Second, *Common Cause* Appellees pleaded and proved tangible burdens on their rights of political speech and association, both on a district-specific and statewide level. A74. Because all of these plaintiffs "allege[d] [and proved] facts showing disadvantage to themselves as individuals," they all "have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1920 (quoting *Baker*, 396 U.S. at 206).

Appellants maintain that *Common Cause* Appellees lack standing because this case is really just about an "abstract interest in policies adopted by the legislature"—a "nonjusticiable 'general interest common to all members of the public.'" App. Br. 24-25. Not so. This case is about the burdens the 2016 Plan imposed on *Common Cause* Appellees' personal votes and personal rights of political speech and association. Appellants' contrary argument both misreads *Gill* and distorts—or outright ignores—*Common Cause* Appellees' allegations and proof.

A. *Common Cause* Appellees Proved Vote-Dilution Injury

Gill expressly recognized that partisan gerrymandering results in vote dilution, and that this is a harm cognizable under Article III. As the Court noted, "the harm asserted by the plaintiffs" in such a case "aris[es] from the burden on those plaintiff's own votes." 138 S. Ct. at 1931. And "that burden arises through a voter's placement in a 'cracked' or 'packed' district." *Ibid.* Because the *Gill* plaintiffs had failed to adduce district-specific proof of packing or cracking, the Court remanded to afford them "an opportunity to prove" that they "live in districts where Democrats ... ha[d] been packed or cracked," and thereby establish standing. *Id.* at 1934.

Here, by contrast, *Common Cause* Appellees "alleged, argued, and prove[d] district-specific [vote-dilution] injuries *throughout* the course of this litigation." A41. This proof included the admissions of Appellants themselves and their map-drawer, Dr. Hofeller, that the Plan intentionally cracked and packed the specific districts where the voter-plaintiffs live. It also included the analyses of Drs. Mattingly and Chen, who used tens of thousands of alternative maps to show that the districts in which the voter-plaintiffs live are severely packed and cracked. *Cf. Gill*, 138 S. Ct. at 1930-31 (a voter establishes standing by proving that "the particular composition of [his] district ... causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district"). This proof was not "retrofit[ted]" after *Gill*, App. Br. 20, and the District Court's meticulous findings accepting it are not chal-

lenged on appeal. Indeed, Appellants barely even mention *Common Cause* Appellees' evidence, and to the extent that they do, they distort the record.

Appellants falsely analogize this case to *Gill*, where lead plaintiff William Whitford's "ideal map" itself showed that his own district had not been packed or cracked. 138 S. Ct. at 1924-25. That is plainly not true here: as discussed above, the undisputed evidence showed that the *Common Cause* voter-plaintiffs live in districts with Democratic vote shares markedly higher or lower than in the vast majority of alternative maps.

Muddying the waters, Appellants mix and match evidence offered by *Common Cause* Appellees and *League* Appellees, indiscriminately referring to them all as "plaintiffs." But there is an important difference. To prove standing, *Common Cause* Appellees offered tens of thousands of maps showing the full range of alternative possibilities. *League* Appellees relied on one map ("Plan 2-297"), which reflected one alternative scenario. Both are valid ways to show standing, but Appellants cannot simply ignore the thousands of alternative maps offered by *Common Cause* Appellees and base their arguments about the *Common Cause* voter-plaintffs on *League* Appellees' Plan 2-297 alone.

For example, Appellants argue that *Common Cause* plaintiff Alice Bordsen has no standing because the Democratic vote share in her CD4, one of the packed districts, approximately equals the Democratic vote share in the single hypothetical map relied upon by *League* Appellees. App. Br. 26. This cherry-picking ignores Dr. Hofeller's testimony that CD4

was intentionally "packed" with extra Democrats, and it ignores the thousands of alternative maps relied on by *Common Cause* Appellees (and the District Court) that confirm this. Thus, Dr. Chen found that the Democratic vote share in Bordsen's CD4 was higher than the Democratic vote share in 80% of hypothetical districts containing Bordsen's home address. A54; JA271; *see also* A163 (discussing similar results for Dr. Mattingly's 24,000 maps).[6]

Appellants play the same game with *Common Cause* plaintiffs Richard and Cheryl Taft of CD3, comparing the vote share of their actual district under the Plan to the vote share of the corresponding district in *League* Appellees' single Plan 2-297 (which they misleadingly call "*plaintiffs'* proposed plan"). App. Br. 27. But *Common Cause* Appellees did not rely on Plan 2-297 to establish the Tafts' standing; we relied on tens of thousands of alternative maps generated by Drs. Chen and Mattingly. That evidence—which Appellants do not challenge—showed that the Tafts would have been placed in a more Democratic district in over 95% of alternative maps, and that they would have been placed in a Democratic-*majority* district 75% of the time. A53, JA271. Instead, they found themselves in a district that was so rigged it could not even generate a Democratic candi-

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[6] Appellants offer a different argument as to *Common Cause* plaintiffs Larry Hall and John Gresham in CD1 and CD12, the other two packed districts. They do not contend that the Democratic vote shares of these plaintiffs' districts were unaffected by the gerrymander, but merely that "their districts would remain majority-Democratic under their own proposed maps." App. Br. 27. But that is true of any packed district, and *Gill* plainly holds that packing, as well as cracking, inflicts vote dilution.

date for Congress in 2018. Any "concessions" *League* Appellees may have made about their own plaintiffs under their single alternative map are immaterial to the standing of the Tafts or any other *Common Cause* voter-plaintiff.

More generally, as discussed above, Appellants admitted that they intentionally cracked ten districts where *Common Cause* plaintiffs reside for the purpose of subordinating Democrats and guaranteeing the election of Republicans. The extreme effects of this cracking were shown by overwhelming evidence on a district-specific basis. Notwithstanding Appellants' verbal sleight of hand, they challenge none of the District Court's extensive fact-findings on packing and cracking in this Court.

Finally, Appellants argue that, in some districts, the 2016 gerrymander may not have changed the outcome of the election. App. Br. 28. But *Gill* did not hold that the injury in a vote-dilution claim is the deprival of one's preferred election result. The injury, rather, is that the "composition of [a] voter's own district ... causes his vote—having been packed or cracked—to *carry less weight*...." 138 S. Ct. at 1930-31 (emphasis added); *see also id.* at 1936 (Kagan, J., concurring); *cf. N.E. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury-in-fact' in an equal protection case ... is the denial of equal treatment ..., not the ultimate inability to obtain the [desired] benefit."). Moreover, although Appellees are not required to show that their preferred candidates would have won absent the gerrymander, Drs. Chen and Mattingly's analyses show clearly that under a map drawn with-

out partisan discrimination, there would be more than three Democratic districts. Indeed, based on the bell curves they generated, there would likely be six or seven, and maybe more. *Ante* at 13-14.

B. *Common Cause* Appellees Proved Associational Injury

"[P]artisan gerrymanders inflict other kinds of constitutional harm" beyond vote dilution. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also Vieth*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). The District Court found such non-dilutionary injury here based on undisputed evidence, and it correctly held that these injuries establish standing. Specifically, it found—and Appellants do not dispute—that the 2016 Plan intentionally burdened Appellees' rights of political speech and association.

The *Common Cause* voter-plaintiffs gave unopposed testimony that the Plan "decreased [their] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70. These are classic injuries-in-fact. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (election law inflicted cognizable "burden" on association by making "[v]olunteers ... more difficult to recruit," "contributions ... more difficult to secure," and "voters ... less interested in the campaign").

And "what [was] true for" the voter-plaintiffs was "triply true" for the North Carolina Democratic Party. A71 (quoting *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring)). The Party's entire *raison d'être* is to engage in political activity and association and to compete for

seats. It is undisputed that the Plan "weaken[ed]" its capacity "to perform all [these] functions." *Ibid.* The Party was so weakened that it could not even recruit a candidate to run in CD3 in the 2018 election. It is hard to imagine a more concrete injury-in-fact to a political party. *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615-16 (1996) (striking down law that hampered party's ability to "convince others to join").

Rather than dispute the District Court's fact-finding, Appellants suggest that these burdens do not constitute injuries-in-fact because Appellees remain "free ... to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise [engage in political] expression." App. Br. 19. On countless occasions, however, this Court has found that voters, candidates, and parties have standing to challenge laws that stop short of altogether denying them the franchise, completely barring their candidacy, or flatly forbidding them to speak. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (public "matching funds" law injured opponents of candidates receiving such funds, even though they remained free to speak as they wished).

These non-dilutionary effects injured *Common Cause* Appellees both in their individual districts and on a statewide basis. Ignoring the district-specific injury, Appellants dispute that these injuries afford standing to challenge the 2016 Plan as a whole. But this argument fails to acknowledge the difference between vote dilution, at issue in *Gill*, and associational harms. Vote-dilution claims by individuals are dis-

trict-specific because citizens vote only in one district—their own. *Gill*, 138 S. Ct. at 1930. Nondilutionary harms, on the other hand, may be district-specific or statewide, particularly for a political party. Unlike vote dilution, "the associational injury flowing from a statewide partisan gerrymander ... has nothing to do with the packing or cracking of any single district's lines." *Id.* at 1938-39 (Kagan, J., concurring). Democrats from Asheville fundraise for candidates in Fayetteville; Democrats from Raleigh conduct voter outreach in Charlotte; and the Party itself does these things statewide—and has a critical organizational interest in the statewide outcome. Where, as here, "the harm alleged is not district specific, the proof needed for standing should not be district specific either." *Ibid.*

II. *COMMON CAUSE* APPELLEES' CLAIMS ARE JUSTICIABLE

Appellants' chief plea is that any partisan-gerrymandering case—whatever its legal theory, and however compelling its facts—should be nonjusticiable. They ask this Court to overrule *Bandemer* and take this momentous step on the flimsiest of bases: a "textual commitment" argument that this Court has rejected ever since *Baker* itself, and a "manageable standards" argument that misconstrues the evil of which Appellees complain and the ability of the courts to redress it.

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). The "political question" doctrine is "a narrow exception to that rule." *Id.* at 195. Indeed, it is so nar-

row that this Court "has relied on [it] only twice in the last [58] years." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., dissenting). *See Nixon v. United States*, 506 U.S. 224, 226 (1993) (precluding judicial review of Senate impeachment trial); *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (precluding judicial exercise of continuing supervisory jurisdiction over National Guard).[7] This case is a far cry from those.

Appellants repeatedly characterize the claims in this case as "politically fraught," "politically charged," and "politically divisive." App. Br. 2, 4, 21, 34, 36, 61. But the political question doctrine is not implicated "merely because [a suit] ha[s] political implications." *Zivotofsky*, 566 U.S. at 196. This Court *must* resolve a properly presented constitutional claim, even when the presidency itself hangs squarely in the balance. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

In any event, none of *Baker*'s potential signs of "political question" status is "inextricable from" this case. 369 U.S. at 217. Appellants raise just two of them: (1) a "textually demonstrable ... commitment"

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[7] *See also* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 459 (2017) (explaining that this Court has invoked the political question doctrine in only "two contexts": where the Constitution requires a coordinate branch "to apply legal rules to particular facts," *e.g.*, *Nixon*, and where plaintiffs seek "mandatory prospective relief ... concerning military and national security matters," *e.g.*, *Gilligan*).

to another decisionmaker; and (2) a lack of "discoverable and manageable standards" for decision. *Ibid.* Neither applies here.

A. The Elections Clause Is Not A "Textually Demonstrable Commitment" That Precludes Judicial Review

Although they did not raise it below, Appellants' "political question" argument now begins with the first *Baker* factor: "a textually demonstrable constitutional commitment of the issue" to another branch. In particular, they maintain that the Elections Clause, which "delegat[es] ... power to the States" to regulate the "Times, Places and Manner" of congressional elections subject to congressional modification, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995), strips the courts of jurisdiction to address claims that a State has exercised this power unconstitutionally. App. Br. 31-36.

This argument does not leave the starting gate. It was definitively rejected in *Baker*—the same case that established the modern political question doctrine. There, the Court surmised that the lower court's nonjusticiability holding might have turned on "the argument" that "Art. I, § 4" (the Elections Clause) renders "congressional redistricting problems ... a 'political question' the resolution of which was confided to Congress." 369 U.S. at 232-33. But this Court found otherwise, concluding that "Article I, ... [§] 4 ... plainly afford[s] no support for the District Court's conclusion." *Id.* at 234. Two years later, this Court again held that "nothing in the language of" the Elections Clause "immunize[s] state congressional apportionment laws which debase a citizen's right

to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry*, 376 U.S. at 6-7.

In the half-century since *Baker* and *Wesberry*, this Court has "continually stressed" that, while the Elections Clause gives States "a major role to play in structuring ... the election process," they "must act within limits imposed by the Constitution." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("A State's broad power to regulate the time, place, and manner of elections does not extinguish the State's responsibility to observe the limits established by ... the First and Fourteenth Amendments."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify ... the abridgment of fundamental rights, such as the right to vote ... or ... the freedom of political association."). Moreover, this Court has repeatedly invalidated State regulations of congressional elections that exceed constitutional limits. *See, e.g.*, *Jones*, 530 U.S. 567 (striking down "blanket primary" law); *Eu*, 489 U.S. 214 (striking down ban on party endorsements); *Tashjian*, 479 U.S. 208 (striking down restriction on primary voting). In fact, far from construing the Elections Clause as a grant of unreviewable discretion to the States or Congress, this Court has treated the Clause as a fount of judicial *authority* to invalidate State electoral regulations. Point III.C, *infra*.

To now accept Appellants' theory that the Elections Clause is a "textual commitment" that bars ju-

dicial review of State action taken under color of its authority would uproot this Court's entire election-law and voting-rights jurisprudence concerning State regulation of federal elections. Not just *partisan*-gerrymandering cases would become nonjusticiable; so would *racial*-gerrymandering and vote-dilution cases, one-person-one-vote cases, and challenges to everything from white primaries to ballot-access laws. After all, nothing in the text of the Elections Clause singles out partisan gerrymandering and treats it differently from any other theory under which State action taken pursuant to the Clause's authority might be challenged.[8]

With this Court's precedents squarely against them, Appellants resort to two arguments for their "textual commitment" thesis: (1) no one expressly raised the possibility of judicial review of districting legislation at the time of the Founding, App. Br. 32-33; and (2) partisan gerrymandering has taken place for a long time, *id.* 3-4. Neither argument is convincing—let alone compelling enough to jettison generations of settled precedent.

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[8] In a vague footnote, Appellants suggest that *racial*-gerrymandering claims would somehow escape unscathed "[i]n light of the Reconstruction Amendments." App. Br. 36 n.1. But they say the exact opposite in the body of their brief, arguing that "nothing in the Reconstruction Amendments suggests a revisiting of the original allocation of authority" under the Elections Clause. *Id.* 36. In any event, it is the Fourteenth Amendment that provides the basis for Appellees' Equal Protection claim and, through its incorporation of the Bill of Rights, Appellees' First Amendment claim. Thus, to the extent the Reconstruction Amendments supersede "the textual commitment ... in the Elections Clause," *id.* 36 n.1, they do so with respect to the claims in this case.

The first argument proves too much. The courts routinely hear all sorts of challenges to electoral regulations (and other types of government action) that the Founders did not, and could never have, specifically foreseen. And what the Founders *did* say is far more illuminating than what they did not: they explained that the courts "were designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within [constitutional] limits" and to prevent "oppressions of the minor party" by "the major voice of the community." Federalist No. 78 (Hamilton). That is precisely what Appellees ask the courts to do here.

Nor does the sordid history of partisan gerrymandering make it nonjusticiable. First, "[n]either the antiquity of a practice nor the fact of steadfast legislative ... adherence to it through the centuries insulates it from constitutional attack." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)). As this Court explained in another Elections Clause case, "[o]ne may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States." *Thornton*, 514 U.S. at 823. Second, while it is true that "various instances of partisan gerrymandering have indeed occurred throughout American history," it "has never been regarded as acceptable ... as part of our constitutional tradition or as a feature of democratic governance." Brief of Historians as *Amici Curiae* 33, *Gill v. Whitford*, No. 16-1161. "To the contrary, from its inception to the present day, it has been harshly condemned as an unconstitutional

mechanism for denying voters' essential rights to equal representation." *Ibid.*[9]

B. This Case Does Not Lack "Manageable Standards" For Resolution

Appellants' "manageable standards" argument fares no better. It bears emphasis, as the District Court noted, that this Court has never deemed a case (let alone an entire category of cases) nonjusticiable *solely* because of a purported lack of "manageable standards." A97 n.19; *see* Brief of Constitutional Law Professors as *Amici Curiae* 4-9, *Gill v. Whitford*, No. 16-1161. Nor should the Court take that unprecedented step here. The political question doctrine requires a *case-specific* assessment of manageability—and whatever may be true of other cases involving partisan gerrymanders, there is nothing "unmanageable" about a case such as this. More generally, the legal principles that should govern partisan-

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[9] For example, the first gerrymander after the formation of the United States—Patrick Henry's effort to shape the newly-formed congressional districts in Virginia to deny seats to James Madison and other Federalists—was bitterly condemned by the Framers. *See* PAPERS OF JAMES MADISON 11:302 (R. Rutland et al., eds. 1962). George Washington "dreaded" that Henry's districting plan would be "so arranged as to place a large proportion of those who are called Antifederalists" in the new Congress. DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 2:374 (M. Jensen et al., eds. 1976). General Henry "Light Horse Harry" Lee warned that Henry's gerrymander "menace[d] the existence of the govt." by designing "the districts ... to conform to the anti-federal interest." *Id.* 2:378. And Edmund Randolph feared that Henry's effort "to arrange the districts" would "tend to the subversion of the new government." PAPERS OF JAMES MADISON, *supra*, 11:339.

gerrymandering claims are well-established, and federal courts apply them successfully in other cases every day. Meanwhile, the unchallenged evidence that *Common Cause* Appellees adduced below is of the type routinely relied upon in judicial proceedings.

1. The Extraordinary Facts Of This Case Demonstrate A Violation Under Any Standard

Appellants ask the Court to use this case as a vehicle to "declare partisan gerrymandering claims nonjusticiable once and for all." App. Br. 2. But "all" partisan gerrymanders are not now before this Court—*this* one is. And however manageable or unmanageable other cases might be, the facts of this case make out a clear constitutional violation under any conceivable standard.

The political question doctrine calls for "case-by-case inquiry," not "blanket rule[s]" or "semantic cataloguing." *Baker*, 369 U.S. at 210-11, 215-16. Courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and determine the issue's "susceptibility to judicial handling ... in *th[at] specific case*." *Id.* at 211-12, 217 (emphasis added); *cf. Gilligan*, 413 U.S. at 11-12 (holding that "no justiciable controversy [was] presented ... *in this case*," but recognizing that the Court was "neither hold[ing] nor imply[ing] that the conduct of the National Guard is always beyond judicial review"). To go beyond the facts and legal theories raised in a case and rule that an entire category of cases is nonjusticiable would violate "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v.*

DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment).

The claims in *this* case are plainly judicially determinable. Invidious intent is clear—indeed, admitted. North Carolina formally adopted binding written criteria that expressly required preserving a Republican "Partisan Advantage," with a preset quota of "10 Republicans" and "3 Democrats." The declared "intent" was to maximize Republican power because "electing Republicans is better than electing Democrats." Equally clear is the discriminatory effect. Undisputed facts show that Appellants' gerrymander was extreme, both statewide and in its individual districts—a clear statistical outlier. No "value-laden judgments," App. Br. 2, are necessary to decide this case; the constitutional violation is plain for all to see.

As several Justices have suggested, at minimum, districting plans designed under a *facially* discriminatory mandate—as the 2016 Plan was—are unconstitutional. In *Vieth*, for example, Justice Kennedy observed that if "a State passed an enactment that declared" expressly that districts "shall be drawn ... to burden" one party, "we would surely conclude"—without further inquiry—"that the Constitution had been violated." 541 U.S. at 311-12.

At oral argument last Term, Justice Kennedy asked again whether a law expressly requiring partisan favoritism in districting would violate the Constitution. *See* Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 26; Oral Argument Tr., *Benisek v. Lamone*, No. 17-333 (Mar. 28, 2018) at 45. In both cases, counsel for the State parties agreed

that it would. So did counsel for the legislative *amici* in *Gill*:

> JUSTICE KENNEDY: ... If the state has a law ... saying all legitimate factors must be used in a way to favor party X or party Y, is that ... an equal protection violation or a First Amendment violation? ...
>
> MS. MURPHY: Yes. It would be ... unconstitutional, if it was on the face of it.

Gill Tr. 26-27.

Justice Kagan asked a similar question and received the same answer from the defendants' counsel:

> JUSTICE KAGAN: ... Suppose the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district[?]
>
> MR. SULLIVAN: ... It would be [viewpoint discrimination] on its face.

Benisek Tr. 47.

Thus, as Justice Alito observed, if nothing else, cases like *this* one can be resolved "manageably":

> JUSTICE ALITO: ... It's not a manageable standard that you cannot have a law that [expressly] says draw maps to favor one party or the other[?] *That seems like a perfectly manageable standard.*

Gill Tr. 20:8-15 (emphasis added). That cases with different facts might present different manageability questions is no reason to "stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 217. This Court can easily condemn the extraordinary combination of express invidious intent and extreme discriminatory effect present here.

2. Appellants' "Line-Drawing" Argument Is A Red Herring

Appellants' chief argument as to why partisan-gerrymandering cases are not "manageable" is that it is impossible for courts to draw an "identifiable constitutional line" between an acceptable and an excessive amount of politics in districting. App. Br. 22. Courts, they insist, are not institutionally suited to "mak[e] value-laden judgments about how much politics is too much." *Id.* 2.

For starters, Appellants' argument is irrelevant in *this* case. Even if some partisan-gerrymandering cases required line-drawing of this sort, this case does not: the Court need only look at the face of the criteria that the Redistricting Committee formally adopted and the admitted packing and cracking that implemented their plan.

More generally, however, Appellants' argument misconceives the evil in a partisan-gerrymandering claim. *Common Cause* Appellees do not assert—and the District Court did not find—that the 2016 Plan is unconstitutional because "politics" *per se* played too great a role in its creation. Rather, they assert—and the District Court found—that the Plan is unconsti-

tutional because it was enacted with the intent to discriminate invidiously on the basis of political viewpoint and association. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (distinguishing mere use of "political classifications" from use of such classifications "in an invidious manner"). Thus, the question that courts are called upon to answer is not one of degree (was "politics" considered "too much?") but one of kind (were political classifications applied in an invidious manner?). *See generally* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). If the classification is invidious, that is all a plaintiff who has suffered resulting injury-in-fact must show.

This Court has recognized the distinction between invidious and non-invidious uses of political classifications. For example, it has held that "political considerations" may be taken into account in districting to "provide ... proportional representation," *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973), or to "avoid[] contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). At the same time, the Court has warned that the use of political classifications must be "nondiscriminatory." *Ibid.* In other words, the map-drawers may not employ them to "invidiously minimiz[e]" the "voting strength" of any "political group." *Gaffney*, 412 U.S. at 754; *see also Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971) (districts are "subject to challenge" where they "operate to minimize or cancel out the voting strength of racial *or political* [groups]" (quot-

ing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) (emphasis added)); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004) (striking down plan where "the policy of protecting incumbents" was "applied in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents"), *summarily aff'd*, 542 U.S 947 (2004).

Appellants would have the Court believe that it has already blessed both the benign *and* the invidious use of political criteria in districting. App. Br. 47. This is simply not true. There is no decision of this Court holding that "a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336-37 (Stevens, J., dissenting). *Gaffney* expressly turned on the fact that the Legislature's purpose in employing political data was benign rather than "invidious[]." 412 U.S. at 754 ("[C]ourts have [no] constitutional warrant to invalidate a state plan ... because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it."). *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), both recognize that a plaintiff cannot prevail on a *racial*-gerrymandering claim when in fact the State's predominant motive was political. But neither *Cromartie* opinion "held" that the invidious use of political classifications to subordinate a minority party is ever constitutional, *cf.* App. Br. 7, and in *Easley*, political data was expressly used (as in *Gaffney*) to achieve "partisan balance throughout the State." 532 U.S. at 253. Nor could either case have held anything about partisan-gerrymandering claims, since none were before the Court in those cases.

Because the claims in this case challenge invidious partisan discrimination, rather than the presence of "political considerations" *per se*, Appellants' manageability concerns evaporate. Courts are well equipped to decide claims that a challenged action was invidiously motivated. They decide such claims routinely. Determinations of invidious intent do not require courts to assume the role of legislatures or make "value-laden judgments." App. Br. 2. When invidious intent and injury sufficient to establish standing are present, no more is needed.

Appellants demur that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan." App. Br. 48 (quoting *Vieth*, 541 U.S. at 344 (Souter, J., dissenting)). That may be true, but only in the same meaningless sense that it is impossible to eliminate racism from all human hearts or to prevent all tax cheating. That is no excuse for refusing to adjudicate race-discrimination or tax-fraud cases. The same goes here: public officials sworn to uphold the Constitution should be capable of refraining from invidious conduct, if they are told that is the law.[10]

At the same time, if the Court desires to limit judicial intervention to the most extreme cases of invid-

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[10] For comparison's sake, when *Shaw v. Reno*, 509 U.S. 630 (1993), was decided, many (including the dissenters) predicted that *Shaw*'s open-ended "bizarreness" standard would spawn constant litigation. But map-drawers quickly got the Court's message, and in the 2000 round of redistricting that followed, there was virtually no *Shaw* litigation. *See* S. Issacharoff, P. Karlan, R. Pildes, & N. Persily, LAW OF DEMOCRACY 937 n.4 (5th ed. 2016).

ious intent, the District Court offered a solution: require the plaintiff to show that invidious intent *predominated* over all other considerations in the redistricting process. A119-20, 142-46. Appellants do not challenge the District Court's factual finding that this was the case here. *See, e.g.*, JA146 n.23, 166, 171. Indeed, it is indisputable that minimizing Democrats' political strength was the overriding purpose to which all other considerations were subordinated.

After complaining that a plain "invidious intent" standard is too demanding, Appellants turn around and criticize a "predominant invidious intent" standard as too inexact. App. Br. 48. But "courts routinely engage" in predominant-purpose inquiries "in many areas of constitutional jurisprudence." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000). Especially relevant here, this Court has manageably applied a predominant-intent standard to *racial*-gerrymandering claims for over 20 years. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). In fact, given the frequency with which States raise "party, not race" defenses to racial-gerrymandering claims, courts are already adept at determining whether pursuit of partisan advantage was the predominant force behind the drawing of an individual district's lines. *See, e.g., Harris*, 137 S. Ct. at 1503.

3. The Legal Principles Governing This Case Are Well-Settled And Within The Judiciary's Competence To Apply

Once *Common Cause* Appellees' claims are properly understood, it becomes clear that "judicially discoverable and manageable standards" exist for resolving them. As set forth in Point III, those "standards"—

e.g., the prohibition on unjustified invidious discrimination—come directly from this Court's well-established First Amendment, Equal Protection, and Elections Clause precedents. *Cf. Baker*, 369 U.S. at 226 ("Nor need ... the Court ... enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar....").

Importantly, *Baker*'s "discoverable and manageable standards" prong does not require an algorithmic test devoid of all human judgment. *See id.* at 283 (Frankfurter, J., dissenting) ("Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines."). If it were otherwise, many—perhaps most—areas of constitutional and statutory jurisprudence would be nonjusticiable. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (forfeiture "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (probable cause is "a fluid concept ... not readily, or even usefully, reduced to a neat set of legal rules"); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977) (practice violates § 1 of Sherman Act if, "weigh[ing] all the circumstances," it "impos[es] an unreasonable restraint on competition").

Baker's "standards" prong asks only whether the controversy literally "defies judicial treatment," 369 U.S. at 212, in that it would require the courts to dictate "policies ... for matters not legal in nature," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S.

221, 230 (1986)—for example, whether to recognize a foreign government, *Baker*, 369 U.S. at 212-14, or the appropriate "standards for the training ... of the National Guard," *Gilligan*, 413 U.S. at 6. None of the tests advanced in this case resembles these quintessentially nonjudicial determinations. Instead, they call for the same familiar modes of inquiry—a search for invidious intent and adverse impact on the plaintiff—that courts make in racial-gerrymandering cases, employment-discrimination cases, and any number of others. These standards "hardly leave[] courts at sea." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

4. The Evidence That *Common Cause* Appellees Adduced To Satisfy These Legal Principles Was Familiar And Compelling

Not only are the proper legal standards well-known to the courts, but the evidence necessary to prove a partisan-gerrymandering claim is also familiar. The alternative maps relied upon by *Common Cause* Appellees are tools regularly used by courts in racial-gerrymandering and vote-dilution cases for analogous purposes. They can provide evidence not only of the district-specific effects of a gerrymander, but also of invidious intent and absence of legitimate justification. *See* Brief of Eric S. Lander as *Amicus Curiae*; Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* 18-24. And they are intuitive and easy for the courts and the public to understand.

Appellants ignore altogether the tens of thousands of alternative maps created by Drs. Mattingly and Chen and the District Court's fact-finding based on them. Instead, they focus on *other* forms of statistical evidence relied upon by *League* Appellees, such as the

efficiency gap, the mean-median difference, and other measures of plan-wide partisan bias. Appellants criticize these measures as lacking a baseline, as prone to false positives, as disguised measures of proportionality, and as unable to provide district-specific evidence. App. Br. 42-46. Because *Common Cause* Appellees did not rely on this evidence below, we leave it to *League* Appellees to respond.

But, crucially, these criticisms are completely irrelevant—*they cannot possibly apply*—to the large-scale simulations based on alternative maps relied upon by *Common Cause* Appellees. Those maps were all drawn atop the actual geography of North Carolina, taking the location of its voters and their voting histories as given. Thus, these alternative maps necessarily account for any natural "clustering" of partisans in particular regions (*e.g.*, urban areas). They are inherently district-specific, because they allow the comparison of a plaintiff's actual district to the full gamut of alternative districts in which that plaintiff's residential address might have been placed. And they do not in any way "measure deviations from proportional representation." App. Br. 50.[11]

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[11] In the district court, Appellants lodged only two objections to the maps of Drs. Mattingly and Chen. They allude to just one here: that the premise underlying the hypothetical maps is that voters vote for a party and not a candidate. App. Br. 45-46. Of course, partisan preferences and turnout can vary from year to year, and candidates and issues do matter. But as the District Court noted in rejecting this argument, the challenged premise is the exact "same assumption" on which Appellants drew the gerrymandered 2016 Plan in the first place—and it works. A175; *see* Brief of Political Science Professors as *Amici Curiae*. Appellants, in any event, did not appeal this finding.

In *Gill*, this Court unanimously approved the use of one or more "hypothetical district[s]" to demonstrate cracking or packing on a district-by-district basis. 138 S. Ct. at 1931. As the concurrence explained, it is "not ... hard" to demonstrate packing or cracking via "an alternative map (or set of alternative maps) ... under which [the plaintiff's] vote would carry more weight." *Id.* at 1936. Notably, the concurrence approvingly cited the *amicus* brief of Dr. Chen and others doing similar work. *See* Brief of Political Geography Scholars as *Amici Curiae* 12-14, *Gill v. Whitford*, No. 16-1161 (describing computer simulation techniques for devising alternative maps). Multiple courts have found Dr. Chen's computational alternative-map analyses persuasive. *See, e.g., Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 202805, at *20-25 (E.D. Mich. Nov. 30, 2018); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D.N.C. 2017); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018). And, more generally, alternative maps are routinely used as "key evidence" in racial-gerrymandering cases. *Harris*, 581 U. S. at 1477-79; *Easley*, 532 U. S. at 258.

Where a single alternative map is used, as *League* Appellees did, it shows that it is possible to achieve a different electoral result than the map under attack. But because it is just one reference point, it cannot prove that the challenged map is itself discriminatory. On the other hand, the vast array of hypothetical maps generated by Drs. Mattingly and Chen, and relied upon by *Common Cause* Appellees, provides compelling evidence of invidious intent, dilutive ef-

fect, and lack of justification. By taking a large random sample from the universe of all available maps, such a collection establishes a baseline—a bell curve—of what the electoral landscape should look like absent partisan gerrymandering, and it permits the fact-finder to measure the deviation of the challenged map (and its individual districts) from that baseline. Here, the district court found, and Appellants do not dispute, that the 2016 Plan was an "extreme statistical outlier." A171. When the maps are analyzed on a district-specific level, they provide direct evidence of the burden that the gerrymander imposes on particular voters in individual districts. A51-65. Extreme deviations like those found here also permit the inference that the gerrymander was intentional. A165-66. Finally, the array of available neutral alternatives also proves the lack of justification for the gerrymander.[12]

There is nothing unusual about using statistical evidence to show the improbability that a given result was due to chance, or to prove the extremity of a practice's impact. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (use of statistical evidence to identify correlation between race and preferred candidates); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (use of statistical evidence to demonstrate intentional exclusion of blacks from grand jury); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (use of statistical evidence to demonstrate intentional racial discrimination in hiring). Alternative maps, and probability

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[12] *League* Appellees agree that alternative maps can be used for all of these purposes, but relied upon them principally for the lack-of-justification prong.

distributions associated with large groups of them, are familiar and no more difficult to understand than a bell curve. Courts can use this evidence and draw correct conclusions from it. And most importantly, the District Court did so here—and Appellants do not claim otherwise.

III. THE 2016 PLAN AND ITS INDIVIDUAL DISTRICTS ARE UNCONSTITUTIONAL

For all their potshots at the District Court's legal tests, it is striking that Appellants offer practically no argument that the 2016 Plan is actually constitutional. They do not challenge any of the District Court's fact-finding (let alone as clearly erroneous), and they make no attempt to square the Plan's undisputedly invidious intent and undisputedly extreme effect with settled First Amendment, Equal Protection Clause, and Article I doctrine. Nor could they.

A. The Plan And Its Districts Violate The First Amendment

The First Amendment "safeguards" the "right" of all Americans to "participate in ... political expression and political association." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014). It protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), and it prohibits the governing majority from "prescrib[ing] what shall be orthodox in politics," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In this way, the First Amendment serves as "a vital guarantee of democratic self-government." *U.S. Telecom Ass'n v.*

FCC, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

In particular, the First Amendment does not permit the government "to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 572 U.S. at 191. It therefore prohibits State action that distorts "[t]he free functioning of the electoral process" or "tips the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). This includes retaliating against public employees who belong to the out party, *see ibid.*; or permitting "[g]overnment funds [to] be expended for the benefit of one political party," *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980); or even "ordering the removal of ... books written by" opposing partisans from public libraries, *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982).

"[T]here is no redistricting exception to this well-established First Amendment jurisprudence." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016). Indeed, as six Justices have agreed, partisan gerrymandering strikes at the heart of these First Amendment values. *See Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *id.* at 324-25 (Stevens, J., dissenting); *see generally* Brief of Floyd Abrams Institute for Freedom of Expression as *Amicus Curiae*.

Here, as the District Court held, the 2016 Plan runs afoul of at least four well-established lines of First Amendment precedent. A275-279. First, the Plan expressly burdens protected activity based on the "motivating ideology ... of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 829 (1995). Second, the Plan expressly regulates protected activity "based on the identity of the speaker." *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Third, by "penalizing" individuals "because of ... their association with a political party[] or their expression of political views," the Plan constitutes unlawful retaliation for exercise of First Amendment rights. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). And fourth, the Plan does not constitute a "reasonable, non-discriminatory" election regulation. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Appellants make no attempt to reconcile the Plan with these well-established precedents; indeed, they cite no First Amendment case law at all.

The District Court correctly found that these violations caused the North Carolina Democratic Party and the voter-plaintiffs to suffer well-recognized First Amendment harms to political expression and association, including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70; *ante* at 11-12, 31-32. These findings were not disputed below and are not challenged here.

Lastly, the District Court correctly held that this burdening of First Amendment rights was not narrowly tailored to a compelling State interest. A111. Indeed, no Justice of this Court has ever suggested that partisan gerrymandering affirmatively serves any such interest. In the District Court, Appellants "never ... argued ... that the 2016 Plan's express partisan discrimination advance[d] *any* democratic, constitutional, or public interest." A110. In a footnote,

Appellants now concoct the notion that the Plan "avoids the concentration of majority-party voters in a small number of districts." App. Br. 50 n.9. This newfound and fanciful "interest" is nothing less than the claim that it is a positive good to crack Democratic constituencies in order to increase Republican power. Nakedly seeking partisan advantage is not a legitimate State interest.

Appellants' criticisms of the District Court's First Amendment analysis miss the mark. First, for the reasons described above, it would not "render unlawful *all* consideration of political affiliation in districting." App. Br. 52, 54. It would ban only *invidious* discrimination on the basis of political expression and association, when not narrowly tailored to a compelling State interest. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring). Second, the District Court did not err by refusing to require some heightened demonstration of effect or burden. "This Court's decisions have prohibited" State action that unjustifiably burdens First Amendment rights, "however slight[ly]." *Elrod*, 427 U.S. at 358 n.11. Harm sufficient to constitute standing is all that is required.

In any event, the injury to *Common Cause* Appellees' First Amendment interests was far from "*de minimis*." App. Br. 55. The voter-plaintiffs and the North Carolina Democratic Party had their voting power diluted to an extreme degree and were significantly impaired in their ability to fundraise and to recruit candidates and volunteers. *See Anderson*, 460 U.S. at 792 (election law inflicted First Amendment harm by making "[v]olunteers ... more difficult to re-

cruit," "contributions ... more difficult to secure," and "voters ... less interested in the campaign").

B. The Plan And Its Districts Violate The Equal Protection Clause

The Equal Protection Clause requires "that all persons similarly situated ... be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It has long prohibited State action that intentionally disfavors a class of citizens absent sufficient justification. Where a constitutional right is burdened, that means narrow tailoring to a compelling State interest. *Id.* at 440. The District Court faithfully applied this precedent via its "three-step framework," which required "discriminatory intent," "discriminatory effects," and lack of justification in terms of a "legitimate redistricting objective." A138-39.

The District Court correctly found that the cracking and packing of 12 of the 13 districts in the 2016 Plan was motivated—not just in part, but *predominantly*—by the invidious intent to burden Democrats' political rights. A35. This was not meaningfully disputed below, and Appellants themselves, their mapdrawer, and their experts have all admitted as much. Moreover, Drs. Mattingly and Chen's simulations controlled for both "clustering" of Democrats and incumbent protection and showed that neither could explain the extreme partisan deviation of these districts. A211-12.

The District Court also correctly found that the 2016 Plan had a "discriminatory effect." The easy-to-understand evidence of Drs. Mattingly and Chen's alternative maps—unchallenged on appeal—proved

this convincingly. The District Court believed that the effect prong required a showing of long-term harm—*i.e.*, "that the dilution of the votes of supporters of [the] disfavored party ... is likely to persist in subsequent elections." A152. It found that requirement met based on the actual election results under the 2016 Plan and its predecessor plan, as well as the statistical and simulation analyses of multiple highly qualified experts. A168-70. Appellants do not challenge these factual findings.

If anything, this "effect" analysis was too demanding. Setting aside *Davis v. Bandemer*—whose "consistent degradation" test has been roundly criticized—the "effect" inquiry in this Court's Equal Protection cases has been whether the challenged intentional discrimination caused the plaintiff to suffer an Article III injury-in-fact. Faithful application of an invidious-intent requirement (especially with a predominance gloss) will appropriately limit judicial intervention; there is no need to engraft a "durability" requirement foreign to Equal Protection doctrine. Indeed, such a requirement would perversely give legislators *carte blanche* to enact *seriatim* the most extreme gerrymanders, one for each new election cycle.

Finally, the District Court correctly held that Appellants' intentional discrimination was not tailored to any rational—let alone compelling—State interest. A222. Appellants did not contend otherwise below.

Appellants' chief complaint with the District Court's Equal Protection test is that it does not "answer the ... question of how much [politics] is too much." App. Br. 47. However, as noted above, *Common Cause* Appellees do not complain of "too much"

politics in the districting process; they complain of invidious discrimination. Appellants also protest that the District Court did not select a quantitative threshold for "[h]ow much [vote] dilution must occur," "[h]ow likely ... the dilutive effect [must] be to persist," and "for how lon[g]." *Id.* 50 (emphases deleted). As discussed above, these questions are beside the point. There is no requirement in Equal Protection case law that a violation be of long duration. Similarly, there is no requirement that it be extreme. Injury-in-fact sufficient to establish standing should suffice. But even if these requirements were grafted onto the test, the District Court found, based on undisputed evidence not challenged on appeal, that the dilutive effects of the 2016 Plan were both extreme and enduring. Those findings make this case one of clear unconstitutionality.

C. The Plan And Its Districts Violate Article I

"Through the Elections Clause [Art. I, § 4], the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001). By contrast, Article I, § 2 grants "the People"—and *not* State legislatures—the power to "cho[ose]" representatives. Together, these clauses provide a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," thus "ensur[ing] to the *people* their rights of election." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (citation omitted).

As this Court has made clear, the Elections Clause is not merely a grant of power; it is also a limitation. States have no "reserved" powers to regulate federal elections; they may do only what "the exclusive delegation of power under the Elections Clause" permits them to do. *Gralike*, 531 U.S. at 522-23; *Thornton*, 514 U.S. at 805. Beyond the boundaries of that Clause's delegated authority, "the [S]tates can exercise no powers whatsoever" to regulate congressional elections. *Gralike*, 531 U.S. at 519 (quoting Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)). When States attempt to do so, their acts are *ultra vires* and "void." *Id.* at 528 (Kennedy, J., concurring).

Although the Elections Clause grants "broad power" to "issue procedural regulations," several limits are clear. *Id.* at 523-24. Namely, the Clause is "not ... a source of power" (1) "to dictate electoral outcomes"; (2) "to favor or disfavor a class of candidates"; or (3) "to evade important constitutional restraints." *Ibid.* These limits follow from Article I, § 2, which keeps political officials electorally accountable by assigning the task of "cho[osing]" representatives to "the People" alone. *See Thornton*, 514 U.S. at 833 & n.47. As the District Court unanimously found, the 2016 Plan is *ultra vires* under each of these three tests. A303; *see also A. Philip Randolph Inst. v. Householder*, 2019 U.S. Dist. LEXIS 24736, at *27-31 (S.D. Ohio Feb. 15, 2019) (recognizing that, in partisan-gerrymandering context, Elections Clause provides a basis for challenging both individual districts and "the entire districting plan").

The comparison with *Gralike* is inescapable: there, Missouri adopted a law requiring candidates' positions on term limits to be included on the ballot. This exceeded Missouri's "delegated power" under the Elections Clause because it was "designed to favor candidates" with one position and "disfavor those" with an opposing view—and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. But Missouri's attempt to bias voters' choices by providing them with selected information was subtle compared to North Carolina's approach. The 2016 Plan *literally* sought to "dictate" the outcome of North Carolina's congressional elections, establishing quotas for the State's delegation ("10 Republicans" and "3 Democrats"), and selecting the party of each individual district's representative, before a single vote was cast.

Appellants make no attempt to explain how the 2016 Plan can satisfy the Elections Clause if the amendment struck down in *Gralike* could not. Indeed, their brief does not even cite *Gralike* (or its predecessor, *Thornton*). Rather than addressing this Court's Elections Clause jurisprudence, Appellants revert to their perennial theme that Article I, §§ 2 and 4 do not specify a quantitative "limit" on "political considerations ... [in] districting." App. Br. 56. As explained above, this "line-drawing" critique misses the mark. Appellants also suggest that Appellees' Elections Clause claims are *really* non-justiciable Guarantee Clause claims. But *Common Cause* Appellees' claims are premised on Article I, §§ 2 and 4 and this Court's decisions in *Gralike* and *Thornton*, not the Guarantee Clause. As this Court made clear in *Baker*, the fact that Appellees "might conceivably have added a claim under the Guarant[ee] Clause" does not mean that

they "may not be heard" on the claims "which in fact they tender." 369 U.S. at 226-27.

D. Appellants Offer No Colorable Defense Of The Plan On The Merits

Almost as an afterthought, Appellants assert that the 2016 Plan is constitutional—despite its undisputed invidious motivation, its express viewpoint discrimination, and its extreme packing and cracking—because the resulting map divided fewer counties and precincts than two previous maps did. But this argument is doubly flawed.

First, Appellants fail to mention that the "maps from the 1990s and 2000s" that they supposedly improved upon were horrendously misshapen. App. Br. 58. In North Carolina's 1992 map, for example, eight of the 12 districts were among the most bizarrely shaped in the country. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 571-73 & tbl. 6 (1993) (perimeter measure). One of them—the infamous CD12 that spawned *Shaw v. Reno*—was the second "worst [district] in the nation." *Id.* at 566. That the 2016 Plan may look better than this, at least superficially, is not saying much.

Second, and more importantly, compliance with "traditional redistricting principles" such as compactness and preservation of political subdivisions is no defense to a charge of gerrymandering. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798-99 (2017). The Constitution "does not prohibit misshapen districts. It prohibits unjustified ... classifica-

tions." *Ibid.* The infirmity of a gerrymander, in other words, "stems from the [improper] purpose," not the "manifestation" of that purpose in the form of divided counties or irregular borders. *Ibid.*; *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("With [modern] tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements.").

Appellants also argue—again, as an afterthought—that they "did not set out to pursue partisan advantage at all costs." App. Br. 59-60. Even if true, "at all costs" is not the standard, and Appellants do not dispute the District Court's unanimous finding that invidious partisanship was the Legislature's predominant motivation. In any event, Appellants' assertion is demonstrably false. Appellant Lewis openly admitted that he proposed a 10-3 map only "because [he] d[id] not believe it's possible to draw a map with 11 Republicans and 2 Democrats." Drs. Chen and Mattingly's tens of thousands of alternative plans confirm for all to see that what Lewis said was true: Appellants could not have drawn a more extremely partisan map if they had tried.

CONCLUSION

For the reasons above, this Court should affirm the District Court's judgment.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,
Appellants,
v.
COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

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QUESTIONS PRESENTED

1. Whether the district court correctly found that plaintiffs have standing to challenge particular North Carolina congressional districts on partisan vote-dilution grounds because those districts unnecessarily crack or pack plaintiffs?

2. Whether the district-specific test for partisan vote-dilution claims set forth by the district court—requiring (1) the intent to subordinate adherents of one party and entrench a rival party in power; (2) the effect of such subordination and entrenchment; and (3) the lack of a legitimate justification for such subordination and entrenchment—is judicially discernible and manageable?

3. Whether the district court's unanimous decision that particular North Carolina congressional districts are unconstitutional under this test is correct?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the League of Women Voters of North Carolina states that it is a nonprofit corporation that has no parent corporation and issues no stock.

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INTRODUCTION

The League of Women Voters of North Carolina ("League") submits this brief in support of an affirmance of the district court's judgment. As throughout this litigation, the League solely advances a claim of partisan vote dilution under the First and Fourteenth Amendments (while also supporting other plaintiffs' different claims). The League's approach was endorsed by the court below, which ruled that particular districts in North Carolina's current congressional plan ("2016 Plan") deliberately diluted Democrats' votes through cracking and packing. Indeed, these districts' drafters repeatedly *boasted* about their scheme to preserve their ill-gotten political gains by minimizing the influence of disfavored voters. The drafters also achieved their objective: an enormous and unjustified Republican advantage virtually certain to endure in future elections.

This Court decided its most recent partisan vote-dilution case, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), on standing grounds. To be injured in fact, the Court held, a litigant must show that she lives in a cracked or packed district—and could be placed in an *un*cracked or *un*packed district by an alternative map. The Court also provided guidance about other aspects of partisan vote-dilution challenges. These suits should be district-specific, not plan-wide, in scope. The intentional pursuit of partisan gain should be an element of the claim. And if liability is found, the remedy should be the revision of the plaintiff's own district (not the map in its entirety).

In its thorough decision, the district court scrupulously followed these instructions. It held that

certain plaintiffs have standing to allege partisan vote dilution—because they are unnecessarily cracked or packed by particular North Carolina congressional districts—while other plaintiffs lack the requisite injury. The district court also adopted a test for partisan vote dilution that follows directly from this Court's analysis in *Whitford*. This test is district-specific. Under it, each district is examined separately, and rises or falls independently.

The test's *first* element is the one the Court contemplated in *Whitford*: whether the challenged district was drawn with the aim of cracking or packing the opposing party's voters, and thus diluting their electoral influence. Of course, evidence of the defendants' motives in designing the map as a whole may be relevant to whether an individual district was crafted with invidious intent. *Second*, the test asks whether the district at issue, and the plan to which it belongs, are in fact dilutive. A plaintiff must prove that she lives in a district that actually cracks or packs her. But since every map includes districts that dilute some voters, the plaintiff satisfies this prong only if she further shows that the entire plan creates a large and durable advantage for the line-drawing party. And *third*, the test considers whether a legitimate justification exists for the dilution, like a State's political geography or nonpartisan redistricting goals. Alternative maps reveal if a State could have achieved its valid aims without abridging the influence of the opposing party's supporters.

Strikingly, Appellants do not argue that the district court misapplied its test. This is because the court's conclusions are based on overwhelming and irrefutable evidence. Start with the drafters' intent. In

a brazen and unprecedented move, Republican legislators explicitly ratified "Partisan Advantage" as one of their official redistricting criteria. This provision stipulated that "[t]he partisan makeup of [North Carolina's] congressional delegation" would be "10 Republicans and 3 Democrats." J.S.App.20. The co-chair of the redistricting committee added that Republicans would be allotted a ten-seat quota only because it was not "possible to draw a map with 11 Republicans and 2 Democrats." J.S.App.22. These facts amount to an official state policy to maximally degrade the representation of disfavored voters. They support an affirmance even if broader issues about the justiciability of partisan gerrymandering are left unresolved.

Consider, next, the dilutive impact of the 2016 Plan. Its boundaries methodically divide clusters of Democratic voters or else cram them into just three districts. Thanks to this rampant cracking and packing, Republican candidates won ten out of thirteen seats in the 2016 election even though the statewide vote was nearly tied. In 2018—as predicted by Appellees' expert—Republicans again prevailed in ten districts while *Democrats* earned a majority of the statewide vote.[1] A Democratic wave thus failed to breach the gerrymander's defenses. To the contrary, it yielded the single largest Republican advantage in the last half-century of congressional elections.

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[1] After the 2018 election, Republican candidate Mark Harris narrowly led Democratic candidate Dan McCready in District 9. However, the State Board of Elections refused to certify the result and ordered a new election because of evidence of widespread irregularities—specifically, a scheme to alter or destroy large numbers of absentee ballots.

With respect to justification, lastly, the drafts of Appellants' own mapmaker highlight the lack of a valid explanation for this record-breaking bias. Several of his maps were more compliant with traditional criteria than the 2016 Plan, but much less skewed in Republicans' favor. More systematically, Appellees' expert used a computer algorithm to randomly generate thousands of North Carolina congressional maps without even considering partisan data. All these maps matched or beat the 2016 Plan on all its nonpartisan goals. But *none* were as favorable for Republicans, proving that neither the State's political geography nor any neutral objective can account for the Plan's extreme tilt.

Appellants observe that, since this Court's decision in *Whitford*, congressional districts have been invalidated in two States (Maryland and North Carolina) and challenged in two more. But Appellants draw precisely the wrong lessons from these cases. First, the volume of litigation is very low. A handful more redistricting suits (after the hundreds brought earlier in the decade) cannot possibly tax the capacity of the federal courts. Second, the cases target the worst of the worst. They involve the most flagrant line-drawing abuses in the country—by both parties. And third, far from flailing in a sea of standards, the cases have converged on a single test for partisan vote-dilution claims: the *same* test adopted by the district court here. It would be ironic for this Court to hold that no workable approach exists just when the lower courts have finally found one.

With the next redistricting cycle about to begin, moreover, a decision rejecting the emerging consensus would be calamitous. Both parties are poised to wield

unified control of many state governments after the 2020 election. If given a judicial green light, both parties will exploit their authority to gerrymander even more aggressively, using even more potent techniques, than they have to date. Like North Carolina's mapmakers, they will ruthlessly crack and pack the opposing party's voters. They will also program computer algorithms to maximize their partisan advantage and make adjustments throughout the decade to any districts that seem to be slipping from their grasp. Through such machinations, "those who govern," who "should be the *last* people to help decide who *should* govern," will try to extinguish "the political responsiveness at the heart of the democratic process." *McCutcheon v. FEC*, 572 U.S. 185, 192, 227 (2014) (plurality).

But this dismal future is not inevitable. To avoid it, this Court should affirm the decision below and confirm its willingness to thwart the most egregious instances of partisan gerrymandering.

STATEMENT

I. The 2016 Plan Was Enacted with the Official Aim of Diluting the Influence of Democratic Voters.

The 2016 Plan is the second one North Carolina has used this decade. The 2012 and 2014 elections were held under the map enacted in July 2011 ("2011 Plan"). This Court held in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), that two of the 2011 Plan's districts were unconstitutional *racial* gerrymanders, drawn with race as their predominant motive. The district court also found that "invidious partisanship was a

motivating purpose behind the 2011 Plan" as a whole. J.S.App.179.

Abundant evidence supported the district court's finding. For example, the co-chairs of the legislative committee responsible for designing the 2011 Plan, Representative David Lewis and Senator Robert Rucho, stated that their "primary goal" was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." J.S.App.180. Similarly, the actual drafter of the map, Dr. Thomas Hofeller, wrote in an expert report that "[t]he General Assembly's overarching goal in 2011 was to create as many safe and competitive districts for Republican incumbents or potential candidates as possible." Ex.2035:23.

After the 2011 Plan was invalidated in part, the same actors took the lead in crafting its replacement. Lewis and Rucho were again the co-chairs of the Joint Select Committee on Congressional Redistricting ("Committee"). Hofeller was once more the cartographer. Lewis and Rucho verbally instructed Hofeller to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," with "10 Republicans and 3 Democrats." J.S.App.15. They added that he should exclusively use "political data" in his work: "precinct-level election results from all statewide elections." *Id.*

Following their directions, Hofeller aggregated these election outcomes into a sophisticated multi-year average that, in his expert view, would accurately capture district partisanship "'in every subsequent election.'" J.S.App.16-17. Employing this metric, he systematically cracked and packed Democratic voters throughout North Carolina. Where

possible, that is, he divided clusters of Democrats that could have anchored congressional districts and submerged the fragments within larger masses of Republicans. Where Democratic concentrations were too large to be split, he wedged them into just three districts. These efforts are described in more detail below. *See infra* pp.9-14.

After Hofeller finished drafting the 2016 Plan—alone and in secret—Lewis and Rucho convened a pair of Committee meetings. J.S.App.19. At the first session, the Committee approved, on party-line votes, the criteria that Lewis and Rucho had previously conveyed orally to Hofeller. J.S.App.23. The "Partisan Advantage" criterion stated that "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." J.S.App.20. The "Political Data" criterion added that, other than population counts, "[t]he only data ... to be used to construct congressional districts shall be election results in statewide contests." *Id.* These criteria appear to be unprecedented in American history: the first time a legislative body has officially ratified a district map's pursuit of maximal partisan gain.

Also at the first session, Lewis declared about the 2016 Plan, "I acknowledge freely that this would be a political gerrymander." J.A.308. He further "propose[d] that to the extent possible, the map drawers create a map which is ... likely to elect 10 Republicans and 3 Democrats." *Id.* He explained: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." J.A.310. And he made clear that "to the extent [we] are going to use

political data in drawing this map, it is to gain partisan advantage." J.S.App.22.

At the second Committee meeting (held the next day), Lewis and Rucho unveiled the 2016 Plan to their colleagues. J.S.App.24. Lewis reiterated that it "will produce an opportunity to elect ten Republican members of Congress." *Id.* The Committee subsequently approved the Plan on a party-line vote. *Id.* Two days later, the North Carolina House of Representatives and Senate debated and passed the Plan, again on party-line votes. *Id.* The law went into effect without the governor's signature because North Carolina does not allow congressional maps to be vetoed. North Carolina also permits no popular role in redistricting, via referendum or voter initiative.

Appellants suggest that the Committee's "Partisan Advantage" policy (and Lewis's equally brazen comments) have an innocent explanation: avoiding liability for racial gerrymandering. Br.8-10. But neither Lewis nor anyone else even *mentioned* race during the lengthy debate over the "Partisan Advantage" policy. Ex.1005:47-69. In fact, the only references to race arose when the "Political Data" criterion was discussed. Ex.1005:24-47. That criterion, though, did not endorse one unlawful policy (partisan gerrymandering) to escape liability for another (racial gerrymandering). Instead, it simply forbade "[d]ata identifying the race of individuals" from being "used in the construction or consideration of districts." J.S.App.20.

II. Particular Districts Intentionally and Unnecessarily Crack or Pack Democratic Voters.

Appellants also claim that the 2016 Plan complies with traditional redistricting criteria, particularly respect for county boundaries. Br.10-11. It does no such thing. Rather, the Plan cracks and packs Democratic voters on a massive scale, typically by *dividing* counties so that Democratic clusters are either sliced in half or crammed into a single district. In summarizing this widespread cracking and packing, the League focuses on nine of the Plan's thirteen districts and on the alternative map submitted by the League to help demonstrate its members' standing.[2]

This alternative map, Plan 2-297, is one of 3000 North Carolina congressional maps randomly generated by Appellees' expert, Professor Jowei Chen, without considering any partisan data. J.S.App.49. Professor Chen selected Plan 2-297 from this group because it has the most compact districts, on average, of maps that split fewer counties than the 2016 Plan, pair fewer incumbents, and exhibit no partisan asymmetry. *Id.* Plan 2-297 thus matches or surpasses the 2016 Plan along all nonpartisan dimensions but is balanced in its treatment of the major parties. *Id.*[3]

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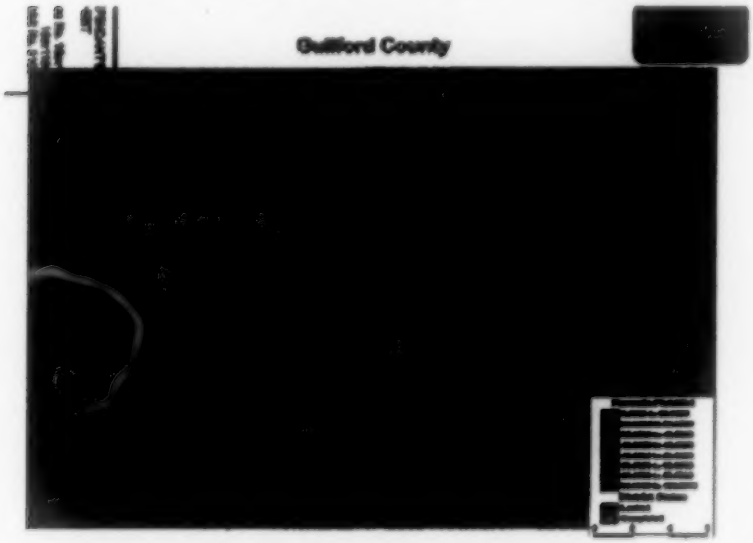
[2] The district court found that District 5 does not *intentionally* crack Democratic voters, J.S.App.242-43, and the League does not contest that finding. The League also does not claim that any of its members from Districts 3, 10, and 11 are *unnecessarily* cracked. No members from these districts, that is, are uncracked by Plan 2-297.

[3] To be clear, Plan 2-297 is far from an "ideal map" for Democratic voters. *Whitford*, 138 S. Ct. at 1924. Professor Chen generated

Cracking. North Carolina's third-most-populous city, Greensboro, offers a dramatic example of the 2016 Plan's cracking of Democratic voters. As shown below, District 6 and District 13 cut Greensboro (and Guilford County) in two, submerging each half within a larger concentration of Republican voters. J.A.298. Thanks to Greensboro's bisection, Hofeller expected District 6 and District 13 each to have Republican vote shares of 54%. Ex.5116:9. In Plan 2-297, on the other hand, League members from District 6 and District 13 are uncracked by being placed in a Democratic-leaning district. J.A.263.[4]

Cracking of Democratic Voters in Greensboro



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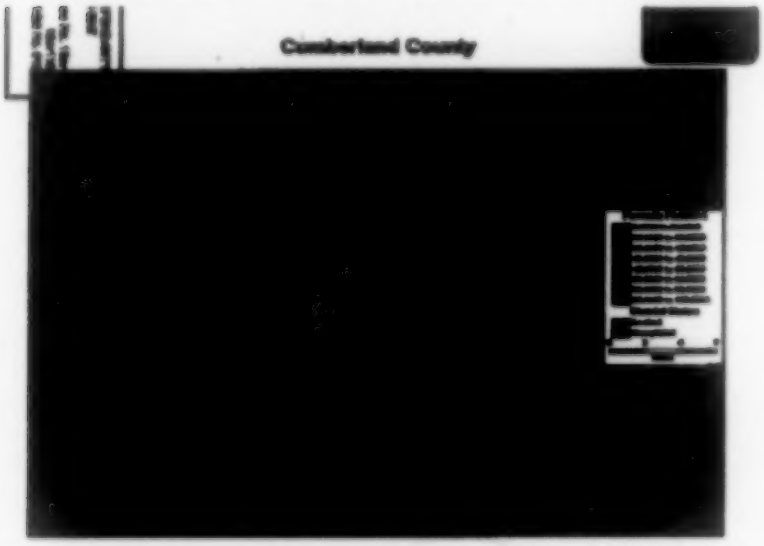
hundreds of maps that are more pro-Democratic than Plan 2-297. Ex.2010.

[4] The League focuses on its own members and plaintiffs. The district court also discussed other plaintiffs, whom the League describes in footnotes. Russell Walker is thus another plaintiff from District 13 who is uncracked by Plan 2-297. J.S.App.62-63.

North Carolina's sixth-most-populous city, Fayetteville, presents another striking instance of cracking. As displayed below, District 8 and District 9 split Fayetteville (and Cumberland County), joining each Democratic fragment with a larger group of Republican voters. J.A.297. Hofeller consequently expected District 8 and District 9 to have Republican vote shares of 55% and 56%, respectively. Ex.5116:9. In Plan 2-297, in contrast, League members from District 8 and District 9 are uncracked by being placed in Democratic-leaning districts. J.A.263.[5]

Cracking of Democratic Voters in Fayetteville



Further cases of cracking abound in the 2016 Plan. District 2 and District 7 partition the cluster of Democratic voters in Johnston County. J.A.299. As a

[5] Coy Brewer and John McNeill are additional plaintiffs from District 8 and District 9, respectively, who are uncracked by Plan 2-297. J.S.App.57-59.

result, Hofeller expected District 2 and District 7 to have Republican vote shares of 56% and 54%, respectively. Ex.5116:9. But in Plan 2-297, League members from District 2 and District 7 are uncracked by being placed in Democratic-leaning districts. J.A.263.[6] Similarly, District 7 and District 9 break up the Democratic cluster in Bladen County. J.A.304. And District 8 and District 13 carve through yet another Democratic cluster in Rowan County. J.A.307.

Packing. Turning to the gerrymanderer's other tool, North Carolina's biggest city, Charlotte, provides a quintessential example of packing. As shown below, literally every Democratic precinct in Mecklenburg County is squeezed into District 12. District 9 enters Mecklenburg County too, but captures only Republican precincts. J.A.300. Hofeller therefore expected District 12 to have a Democratic vote share of 64%. Ex.5116:9. In Plan 2-297, on the other hand, a League member in District 12 is unpacked by being placed in a less heavily Democratic district. J.A.263.[7]

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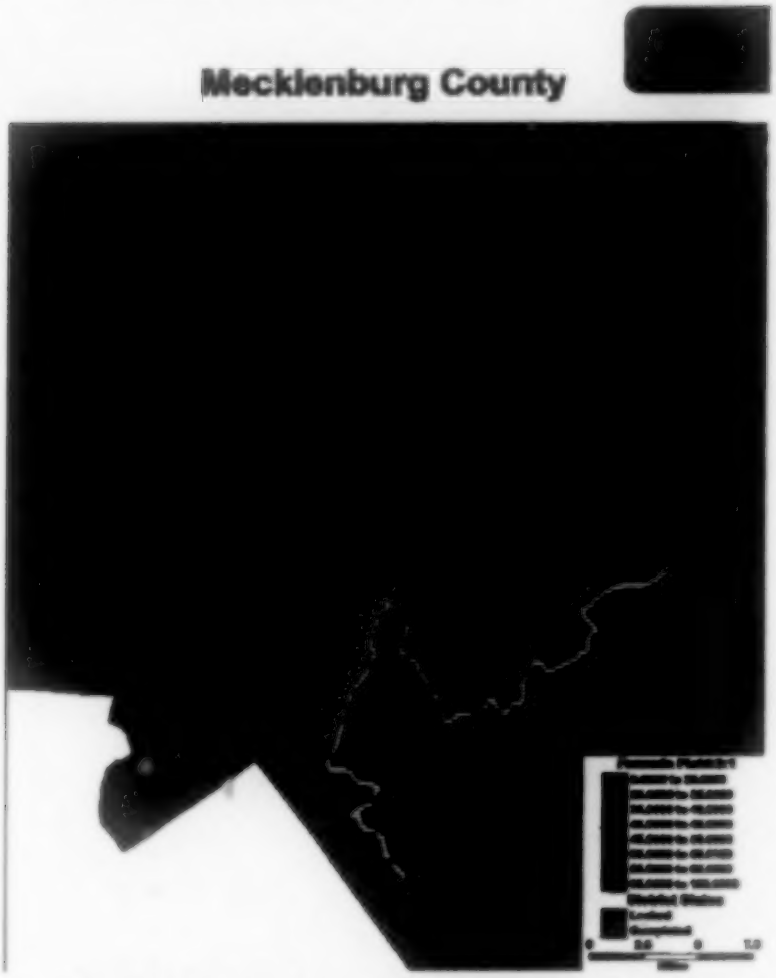
[6] Douglas Berger is another plaintiff from District 2 who is uncracked by Plan 2-297. J.S.App.52-53.

[7] John Gresham is another plaintiff from District 12 who is unpacked by Plan 2-297. J.S.App.62.

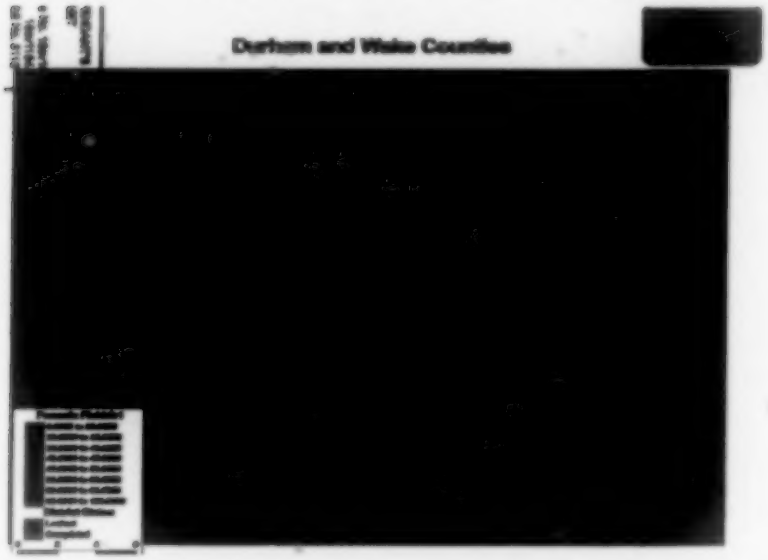
Packing of Democratic Voters in Charlotte



North Carolina's second-largest city, Raleigh, is another model of packing. As displayed below, virtually every Democratic precinct in Wake County is wedged into District 4. District 2's portion of Wake County is composed almost exclusively of Republican precincts. J.A.302. Hofeller thus expected District 4 to

have a Democratic vote share of 63%. Ex.5116:9. In Plan 2-297, in contrast, a League member in District 4 is unpacked by being placed in a less heavily Democratic district. J.A.263.

Packing of Democratic Voters in Raleigh



District 1 packs Democratic voters in northeastern North Carolina as well. It divides Pitt and Wilson Counties, in both cases including their more Democratic areas, and incorporates nearly all of the State's fifth-largest city, Durham. J.A.301-03. As a result, Hofeller expected District 1 to have a Democratic vote share of 69%. Ex.5116:9. But in Plan 2-297, a League member in District 1 is unpacked by being placed in a less heavily Democratic district. J.A.263.[8]

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[8] Larry Hall is another plaintiff from District 1 who is unpacked by Plan 2-297. J.S.App.51-52.

III. The 2016 Plan Severely and Durably Dilutes the Influence of Democratic Voters.

Unsurprisingly, all this district-specific cracking and packing has added up to a massive plan-wide advantage for Republicans. As noted above, North Carolina's 2012 and 2014 congressional elections were held under the 2011 Plan, while the 2016 and 2018 elections were held under the 2016 Plan. All four of these elections were tight. Democrats earned a slight majority of the statewide congressional vote in 2012 (51%) and 2018 (51%), while Republicans won small majorities in 2014 (54%) and 2016 (53%). J.S.App.188-91, 212-14; *North Carolina 2016 Plan*, PlanScore, https://planscore.org/north_carolina/#!2016-plan-ushouse-eg.[9] Yet Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and ten seats in 2014, 2016, and (based on initial returns) 2018. *Id.* These ten seats, moreover, were exactly the ones Hofeller expected Republicans to win. J.S.App.188.[10]

The League's expert, Professor Simon Jackman, calculated three measures of partisan asymmetry using these election results. (Partisan asymmetry refers to "whether supporters of each of the two parties are able to translate their votes into representation with equal ease." J.S.App.191.) First, the efficiency gap is the difference between the parties' respective "wasted votes" (ballots that do not contribute to a candidate's election), divided by the

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[9] The statewide vote shares incorporate imputations for any uncontested seats. Ex.4002:20-26.

[10] As noted earlier, a new election will be held in District 9. If a Democrat manages to win this district, the partisan asymmetry scores reported here would change only modestly.

total number of votes cast. *See Whitford*, 138 S. Ct. at 1933. Second, partisan bias is the difference between a party's seat share and fifty percent in a hypothetical tied election. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419-20 (2006) (opinion of Kennedy, J.) (*LULAC*). And third, the mean-median difference subtracts a party's median vote share, across a plan's districts, from its mean vote share. J.S.App.207-08.

As the district court found, all three metrics tell the same story about the 2011 and 2016 Plans: They have benefited Republicans (and handicapped Democrats) to a staggering degree. North Carolina recorded efficiency gaps of -21%, -21%, -19%, and -28% in 2012, 2014, 2016, and 2018 (negative scores being pro-Republican and positive scores pro-Democratic). That is, votes for Republican candidates were wasted at a rate about twenty percentage points lower than votes for Democratic candidates. North Carolina also registered partisan biases of -27%, -27%, -27%, and -27% in 2012, 2014, 2016, and 2018, indicating that in hypothetical tied elections, Republicans would have won 77% of the State's congressional seats. And North Carolina's mean-median differences were -8%, -7%, -5%, and -6% in 2012, 2014, 2016, and 2018, meaning that, throughout this period, the State's median congressional district was much more pro-Republican than the State as a whole. J.S.App.193, 206, 208, 213; Ex.4003:4, 8; *North Carolina 2016 Plan*, *supra*.

To put these scores in historical perspective, Professor Jackman computed the metrics for congressional maps from 1972 to 2016. J.S.App.193-94. As the below chart illustrates, both the 2011 and 2016 Plans are extreme outliers. J.A.285. In fact, the

2011 Plan had the worst average efficiency gap of any map in Professor Jackman's database. Ex.4002:10. Not to be outdone, the 2016 Plan had the worst efficiency gap in the country in 2016—and in the wake of the 2018 election, has overtaken the 2011 Plan as the most asymmetric map of the last half-century. J.S.App.195. The 2011 and 2016 Plans have also exhibited nearly unparalleled scores on other measures. Their partisan biases, for instance, are the second-largest in the modern era. J.S.App.206-07.

The 2016 Plan Is an Extreme Outlier Among Modern Congressional Plans

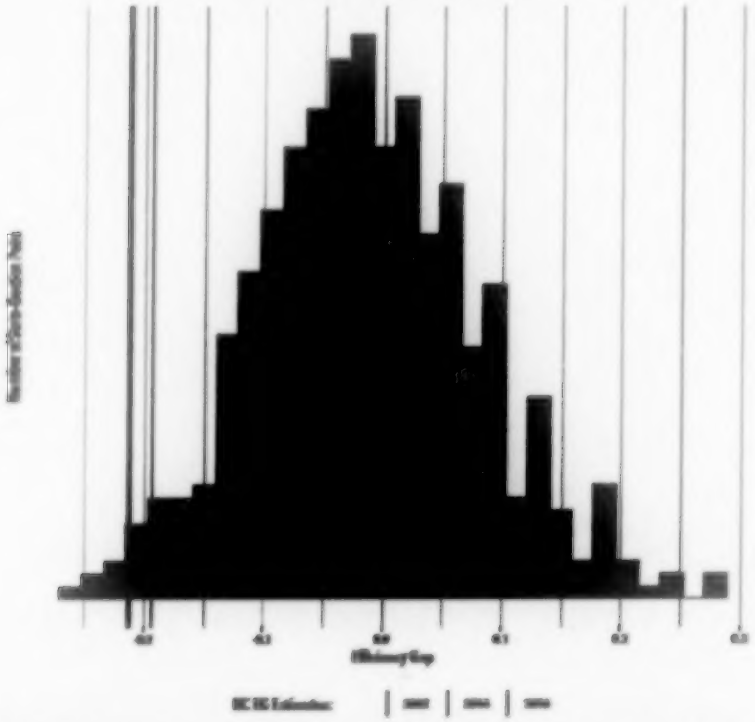


Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

Professor Jackman further testified about the durability of the 2016 Plan's partisan asymmetry. He conducted what is known as sensitivity testing, swinging the 2016 election results by up to ten percentage points in each party's direction and then recalculating the Plan's efficiency gap for each incremental shift. J.S.App.191. This testing indicated that it would take a six-point pro-Democratic swing for Democrats to capture one more seat, thanks to the robust safety margin built into each Republican district. *Id.* For the Plan's asymmetry to disappear, Democrats would have to improve on their 2016 showing by *nine* points—a wave whose only modern precedent is the post-Watergate election of 1974. J.S.App.197.

In 2018, North Carolina's statewide vote shifted by four points in a Democratic direction. *North Carolina 2016 Plan*, *supra*. Given a swing of this magnitude, Professor Jackman's sensitivity testing had predicted a pro-Republican efficiency gap of -27%. J.A.286. This forecast, it turns out, was almost perfectly accurate: The 2016 Plan's efficiency gap was -28% in 2018, just a point away from Professor Jackman's projection.

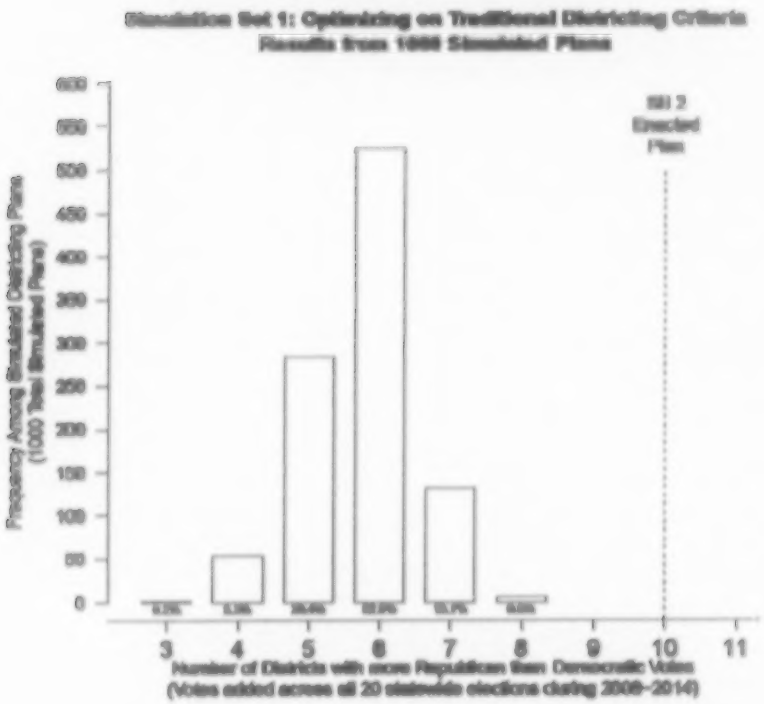
IV. There Is No Legitimate Justification for the 2016 Plan's Dilution.

While Professor Jackman's analysis establishes the size and persistence of the Republican advantage under the 2016 Plan, it does not indicate whether this distortion can be justified by any neutral factor, such as North Carolina's political geography or nonpartisan redistricting criteria. Three sets of district maps demonstrate the lack of any legitimate explanation. *First*, Professor Chen used a computer

simulation technique to randomly generate 3000 different congressional plans for North Carolina. J.S.App.167-71. All these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan criteria adopted by the Committee. The maps' districts were contiguous and equal in population; they split as many or fewer counties; and, on average, they were significantly more compact. *Id.*

Yet *not one* of these 3000 maps ever resulted in a ten-three Republican advantage or an efficiency gap as large as the 2016 Plan's. No matter how Professor Chen analyzed the maps' partisan implications, *all* of them were more symmetric than the Plan. J.S.App.167-71, 210-12. In fact, as the below chart reveals, the randomly generated maps tilted slightly in a Democratic direction, with a median outcome of six Republican seats out of thirteen. J.A.278. Thus, far from justifying the Plan's pro-Republican asymmetry, North Carolina's political geography and the Committee's nonpartisan criteria seem to mildly favor Democrats.

The 2016 Plan Is an Extreme Outlier Among Potential North Carolina Plans



Second, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed about as well as the Plan in terms of traditional criteria but were far less skewed. J.S.App.226. Both of these maps' districts were more compact, on average, than the Plan's districts. J.A.293. The "ST-B" map divided three fewer counties than the Plan; the "17A" map split two more. *Id.* But using Hofeller's own set of twenty prior statewide elections, both maps were expected to yield seven (rather than ten) Republican seats and six (instead of three) Democratic seats. *Id.*

And *third*, during the 2000s, North Carolina used a congressional plan for all five elections that complied with all federal and state requirements and was not even challenged in court. But unlike its successors in the current cycle, the 2000s plan had an average efficiency gap of just 2%, or close to perfect symmetry. Ex.4002:63.

V. On Remand, the District Court Unanimously Invalidated Nine Districts on Partisan Vote-Dilution Grounds.

This case began in August 2016, shortly after the 2016 Plan was enacted. The plaintiffs include individual North Carolina voters in every congressional district in the State. The plaintiffs also include the League, Common Cause, and the North Carolina Democratic Party.

Throughout the litigation, the plaintiffs emphasized the 2016 Plan's cracking and packing of Democratic voters in particular areas. At trial, for example, the League introduced a series of screenshots from Hofeller's own redistricting software showing how he split Democratic clusters in Bladen, Buncombe, Cumberland, Guilford, Johnston, and Rowan Counties; and overconcentrated Democrats in Durham, Mecklenburg, Pitt, Wake, and Wilson Counties. Exs.4007-15; J.A.296-307. On remand from this Court, similarly, the League demonstrated that it has members in nine districts who are Democratic voters, who were deliberately cracked or packed by the 2016 Plan, and who would be uncracked or unpacked by Plan 2-297. J.A.260-64, 290-92; J.S.App.44-50.

In its August 2018 decision, the district court diligently followed the guidance this Court provided in *Whitford*. The district court found that at least one plaintiff was needlessly cracked or packed in each district it ultimately invalidated on partisan vote-dilution grounds. J.S.App.51-65. The district court also found that several plaintiffs *lacked* standing under *Whitford* because their alleged injuries did not involve the cracking or packing of their home districts. J.S.App.65-67.

The district court further adopted a partisan vote-dilution test that, like *Whitford*'s standing inquiry, "proceed[s] on a district-by-district basis." J.S.App.139. This test requires a district to be drawn with the intent of diluting votes cast for the opposing party's candidates. J.S.App.139-46. Next, the test insists that both the challenged district and the plan to which it belongs actually be dilutive. J.S.App.146-52. A district dilutes votes by cracking or packing voters. Likewise, a plan is dilutive if its districts' cracking and packing create a large and durable advantage for the line-drawing party. J.S.App.187-214. Lastly, the test provides an affirmative defense if a legitimate justification, like a State's political geography or nonpartisan redistricting goals, exists for the dilution. J.S.App.152-54, 215-22. Applying the test, the district court held that some (but not all) districts unlawfully dilute plaintiffs' votes. J.S.App.223-74.

Judge Osteen concurred as to almost all these points. In particular, he agreed that partisan vote-dilution claims are justiciable, J.S.App.325, that the majority's test for such claims is the right one, J.S.App.326, and that nine districts are unlawful

under this test, J.S.App.326-27. Judge Osteen disagreed, however, that there can be standing (or liability) on partisan vote-dilution grounds when a district is packed (rather than cracked). He would therefore have upheld the three districts that overconcentrate Democratic voters. J.S.App.328-31. Judge Osteen also argued that the mere pursuit of partisan advantage is not constitutionally problematic. He would thus have required a predominant partisan purpose before imposing liability (a heightened intent threshold the majority also applied in the alternative). J.S.App.336-40.

VI. Partisan Gerrymandering Has Become More Extreme, More Persistent, and More Damaging.

Appellants have much to say—much of it misleading—about redistricting in the eighteenth and nineteenth centuries. Br.3-7, 31-36. But they are oddly silent about recent developments across the country, which are deeply troubling for American democracy. Over the last two decades in particular, partisan gerrymandering has become more extreme, more persistent, and more damaging than at any point since the reapportionment revolution of the 1960s.

Starting with congressional plans' skews over time, Professor Jackman calculated the median size of plans' efficiency gaps from 1972 to 2016. This value fell in the 1970s as the last highly malapportioned plans were eliminated. It then rose gradually in the 1980s, 1990s, and 2000s, as mapmakers' efforts became increasingly aggressive. The current cycle, though, is unlike anything that has come before. In 2012, the typical congressional plan had an efficiency

gap *one-third* larger than the previous record. This pattern persisted in 2014 and 2016: respectively, the fifth- and third-most biased election years of the last half-century. Ex.4002:30; Anthony J. McGann *et al.*, *Gerrymandering in America* 4-5, 97-98 (2016).

Professor Jackman also studied the durability of gerrymandering by determining the correlation between plans' initial efficiency gaps and their average efficiency gaps over the rest of their lifetimes. In the 1970s, 1980s, and 1990s, this correlation was only moderate. A plan's asymmetry in its first election, in other words, did merely a passable job predicting the plan's subsequent performance. In the 2000s and 2010s, however, this correlation skyrocketed. Maps that start a decade skewed now almost always end it that way too. Ex.4002:48-49; Eric McGhee, *The Role of Partisan Gerrymandering in U.S. Elections* 11 (Aug. 2017).

Professor Jackman further examined the boost the line-drawing party receives from control of the redistricting process. This boost was quite small in the 1970s, 1980s, and 1990s, statistically indistinguishable from zero. In the 2000s and 2010s, though, the typical Republican-drawn plan had an efficiency gap seven points more pro-Republican than a nonpartisan map, and the typical Democrat-drawn plan had an efficiency gap twelve points more pro-Democratic. While once the parties frequently failed to profit from control of redistricting, they now extract every drop of partisan advantage when they draw the lines unilaterally. Ex.4002:33.

What accounts for these alarming trends? One explanation is technological. Today's gerrymanderers are able to rely not just on redistricting software but

also on a host of other tools that were unavailable to their predecessors. These include regression models of voter behavior, individual-level data from enhanced voter files, sensitivity testing to ensure the persistence of a plan's bias, and computer algorithms to explore the universe of mapping options. These algorithms are especially noteworthy. Like Professor Chen's, they can be instructed to ignore partisanship. But they can also be programmed to *maximize* a party's edge, even while complying with all nonpartisan criteria. *See, e.g.*, *iRedistrict Online*, Zillion Info, http://www.zillioninfo.com/product/iRedistrict.

The other explanation is voters' rising partisanship, which makes their choices at the polls easier for gerrymanderers to anticipate. Through the 1980s, voters often switched their votes from one election to the next, and split their tickets even in the same election. But since then, voters have become increasingly set in their partisan ways. Only about 5% of voters now change their party preferences from one presidential election to another, compared to roughly 15% a generation earlier. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 368 (2017). The frequency of ticket splitting in federal elections has fallen below 10% in the 2010s, compared to at least 25% a few decades before. *See, e.g.*, Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 Pol. Psychol. 505, 513 (2011). And as partisanship has grown more intense, candidate-specific qualities have faded in importance. The advantage enjoyed by congressional incumbents, in particular, has tumbled from nine points in the 1980s to less than three today. *See, e.g.*, Gary C.

Jacobson, *It's Nothing Personal*, 77 J. Pol. 861, 863 (2015).

Voters are not the only ones who have become more partisan. The ideological gap between Democrats and Republicans in Congress is also larger than at any previous point in American history. *See, e.g.*, Jeff Lewis, *Polarization in Congress*, Voteview (March 11, 2018), https://www.voteview.com/articles/party_polarization. This unprecedented polarization exacerbates the effects of gerrymandering. It means the extra Democrats or Republicans elected due to skewed maps are not moderates willing to compromise with the other side. Rather, they are very liberal or very conservative—and very far from the political center. As a consequence, a large bias in a party's favor does not just result in more of the party's candidates winning office. It also distorts the policies enacted by the legislature, pulling them toward the party's preferred pole and away from the preferences of most voters. *See, e.g.*, Devin Caughey *et al.*, *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017).

SUMMARY OF ARGUMENT

In its unanimous decision in *Whitford*, this Court clarified who has standing to bring a partisan vote-dilution claim. A voter must live in a district that is cracked or packed. And an alternative district must be able to uncrack or unpack the voter. Under this standard, it is plain that League members have standing to challenge nine of the 2016 Plan's districts. League members are cracked by Districts 2, 6, 7, 8, 9, and 13. They are packed by Districts 1, 4, and 12. And they are simultaneously uncracked and unpacked by

Plan 2-297, a balanced map that also beats the 2016 Plan on every nonpartisan criterion.

Appellants' arguments that Appellees lack an injury in fact are barely colorable. Appellants cite statements made years before *Whitford* as if they represent Appellees' post-*Whitford* position. Appellants complain that three plaintiffs are not uncracked or unpacked by Plan 2-297 while ignoring the many more who are. Most startlingly, Appellants assert that a voter is unharmed even if she lives in a cracked district and could be uncracked by a different district. That is exactly the opposite of what this Court held in *Whitford*.

Appellees not only have standing to pursue their partisan vote-dilution claims; these claims are also justiciable. On three prior occasions, a majority of this Court has confirmed that such challenges are not political questions. This conclusion follows from the undisputed justiciability of *racial* vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not. Partisan vote dilution is also justiciable because it endangers the responsiveness that is the essence of American democracy. This Court has been vigilant against other threats to responsiveness, especially in the campaign-finance context. It should not let down its guard here.

Appellants contend that the Elections Clause somehow renders partisan gerrymandering nonjusticiable. This argument is so novel it never occurred to them during two years of litigation below. And for good reason. According to almost a century of precedent, the Elections Clause *authorizes* judicial

review of States' regulations of congressional elections. It does not *bar* courts from hearing claims that such regulations offend the First or Fourteenth Amendments. Even if Appellants' stance were not precluded, this Court should not adopt it. The Elections Clause is simply an authority-conferring provision, resembling many others that no one thinks prohibit judicial review. The Clause also makes no distinction between partisan gerrymandering and other electoral laws, and so provides no basis for deeming only gerrymandering a political question.

In any event, this Court need not address the overall justiciability of partisan gerrymandering to decide this case. Unlike any previous map, the 2016 Plan was drafted pursuant to an official state policy to maximally degrade a targeted party's representation. The Plan also achieved its goal, producing the single largest Republican advantage of any congressional plan in the last five decades. *This* map is therefore unlawful even if the status of other plans remains unresolved.

Other plans, however, clearly can be adjudicated using the discernible and manageable test adopted by the district court. The test's intent prong is the one this Court alluded to in *Whitford*: deliberately diluting votes cast for the opposing party's candidates. The test's effect prong also parallels the inquiry in racial vote-dilution cases, asking if particular districts are cracked or packed, and if this cracking and packing create a large and durable advantage for the line-drawing party. The test's justification prong, too, is drawn verbatim from one-person, one-vote cases, where it plays the same role of negating liability if a

legitimate explanation exists for a dilutive district or map.

In combination, these elements drastically curtail the test's reach. Because the test is district-specific, it never invalidates plans in their entirety. The intent prong takes off the table all districts not drawn by a party in full control of the state government. The effect prong further limits exposure to the narrow subset of maps that are severely and durably dilutive. And the justification prong saves plans that are no more biased than expected given States' political geographies and legitimate redistricting goals. In the end, liability is confined to needlessly cracked and packed districts in the small—but unfortunately growing—number of maps that genuinely imperil core democratic values.

Lastly, the district court's conclusion that the 2016 Plan violates several constitutional provisions implies neither the absence of a judicially manageable standard nor a failure by the plaintiffs to forge consensus. Rather, the various sets of litigants took to heart this Court's exhortations to develop a workable test, *see, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 309-10 (2004) (Kennedy, J., concurring), and offered distinct, but complementary, approaches to understanding the constitutional injury. Likewise, the district court analyzed the evidence under each proposed framework and thus fully developed the record for the Court's review. This comprehensive record confirms the availability of manageable standards and may help the Court define the contours of the legal inquiry.

ARGUMENT

I. Appellees Have Standing to Challenge Particular Districts on Partisan Vote-Dilution Grounds.

1. This Court could not have been clearer in *Whitford* about how an injury in fact must be proved in a partisan vote-dilution case. First, a plaintiff must show that "the particular composition of the voter's own district ... causes his vote [to be] packed or cracked." 138 S. Ct. at 1931; *see also id.* ("[T]hat burden arises through a voter's placement in a 'cracked' or 'packed' district."); *id.* at 1932 (a plaintiff must "prove that he ... lives in a cracked or packed district"). And second, a plaintiff must demonstrate that his vote "carr[ies] less weight than it would carry in another, hypothetical district"—in other words, that he could be *un*cracked or *un*packed by a different set of boundaries. *Id.* at 1931.

Applying this standard, the Court suggested that the lead plaintiff in *Whitford* lacked standing. While he lived in a packed district, he could not be unpacked by any (reasonable) alternative configuration. Since "Democrats are 'naturally' packed [in Madison, Wisconsin] due to their geographic concentration," "even plaintiffs' own demonstration map resulted in a virtually identical district for him." *Id.* at 1933. Conversely, the Court held that four other plaintiffs *would* have standing if they could "prove[] at trial" what they had "alleged at the pleading stage"—namely, that they were subjected to unnecessary "packing or cracking in their legislative districts." *Id.* at 1931. That is why the Court remanded the case to the district court instead of dismissing these plaintiffs' claims. *Id.* at 1933-34.

The Court's focus on needless cracking and packing mirrors its approach in the analogous context of racial vote dilution. In that area as well, the Court has long recognized that cracking and packing are the techniques through which equipopulous, single-member districts dilute the influence of targeted voters. *See, e.g.*, *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.) (a district map may "dilute minority voting power if it packed minority voters in a few districts ... or dispersed them among [many] districts"); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). There, too, the Court requires plaintiffs to prove they could be uncracked or unpacked by a different district map. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality); *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.) ("[A] §2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one."). *Whitford*'s standing analysis thus dovetails with existing vote-dilution precedent.

2. Under *Whitford*, League members plainly have standing to challenge nine of the 2016 Plan's thirteen districts on partisan vote-dilution grounds. League members and other individual plaintiffs who support the Democratic Party live in, and are cracked or packed by, Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13. They are also unnecessarily cracked or packed, because Plan 2-297 simultaneously uncracks or unpacks them all. *See supra* pp.9-14. These League members have therefore proved that "the particular composition of [their] own district[s] ... causes [their] vote[s]—having been packed or cracked—to carry less weight than [they] would carry in [other], hypothetical district[s]." *Whitford*, 138 S. Ct. at 1931. They have proved, that

is, the injury the four plaintiffs the Court discussed in *Whitford* merely alleged.

3. Appellants resist this conclusion, first, by cherry-picking statements from Common Cause's and the League's complaints. Br.25. But these complaints were filed almost two years before this Court explained in *Whitford* that partisan vote-dilution standing is district-specific. Both complaints also anticipated *Whitford*'s holding. Common Cause contended that the vote of each of its plaintiffs "will be diluted or nullified as a result of his placement" in his district. J.A.208-12. Likewise, the League asserted that "[s]ome of [its] Plaintiffs have been packed into a handful of districts," while "others have been cracked among numerous districts where Democratic candidates are virtually certain to lose." J.A.241.

In any event, ever since *Whitford*, Appellees have indisputably framed their injuries as needless and district-specific cracking and packing. As the League put it in its first filing on remand, "only plaintiffs living in cracked or packed districts—and so *not* all supporters of the victimized party—have standing." Dkt.129:2 These plaintiffs also "must show that they could have been uncracked or unpacked by a different map." Dkt.129:3. Appellants mockingly call this "retrofit[ting]." Br.25. What it really is, of course, is following this Court's instructions.

4. Next, Appellants latch onto three of the many individual plaintiffs in this case: Alice Bordsen in District 4, and Richard and Cheryl Taft in District 3. Br.26-27.[11] These plaintiffs are as unrepresentative as

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[11] Appellants also mention Larry Hall from District 1 and John Gresham from District 12. Br.27. These references are

Appellants' quotes from Appellees' complaints, being some of the few litigants who are not uncracked or unpacked by Plan 2-297. The League thus agrees that Bordsen and the Tafts cannot claim standing based on Plan 2-297 (though they certainly can based on other alternative maps, like those cited by Common Cause, or other theories of liability).

Whether or not Bordsen is injured by her placement in District 4, a League member does have standing to challenge it. Consistent with *Whitford*, this member is a Democratic voter who *is* unpacked by Plan 2-297. The below maps show the member's location in Precinct 01-04 of Wake County. The member goes from District 4 in the 2016 Plan (with its 63% Democratic vote share) to District 10 in Plan 2-297 (with a Democratic vote share of 53%). J.A.263; Dkt.129-7:2; Dkt.129-11:1. Moreover, District 10 in Plan 2-297 is not just much less heavily Democratic than District 4 in the 2016 Plan; it is also far more compact. J.A.262; Ex.5048.[12]

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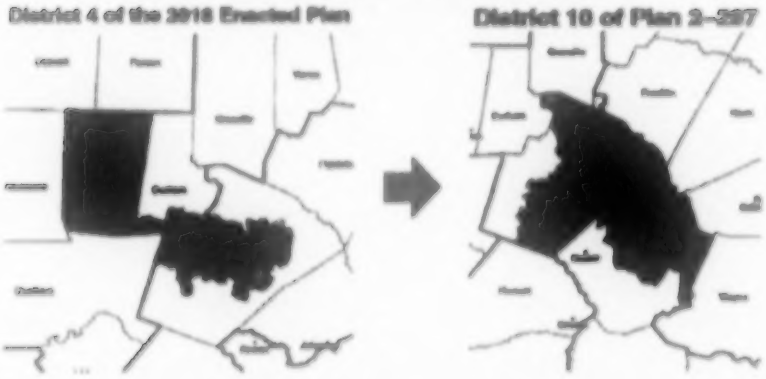
understandably brief. Hall and Gresham plainly are unpacked by Plan 2-297. J.A.275.

[12] Appellants note that some League members assert standing as plaintiffs while the League itself asserts associational standing on behalf of other League members. Br.26 n.4. There is a reason this observation is relegated to a footnote: It is utterly unremarkable. This Court has long held that "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Here, it is undisputed that the League members on whose behalf the League claims associational standing are registered to vote as Democrats, regularly vote in Democratic primaries, and live in particular precincts. J.A.290-92. There is no controversy, that is, over the facts that would entitle these members to standing if they were to sue in their

Plan 2-297's Unpacking of District 4



As for District 3, the League admits that none of its members have standing to dispute it, because none of them are uncracked by Plan 2-297. But this concession is the opposite of damning. Rather, the fact that some of the 2016 Plan's districts may be unlawfully dilutive, while others may not be, refutes Appellants' assertion that Appellees are attacking the Plan as an undifferentiated whole. Br.25. If they were, all of the Plan's districts would rise or fall together—which, on this district-specific theory, they emphatically do not.

5. Lastly, Appellants fall back on the argument that Appellees lack standing *even if* they live in cracked districts that "would have changed hands under their proposed map." Br.28. This is because, in Appellants' view, "[i]f each vote is counted and counted equally," vote dilution simply cannot occur. *Id.* It is worth pausing to appreciate the radicalism of

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own right. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268-70 (2015) (*ALBC*) (reversing a district court's holding that a statewide membership organization lacked associational standing to allege racial gerrymandering).

this position. It defies this Court's unanimous conclusion in *Whitford* that plaintiffs *can* bring "allegations that their votes have been diluted," and *do* have standing if their votes, "having been packed or cracked ... carry less weight than [they] would carry in [other], hypothetical district[s]." 138 S. Ct. at 1930-31.

Appellants' stance is also irreconcilable with the Court's repeated recognitions, in its partisan-gerrymandering and racial vote-dilution cases, that voters' influence can be diluted not just through malapportionment but through cracking and packing as well. In *Vieth*, for instance, the plurality defined partisan gerrymandering as "intentional vote dilution," and explained that it operates by "filling a district with a supermajority of a given group" or "splitting ... a group ... among several districts." 541 U.S. at 286 n.7, 298 (plurality). In *LULAC*, similarly, Chief Justice Roberts pointed out that racial vote dilution, too, works by "pack[ing] minority voters in a few districts" or "dispers[ing] them among [many] districts." 548 U.S. at 495 (opinion of Roberts, C.J.); *see also, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); *Voinovich*, 507 U.S. at 153-54; *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality). All these precedents would have to be revisited under Appellants' theory of standing, because they all acknowledge that malapportionment does not exhaust the set of dilutive mechanisms.

II. The Court Should Adhere to Its Consistent Holdings That Partisan Gerrymandering Is Justiciable.

Not only do Appellees have standing to press their partisan vote-dilution claims; these claims are also

justiciable. Justiciability, of course, is the rule, not the exception, in American constitutional law. Ordinarily, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"). Nevertheless, Appellants invoke two categories of cases that do constitute unreviewable political questions. The first of these arises when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). To decide if such a commitment exists, the Court must "first determine what power the Constitution confers"; only then can it "determine to what extent, if any, the exercise of that power is subject to judicial review." *Powell v. McCormack*, 395 U.S. 486, 519 (1969).

The second type of political question (addressed in the next section) stems from "a lack of judicially discoverable and manageable standards for resolving [the case]." *Baker*, 369 U.S. at 217. This exception to justiciability does not apply when "both sides offer detailed legal arguments" that "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 566 U.S. at 197, 201. "Recitation of these arguments" is "enough to establish that [a] case does not 'turn on standards that defy judicial application.'" *Id.* at 201 (quoting *Baker*, 369 U.S. at 211).

A. The Court Has Recognized the Justiciability of Partisan Gerrymandering for More Than Thirty Years.

1. Before turning to the provision that Appellants argue strips the Judiciary of its authority to hear partisan-gerrymandering cases—the Elections Clause of Article I, Section 4—it is important to note that the Court is not writing on a clean slate. To the contrary, the Court has already (and repeatedly) held that partisan-gerrymandering claims are justiciable. In *Bandemer*, six Justices reached the "conclusion that this case is justiciable." 478 U.S. at 125. In doing so, these Justices explicitly rejected Appellants' position that a textual commitment exists to a nonjudicial body: "Disposition of this question does not involve us in a matter more properly decided by a coequal branch of our Government." *Id.* at 123. Again in *Vieth*, "five members of the Court [were] convinced" that "political gerrymandering claims are justiciable." 541 U.S. at 317 (Stevens, J., dissenting). And once more in *LULAC*, after observing that "a majority [in *Vieth*] declined" to deem partisan-gerrymandering suits "nonjusticiable political questions," the Court refused to "revisit [*Vieth*'s] justiciability holding." 548 U.S. at 414.[13]

2. These cases should be followed not just because they are precedents but also because they are right. In particular, partisan vote-dilution claims have the

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[13] There is also no disagreement on the Court that partisan gerrymandering can violate the Constitution. As even the *Vieth* plurality conceded, "an *excessive* injection of politics [into redistricting] is *un*lawful." 541 U.S. at 293 (plurality). "So it is, and so does our opinion assume." *Id.*

same structure as *racial* vote-dilution challenges, which have been justiciable for almost half a century. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 765-70 (1973). In racial (as in partisan) vote-dilution suits under the Constitution, discriminatory intent is a prerequisite for liability. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617-18 (1982). As noted above, racial and partisan vote dilution both function by cracking and packing disfavored voters. *See supra* pp.30-35. Racial and partisan vote dilution both also depend on voter behavior that is predictable and polarized. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52-74 (1986). And racial and partisan vote dilution both require analyses of individual districts as well as "whether line-drawing in the challenged area as a whole dilutes [a group's] voting strength." *LULAC*, 548 U.S. at 504 (opinion of Roberts, C.J.). These issues cannot be judicially manageable in one context but beyond courts' powers in another.

3. Strongly supporting justiciability, too, is this Court's general vigilance against electoral regulations that threaten to entrench parties and undermine responsiveness. In *Davis v. FEC*, 554 U.S. 724, 742 (2008), for example, the Court struck down a campaign-finance law "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." The Court explained that "it is a dangerous business for [politicians] to use the election laws to influence the voters' choices." *Id.* In *McCutcheon*, similarly, the Court invalidated another campaign-finance provision that "compromis[ed] the political responsiveness at the heart of the democratic process" and "allow[ed] the Government to favor some participants in that process over others." 572 U.S. at

227 (plurality). "[T]hose who govern," the plurality declared, "should be the *last* people to help decide who *should* govern." *Id.* at 192; *see also, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) (forbidding "intrusion by the government into the debate over who should govern").

These cases' lessons apply squarely to partisan gerrymandering. What is gerrymandering if not "making and implementing judgments about ... the outcome of an election"? *Davis*, 554 U.S. at 742. What do gerrymanderers do if not "favor some participants in [the political] process over others"? *McCutcheon*, 572 U.S. at 227 (plurality). Who are gerrymanderers if not "the *last* people to help decide who *should* govern"? *Id.* at 192. Indeed, the Court's insights are even more penetrating in the gerrymandering context. Regulations of money in politics may influence voters' behavior. But gerrymandering enables parties to entrench themselves directly, without even needing to change voters' minds.

4. That partisan vote-dilution claims are justiciable is evident as well from recent lower-court decisions that have shown just that. In *Vieth*, one of the plurality's reasons for vacating the field was that "lower courts" had not "succeeded in shaping the standard that this Court was initially unable to enunciate." 541 U.S. at 279 (plurality). Over the last few years, however, lower courts have made impressive progress toward the goal that eluded them between *Bandemer* and *Vieth*. Again, the district court here adopted a district-specific test requiring the (1) intentional, (2) effective, and (3) unjustified subordination of the opposing party and entrenchment of the line-drawing party. J.S.App.139-

54. This test built on the standard endorsed by the district court in *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). And since the decision below, its approach has been borrowed by two more district courts. *See Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357, slip op. at 9-12 (S.D. Ohio Feb. 15, 2019) (*Randolph Inst.*); *League of Women Voters v. Johnson*, 2018 WL 6257476, at *16 (E.D. Mich. Nov. 30, 2018) (*LWVMI*).

What was "fantasy" in *Vieth*—the idea that "lower court jurisprudence has brought forth [justiciable] standards," 541 U.S. at 281 (plurality)—is thus now reality. Lower courts have converged on a single partisan vote-dilution test that exposes only egregious gerrymanders to liability and is highly workable to boot.

B. The Court Should Reject Appellants' Radical Elections Clause Argument.

1. Appellants' response to the encouraging lower-court activity is to try to pull the plug on it. The Elections Clause, they maintain, renders all partisan-gerrymandering claims—and, somehow, *only* partisan-gerrymandering claims—categorically nonjusticiable. Br.30-36. If this argument sounds novel, it should. Appellants never once made it below, referencing the Elections Clause only in response to Common Cause's theory that the provision bans redistricting for partisan gain. Dkt.112:148-52; Dkt.131:6-7. Nor have any Justices contended that the Elections Clause transforms partisan-gerrymandering suits into political questions. *Cf. LULAC*, 548 U.S. at 415-16 (opinion of Kennedy, J.) (discussing the Clause without asserting it is a

textually demonstrable commitment to another branch); *Vieth*, 541 U.S. at 275-77 (plurality) (same).

2. There is a reason why neither Appellants nor any Justices have previously advanced this argument. This Court has never held that the Elections Clause renders *any* claim nonjusticiable: not in the redistricting context nor in any other area of electoral regulation. Rather, the Clause grants state legislatures and Congress the power to "prescribe[]" the "Times, Places and Manner" of congressional elections, so long as they abide by the limits set by the rest of the Constitution, especially the First and Fourteenth Amendments. U.S. Const. art. I, §4. Moreover, far from denying courts their usual role, the Clause actually authorizes judicial review to ensure that laws enacted pursuant to it are procedural instead of substantive.

The Court first rejected the claim that state regulation of congressional elections "present[s] a political and not a judicial question" in *Smiley v. Holm*, 285 U.S. 355, 363 (1932). Deeming justiciable a Minnesota redistricting statute, the Court proceeded to the merits and held that the State's governor had veto power over the legislation. *Id.* at 368. Fourteen years later, Justice Frankfurter argued that a malapportionment challenge to an Illinois district plan was nonjusticiable due to the Elections Clause, *see Colegrove v. Green*, 328 U.S. 549, 554 (1946) (plurality), but a majority of the Court disagreed. "[T]he *Smiley* case rules squarely to the contrary," and means "this Court has power to afford relief" despite "the objection that the issues are not justiciable." *Id.* at 564-65 (Rutledge, J., concurring); *see also id.* at 571-73 (Black, J., dissenting).

Again in *Baker*, the Court observed that *Smiley* "settled the issue in favor of justiciability of questions of congressional redistricting." 369 U.S. at 232. The Court also reaffirmed its past "decisions in favor of justiciability even in light of" the Elections Clause. *Id.* at 234. And when Justice Harlan voiced Appellants' position in *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting)—marking the last time any Justice did so—the view was rebuffed once more. "[N]othing in the language of that article ... immunize[s] state congressional apportionment laws ... from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* at 6.

Since *Wesberry*, the Court has addressed the Elections Clause in two more lines of cases that are relevant here. In one, the Court has reiterated that state laws passed under the Clause may still be unlawful if they violate other constitutional provisions. *See, e.g.*, *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) ("[T]his authority does not extinguish the State's responsibility to observe the limits established by the First Amendment."); *Storer v. Brown*, 415 U.S. 724, 730 (1974). In another, the Court has held that state regulations may transgress the Elections Clause itself if they seek to "dictate electoral outcomes" rather than set procedures for congressional elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 523-24 (2001). Both of these doctrinal strands are fatal for Appellants' argument. The first confirms that no issues transform into political questions because of the Elections Clause. The second establishes that the Clause is a source of—not a restriction on—judicial review.

3. Even if Appellants' stance were not precluded by almost a century of precedent, there would be no textual reason for this Court to adopt it. The Elections Clause is simply a power-conferring provision. It gives state legislatures the default authority to set the time, place, and manner of congressional elections, and Congress the right to make or alter these regulations as it sees fit. The Clause thus resembles many other constitutional provisions that bestow powers on either state legislatures or Congress. *See, e.g.*, U.S. Const. art. II, §1 (state legislatures); *id.* amend. XVII (same); *id.* art. I, §8 (Congress); *id.* amend. XIV, §5 (same). No one has ever suggested these parts of the Constitution are nonjusticiable because they assign authority to nonjudicial bodies. Indeed, this proposition would turn American constitutional law upside down, making the availability of judicial review the exception rather than the norm.

Critically, the Elections Clause does not confer "*sole* Power" over congressional elections to state legislatures and Congress. The Impeachment Clauses of Article I, Sections 2 and 3 do use this language, and this Court has held that it "indicates that this authority is reposed in [Congress] and nowhere else." *Nixon v. United States*, 506 U.S. 224, 229 (1993). The Elections Clause instead mirrors the Electors Clause of Article II, Section 1, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a [certain] Number of Electors." U.S. Const. art. II, §1. Under Appellants' approach to constitutional interpretation, this provision must surely be nonjusticiable. Yet the Court held exactly the opposite in *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), rejecting the view that "the subject-

matter of the controversy is not of judicial cognizance."

One more textual point: Given Appellants' position, one might be forgiven for thinking the Elections Clause refers explicitly to partisan gerrymandering. That, after all, is the only activity they say is rendered nonjusticiable by the Clause. But the Clause does no such thing. Rather, it extends to *all* "Regulations" of the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4. Based on the Clause's language, then, there is no way to distinguish between gerrymandering and any other regulation of congressional elections. If gerrymandering is nonjusticiable because of the Clause, then so must be malapportionment, *but see, e.g.*, *Wesberry*, racial vote dilution, *but see, e.g.*, *LULAC*, racial gerrymandering, *but see, e.g.*, *Harris*, campaign-finance laws, *but see, e.g.*, *McCutcheon*, regulations of congressional primaries, *but see, e.g.*, *Tashjian*, and every other aspect of federal elections a plaintiff might wish to challenge.

4. Unable to make a plausible textual argument, Appellants turn to history. No one at the Framing, they assert, thought the federal courts would play any role under the Elections Clause. Br.32-33. This claim also proves too much. If it were accepted, it would eliminate judicial review of all congressional electoral regulation, not just partisan gerrymandering. Furthermore, one must be careful drawing inferences about justiciability from the Framers' discussions of courts' likely activities. Debating the Constitution in an era well before *Marbury*, the Framers said little

about the judicial enforcement of many provisions now deemed justiciable.

Even more problematically for Appellants, John Steele cited court action as a reason not to fear abuse by Congress of its Elections Clause authority. Speaking to the North Carolina ratifying convention, he declared, "If the Congress make laws inconsistent with [the Clause], *independent judges will not uphold them*, nor will the people obey them." 4 *Debates on the Federal Constitution* 71 (J. Elliot 2d ed. 1836) (*Debates*) (emphasis added); *see also Wesberry*, 376 U.S. at 16 (quoting Steele's comment). James Madison similarly explained to the Virginia ratifying convention that the new federal government would provide "sufficient security against abuse" of Congress's Elections Clause power. 3 *Debates* 408. The government would be "subdivided into *three branches*"—the Legislature, the Executive, and the Judiciary—which would be "kept independent of each other," thus "increas[ing] the security of liberty." *Id.* at 408-09 (emphasis added).

5. Next, Appellants contend that, because partisan-gerrymandering cases involve political issues, they "could undermine the Court's reputation" if they are justiciable. Br.34. This claim parrots Justice Frankfurter's dissent in *Baker*, which predicted that "the Court's position" would be "impair[ed]" if it confronted the "political entanglements" of malapportionment disputes. 369 U.S. at 267 (Frankfurter, J., dissenting). The dispositive response to this point is also the same now as it was then. Whatever "the dangers of entering into political thickets" may be, "a denial of constitutionally protected rights demands judicial protection."

Reynolds v. Sims, 377 U.S. 533, 566 (1964). The Court "cannot shirk [its] responsibility merely because [its] decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

Moreover, Justice Frankfurter's prophecy of doom was wrong, and so is Appellants' dire forecast. While politicians who benefited from malapportionment resisted the one-person, one-vote rule, *see* Peyton McCrary, *Bringing Equality to Power*, 5 U. Pa. J. Const. L. 665, 680 (2003), most jurisdictions quickly complied with it, and the bulk of Americans supported the Court's intervention, *see* Joshua Fougere *et al.*, *Partisanship, Public Opinion, and Redistricting*, 9 Election L.J. 325, 325 (2010). Similarly, today's gerrymanderers may strenuously oppose judicial efforts to undo their handiwork. Br.39. But the few court decisions striking down plans because of their partisanship have swiftly yielded fairer maps. *See, e.g.*, *Cox v. Larios*, 542 U.S. 947 (2004). And Americans are eager for gerrymandering to be judicially curbed, even if their preferred parties win fewer seats as a result. *See, e.g.*, ALG Research & GS Strategy Grp., *New Bipartisan Poll on Gerrymandering and the Supreme Court* (Jan. 25, 2019).

6. Lastly, Appellants echo another argument of the one-person, one-vote dissenters: that this Court need not act because Congress may do so instead. Br.35-36; *see, e.g.*, *Wesberry*, 376 U.S. at 30 (Harlan, J., dissenting). And again, that era's decisions provide the definitive rebuttals. "[T]he fact that a nonjudicial, political remedy may be available" has "no significance" since "individual constitutional rights

cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964). Additionally, even if "there is recourse in Congress," "from a practical standpoint this is without substance." *Baker*, 369 U.S. at 259 (Clark, J., concurring). "To date Congress has never undertaken such a task in any State." *Id.*

Reviewing the same record of congressional action (and inaction) as Justice Clark, Appellants come to the opposite conclusion about its efficacy. But it is undisputable that Congress has never directly confronted the problem of partisan gerrymandering. The requirements it has imposed, most importantly the use of single-member districts, do virtually nothing to stop the cracking and packing of the opposing party's voters. Congressional activity has also been exceedingly infrequent. Indeed, Congress has not enacted a single new redistricting criterion in more than a century. *See* Apportionment Act of 1911, 37 Stat. 13. And even when Congress has legislated, its motivation has not been the high-minded restraint of state-level abuses suggested by Appellants. Rather, it has been a congressional majority's pursuit of partisan advantage. *See, e.g.*, Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 43-44 (2013) (describing how the Whigs banned at-large congressional elections in 1842 to avoid losing every seat in Democratic-leaning States).

The reason for this pattern is a development the Framers did not anticipate (and would have opposed): the "rise of the party system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson,

J., concurring). National parties combining federal, state, and local politicians under the same banner emerged early in American history. These vertically integrated entities had no incentive to use the Elections Clause to curb state-level factionalism because the national parties were largely coextensive with the state parties. Ambition thus did not counter ambition, as Appellants assert. Br.32. Rather, federal ambition *complemented* state ambition, making vigorous congressional action against partisan gerrymandering nearly impossible.

C. The Court May Decide This Case Without Addressing the General Justiciability of Partisan Gerrymandering.

1. In any event, given the particular facts of this case, this Court should affirm the judgment below even if it chooses not to specify a single standard for adjudicating partisan-gerrymandering claims. Appellees alleged, and the district court found, that the 2016 Plan was enacted with the naked desire to undermine the political voice of Democratic voters in North Carolina. Indeed, for the first time in American history, this raw partisan motive was ratified as an official state policy to maximally degrade the representation of a disfavored political group. *See supra* pp.5-8. The law challenged here thus cannot survive even the most deferential review under the First and Fourteenth Amendments because of the openly discriminatory intent with which it was passed. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute

a legitimate governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down a provision that "seems inexplicable by anything but animus toward the class it affects"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (same).

This Court's redistricting precedents support the 2016 Plan's invalidation even absent a broader justiciability holding. Consider the Court's first racial-gerrymandering case, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), decided in an era when line-drawing challenges were still nonjusticiable and decades before the Court adopted a standard for racial-gerrymandering claims. The Court nevertheless held that when Alabama transformed a square municipal boundary into "an uncouth twenty-eight-sided figure" excising every African-American neighborhood, "the conclusion [was] irresistible, tantamount for all practical purposes to a mathematical demonstration," that the Fifteenth Amendment had been violated. *Id.* at 340-41. So too here: In an evenly divided State like North Carolina, a redistricting statute that facially intends to—and in fact does—produce a congressional delegation with ten Republicans and three Democrats can only be understood as a means for discriminating against Democratic voters.

In *Vieth*, similarly, Justice Kennedy addressed what he thought was an outlandish hypothetical: "an enactment that declared" that district lines "'shall be drawn so as most to burden Party X's rights to fair and effective representation.'" 541 U.S. at 312 (Kennedy, J., concurring). In Justice Kennedy's view, the Court "would surely conclude the Constitution had been

violated" by such a law. *Id.* The 2016 Plan, of course, *is* this counterfactual: a statute that officially sets "[t]he partisan makeup of the congressional delegation" at "10 Republicans and 3 Democrats," J.S.App.20, because it is not "possible to draw a map with 11 Republicans and 2 Democrats," J.S.App.22. The 2016 Plan therefore can and should be struck down even if the status of other maps remains unresolved.

2. Appellants contend that the 2016 Plan's overt partisanship should be overlooked because the Plan supposedly has a nonpartisan aim too: compliance with traditional redistricting criteria. Br.57-60. But as explained earlier, this purported compliance is a charade. In fact, the Plan systematically *divides* cities and counties to crack smaller Democratic clusters and pack larger ones. The Plan respects political subdivisions only where doing so is compatible with its overriding goal of benefiting Republicans and handicapping Democrats. *See supra* pp.9-14. Moreover, this Court has long recognized that "adherence to traditional districting factors" does not "negate[] any possibility of intentional vote dilution." *Vieth*, 541 U.S. at 298 (plurality). Aesthetically pleasing districts "cannot promise political neutrality" and, indeed, may "have significant political effect" when they are simply a ploy to disguise a gerrymander. *Id.* at 308-09 (Kennedy, J., concurring).

III. The District Court's Test for Partisan Vote Dilution Is Discernible and Manageable.

Appellants' other rationale for nonjusticiability is "a lack of judicially discoverable and manageable standards" for deciding partisan-gerrymandering claims. *Baker*, 369 U.S. at 217. For the first time in its

history, Appellants maintain, this Court should deem an entire cause of action a political question on this basis. But each prong of the district-specific test the district court adopted for partisan vote-dilution challenges is plainly discernible and manageable. Moreover, this test captures not just equal protection violations but also the First Amendment injury of intentional viewpoint discrimination. A district that fails the test indisputably "has the purpose and effect of subjecting a group of voters ... to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

A. The District Court's Intent Prong Is Limited and Precise.

1. The district court derived its intent prong from this Court's own definition of partisan gerrymandering. The prong asks whether a particular district was drawn with the "intent to 'subordinate adherents of one political party and entrench a rival party in power.'" J.S.App.142 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)); *see also Randolph Inst.*, slip op. at 10 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 890 (same). The prong also follows from the Court's analysis of partisan motivation in *Whitford*. The Court cited a variety of material, some district-specific and other plan-wide, showing Wisconsin mapmakers' aim of durably diluting Democratic votes. 138 S. Ct. at 1932. "That evidence," the Court continued, "may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims." *Id.*

Consistent with *Whitford*, the district court held that district-specific partisan intent may be established using both district-specific and plan-wide material. Probative district-specific evidence includes (1) drafters' statements about particular districts; (2) drafters' data showing how they expected particular districts to perform; (3) how particular districts disperse or overconcentrate the opposing party's voters; and (4) how else particular districts could have been drawn so as not to crack or pack these voters. J.S.App.223-27. Likewise, plan-wide evidence may illuminate mapmakers' overall goals and corroborate inferences drawn from district-specific material. *See, e.g.*, *ALBC*, 135 S. Ct. at 1265 ("Voters, of course, can present statewide *evidence* in order to prove [a discriminatory purpose] in a particular district.").

2. All by itself, the district court's intent prong significantly shrinks the pool of districts potentially subject to liability. Only parties with unified control of state governments (or legislative supermajorities) are able to craft districts with the objective of subordinating opposing-party voters and entrenching themselves in power. According to Professor Jackman's dataset of congressional plans, ten of the twenty-four current maps with at least seven seats were designed by a commission, a court, or a divided state government. Ex.4002:32. Over the entire period since 1972, this proportion was 59 out of 136. *Id.* Almost *half* of all congressional plans would thus be virtually *immunized* by the district court's intent prong alone. Challenges to these maps' districts could not get off the ground due to the lack of a sufficient partisan motive.

Even in plans enacted by a single party, only a subset of their districts would be legally vulnerable. Some of these maps' districts would unavoidably crack or pack the opposing party's voters—due to States' political geographies and legitimate redistricting criteria—and so could not be said to dilute these voters deliberately. Here, for instance, the League only alleges that nine of the 2016 Plan's districts are unlawful. In the ongoing Michigan case, similarly, just 36 of 110 state house districts and 6 of 38 state senate districts are under attack. *LWVMI*, 2018 WL 6257476, at *8 n.14.

3. Appellants object to the district court's intent prong because they think there is nothing wrong with a party trying to subordinate the opposition and entrench itself in office. Br.40-42. But Appellants make no effort to reconcile their position with this Court's statement in *Arizona State Legislature* that this aim is the essence of unconstitutional partisan gerrymandering. Nor do Appellants have anything to say about the Court's analysis in *Whitford*. If a dilutive purpose is entirely acceptable, then how could its presence be "pertinent with respect to any ultimate determination whether the plaintiffs may prevail"? 138 S. Ct. at 1932. And nor do Appellants so much as mention the Court's recent unanimous assumption that "partisanship is an illegitimate redistricting factor." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016). Again, this assumption would be inexplicable if mapmaking really were the one area where the government could seek to harm a disfavored political group.

Indeed, Appellants cite only a single opinion supporting their view that raw partisan advantage is

a permissible—as opposed to merely a common—motivation. But that opinion, in *Vieth*, was by a plurality, and its reasoning was explicitly disavowed by the rest of the Court. In his controlling concurrence, Justice Kennedy wrote that "a gerrymander violates the law" if it applies "political classifications" "in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J., concurring). Likewise, Justice Stevens observed that, before *Vieth*, "there ha[d] not been the slightest intimation in any opinion" that "a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Id.* at 336-37 (Stevens, J., dissenting); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 354 (2017) (identifying "*Vieth* as the puzzling aberration from the general norm against government nonpartisanship").

4. Appellants also complain about the district court's use in the alternative of a heightened intent threshold, requiring partisan gain to predominate over other redistricting goals. Br.48-49. But while a plurality in *Vieth* was unwilling to adopt a predominance standard, a unanimous Court did exactly that in *Harris*. Under *Harris*, a one-person, one-vote plaintiff challenging a plan with a total population "deviation of less than 10%" must show that the variance "reflects the *predominance* of illegitimate reapportionment factors," such as "partisanship." 136 S. Ct. at 1307, 1310 (emphasis added). Relying on this standard, every Justice concluded that the Arizona state-legislative map at issue was lawful, because its "deviations *predominantly* reflected Commission efforts to

achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party." *Id.* at 1307 (emphasis added). Every Justice, that is, did what Appellants say cannot be done: apply a predominant partisan-intent requirement.

B. The District Court's Effect Prong Is Limited and Precise.

1. Next, the district court's effect prong asks whether the challenged district, and the plan to which it belongs, are actually dilutive. "[T]he lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." J.S.App.151. Similarly, a map is dilutive if its districts' cracking and packing create a large and durable advantage for the line-drawing party. J.S.App.188. The magnitude of a party's advantage may be demonstrated through election results as well as measures of partisan asymmetry such as the efficiency gap, partisan bias, and the mean-median difference. J.S.App.188-209. In turn, the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions. J.S.App.190-91; *see also Randolph Inst.*, slip op. at 10-11 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 910 (same).

2. The plan-wide piece of this inquiry has analogues in both other kinds of vote-dilution cases. As in those doctrines, it ensures that no liability attaches unless a dilutive district is part of a map that is itself dilutive. In a malapportionment challenge, for

example, it is not enough for a plaintiff to prove that her own district is overpopulated. To prevail, she must also establish that the total population deviation between the entire plan's most and least populous districts exceeds ten percent (in a state-legislative suit). *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Likewise, a racial vote-dilution plaintiff is not done after showing that she has been cracked or packed—or even that she could have been placed in "an *additional* majority-minority district." *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.). Rather, a court must also consider "whether 'minority voters form effective voting majorities in a number of districts roughly proportional to [their] shares in the voting-age population.'" *Id.* at 508 (quoting *De Grandy*, 512 U.S. at 1000). "A finding of proportionality under this standard can defeat §2 liability even if a clear [district-specific] violation has been made out." *Id.*[14]

Professor Jackman's dataset confirms what these doctrinal analogies suggest: that only a few congressional maps would be vulnerable under the district court's effect prong. According to the dataset, fourteen of the twenty-four current congressional plans with at least seven seats either were not enacted by a single party or are forecast to have a lifetime average partisan asymmetry of less than one seat. Ex.4002:51. Over the entire period since 1972, this fraction increases to 107 out of 136. *Id.* Suits against

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[14] The district court's effect prong is also rooted in this Court's partisan-gerrymandering cases. Several Justices have noted "'the utility of a criterion of symmetry.'" *Whitford*, 138 S. Ct. at 1929. Similarly, the durability of a plan's skew—whether it "consistently degrade[s] ... a group of voters' influence"—was the crux of the *Bandemer* plurality's test. 478 U.S. at 132 (plurality).

the vast majority of congressional maps would therefore be futile under the district court's framework. Most plans, it turns out, either do not exhibit the requisite intent or do not actually dilute a party's votes.[15]

3. Appellants respond with a grab bag of criticisms, most of them unmoored from the record and oblivious to the rebuttals already supplied by the district court. For instance, Appellants assert that measures of partisan asymmetry are tantamount to "deviations from proportional representation." Br.43. As the district court explained, this is simply incorrect. The metrics do *not* necessarily flag "a districting plan that awards the party that obtains a bare majority of the statewide vote a larger proportion of the seats in the state's congressional delegation." J.S.App.199. This is because the metrics are based not on proportionality but rather on the quite different principle of symmetry: "the notion that the magnitude of the winner's bonus should be approximately the same for both parties." *Id.*[16]

Appellants also claim the metrics "misunderstand[] how politics works" because they do not distinguish between more and less safe seats won by a given party. Br.43. In fact, it is Appellants who fail to grasp the implications of today's hyperpolarized

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[15] Moreover, Professor Jackman's dataset does not take into account sensitivity testing. Even more congressional plans are not intentionally, severely, *and durably* asymmetric.

[16] Take the efficiency gap. If it were a measure of disproportionality, it would be calculated by comparing a party's statewide seat and vote shares. But that is not how the metric is computed. Rather, it tallies the votes each party wastes due to cracking and packing, district by district, and then compares the resulting totals. *See Whitford*, 138 S. Ct. at 1933.

Congress. Since almost every House member is staunchly liberal or conservative, competitive districts cannot be electing many moderate Representatives. If they were, Congress would not be nearly devoid of centrists. Take Appellants' example of North Carolina's Ninth Congressional District, with its tight 2018 race. Br.51. If House members from competitive seats "respond to voters of the opposing party," *id.*, then District 9 should be a hotbed of moderation. But actually, its only Representative this decade has been a conservative Republican far from the ideological center. *See Robert Pittenger*, Voteview, https://voteview.com/person/21347/robert-pittenger.

Appellants further observe that bipartisan and nonpartisan plans are sometimes asymmetric. Br.44. That is true, but irrelevant. As the district court noted, if a plaintiff were ever to challenge such a map, she would be "unable to establish that it was drawn with discriminatory intent, and therefore the plan [would] pass constitutional muster." J.S.App.203. Moreover, as mapmakers have honed their skills in recent years, mismatches between intent and effect have become rarer. In the current cycle, almost every plan designed by Democrats skews in their direction, nearly every Republican-drawn map tilts the other way, and most bipartisan and nonpartisan plans are balanced. Ex.4002:34.

Appellants contend as well that measures of partisan asymmetry have a "built-in bias" against Republicans. Br.44. If this were correct, these metrics should yield more pro-Republican than pro-Democratic scores. But that does not happen. As the district court found, the historical distribution of efficiency gaps is "normal with its mean and median

centered on zero, meaning that, on average, the districting plans ... did not tend to favor either party." J.S.App.194-95. Even in a State whose "pre-existing political geography" did advantage Republicans, Br.44, the district court's test would not produce anomalous results. As discussed below, the whole point of the test's justification prong is to avoid liability when a State's map is no more skewed than expected given the State's nonpartisan redistricting criteria and its voters' spatial patterns. *See infra* pp.60-63.

Appellants point out, too, that voters' preferences can change from one election to the next. Br.45-46. Of course they can. Sometimes, a plan's asymmetry would evaporate given plausible electoral shifts—and in that case, the district court's effect prong would not be satisfied. Other maps, however, are carefully crafted to continue benefiting the line-drawing party for the entire decade, even if public opinion turns sharply against it. The 2016 Plan, for example, just set the record for pro-Republican bias despite a Democratic wave election in 2018. The degree of voter volatility also should not be overstated. Hofeller himself testified that "'the underlying political nature of the precincts ... does not change no matter what race you use to analyze it.'" J.S.App.16. Professor Chen confirmed Hofeller's testimony by demonstrating that North Carolina's voters behave nearly identically in contests at different electoral levels. Ex.2010:38.

Lastly, Appellants fault the district court for not specifying an asymmetry threshold for all future cases. Br.50-51. It would certainly have been odd if the court had made such a grand pronouncement. To

resolve the dispute in front of it, it was enough for the court to find that the 2016 Plan's skew is exceptionally severe, and thus well above any conceivable bar. Notably, this Court took exactly the same approach in its early one-person, one-vote decisions. In *Baker*, *Reynolds*, and all the rest of the malapportionment cases of the 1960s, the Court never indicated at what point a map's total population deviation becomes presumptively unlawful. Instead, the Court reasoned that "[d]eveloping a body of doctrine on a case-by-case basis" is "the most satisfactory means of arriving at detailed constitutional requirements." *Reynolds*, 377 U.S. at 578.[17]

C. The District Court's Justification Prong Is Limited and Precise.

1. The third and final prong of the district court's test is justification: whether "the defendant [can] prove that a district's or districts' discriminatory effects are attributable to a legitimate state interest or other neutral explanation." J.S.App.154. If the dilutive impact of a district or plan *is* accounted for by a State's political geography or valid nonpartisan redistricting objectives, then the plaintiff's challenge fails. *Id.* Alternative district maps are the most probative evidence at this stage of the analysis. Thanks to technological advances, they can be generated randomly and in large numbers, without considering partisan data and matching or beating

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[17] Eventually, of course, the Court did settle on a population deviation threshold—ten percent—for state-legislative maps. *See Connor v. Finch*, 431 U.S. 407, 418 (1977). Here, likewise, Professor Jackman suggested as a cutoff an average partisan asymmetry, over a plan's ten-year lifetime, of at least one congressional seat. Ex.4002:51-54.

the enacted plan on all legitimate nonpartisan criteria. J.S.App.217-22. If these alternative maps are about as skewed as the enacted plan, then its bias is justified and it is exempt from liability. But if most or all of the alternative maps are less tilted, then no valid justification exists for the enacted plan's asymmetry. *Id.*; *see also Randolph Inst.*, slip op. at 10-12 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 911 (same).[18]

2. This Court contemplated an inquiry of this kind in *Whitford*. A test for partisan vote dilution, the Court suggested, should distinguish between voters who are "'naturally' packed due to their geographic concentration" and voters who have been "deliberately cracked." 138 S. Ct. at 1933. Randomly generated alternative maps make exactly this distinction. They reveal in which areas cracking and packing occur on their own—and in which areas they are very much the product of the mapmaker's efforts. *See also Harris*, 137 S. Ct. at 1479 (describing "alternative districting plan[s]" as "key evidence"). The district court's justification prong is rooted in this Court's malapportionment cases too, which employ an identical framework. "A plan with larger disparities in population ... creates a prima facie case of discrimination and therefore must be justified by the

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[18] As the district court held, randomly generated alternative maps are also relevant to its test's intent and effect prongs. A dilutive purpose may be inferred when an enacted plan is more skewed than most or all alternative maps. J.S.App.159-79. And alternative maps provide a legally attractive "baseline," Br.42—the outcome of a redistricting process that does *not* pursue partisan advantage—to which the enacted plan's asymmetry may be compared. J.S.App.209-12.

State." *Brown*, 462 U.S. at 842-43. If "the maximum total deviation from ideal district size exceed[s] 10%," defendants are "required to justify the deviation." *Voinovich*, 507 U.S. at 161.

As in the one-person, one-vote context, the justification prong makes it harder for plaintiffs to prevail. Even if they show both discriminatory intent and discriminatory effect, they still lose if the dilutive impact can be justified—which it often can be. At the congressional level, many of the plans currently in effect are about as asymmetric as the typical randomly generated map for the State. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering*, 44 Electoral Stud. 329, 337 (2016). At the state-legislative level, the same was true for many state house and state senate plans in the 1990s and 2000s. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering*, 8 Q.J. Pol. Sci. 239, 263 (2013). All such plans would avoid liability due to the justification prong. Even if they are highly skewed, they are no *more* skewed than expected given their States' political geographies and legitimate redistricting aims.[19]

3. Appellants' sole objection to the justification prong is that it puts the burden of proof on the defendant rather than the plaintiff. Br.51-52. This complaint is entirely new, having never been voiced below. J.S.App.153-54 n.25. It is also tangential, as

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[19] That the district court's test is so limited in its reach, of course, does not mean it is ineffectual. It *would* still invalidate needlessly cracked and packed districts in the few (but multiplying) maps as egregious as the 2016 Plan. It would also deter mapmakers from pursuing partisan advantage so aggressively.

the district court found that "even if the burden lies with Plaintiffs, Plaintiffs have propounded sufficient evidence of the 2016 Plan's lack of justification." *Id.* Appellants' view contradicts this Court's malapportionment cases as well, which allocate the burden to the State because of its greater familiarity with its "consistently applied legislative policies" and superior ability "to show with some specificity that a particular objective required the [dilutive impact of] its plan." *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983).

CONCLUSION

By the standards of the past, North Carolina's current congressional plan is exceptional. It is the first map in American history to ratify the pursuit of maximal partisan advantage and to have its architect boast, on the record, about his desire to harm his political opponents. It is the single most pro-Republican congressional map of the last half-century. And it has set this record even though the State's political geography mildly favors Democrats. If this Court holds that partisan-gerrymandering claims are nonjusticiable, however, the 2016 Plan will be the wave of the future. In the 2020 cycle and beyond, both parties will emulate—or exceed—its abuses, openly entrenching themselves in power using the full array of modern mapmaking technologies. This is not a future a Court that values "the political responsiveness at the heart of the democratic process" should countenance. *McCutcheon*, 572 U.S. at 227 (plurality). The Court should therefore affirm the judgment below.

March 4, 2019

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No. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

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REPLY BRIEF

For three decades and counting, this Court has struggled to determine "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018). Plaintiffs' briefs underscore why that endeavor has proven fruitless. Plaintiffs cannot even agree amongst *themselves* on who has standing, which constitutional provisions govern, or what standard applies. Indeed, of the four tests the district court proposed, there is not a single one that both sets of plaintiffs squarely embrace.

Plaintiffs' discord is a product of two basic realities: The framers assigned the inherently political task of districting to political actors, and they gave the judiciary no tools or text to discern judicially manageable standards. The Common Cause plaintiffs embrace the view that no amount of districting for partisan advantage is permissible, but that radical proposition is inconsistent with decades of judicial precedent and the framers' decision to assign the task to state legislatures and Congress. The League plaintiffs concede that some partisan motivation is inevitable and permissible, but they fail to answer "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004) (plurality op.). The Constitution does not provide an answer to that question because the framers protected the essential independence of the Article III courts by wisely shielding them from an issue that is "root-and-branch" a political question. *Id.* at 285.

ARGUMENT

I. Plaintiffs Lack Standing.

Federal courts have neither the responsibility nor the power to vindicate "group political interests" or "generalized partisan preferences." *Gill*, 138 S. Ct. at 1933. That principle suffices to dispose of this case, as plaintiffs have not identified any concrete and particularized individual injury.

The League plaintiffs prudently decline to defend the district court's holding that they suffered so-called "non-dilutionary" injuries, JS.App.69-74, which suffers all the same problems as the amorphous standing theories rejected in *Gill*. The Common Cause plaintiffs' efforts to defend that holding prove the point. In their view, they have standing to challenge any law that impedes their ability to "mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." CC.Br.31. Indeed, they blithely insist that a Democrat who lives in Asheville *should* be able to challenge alleged gerrymandering in a district across the State because "Democrats from Asheville fundraise for candidates in Fayetteville." CC.Br.33.

This Court has never accepted such a radical conception of Article III injury and squarely rejected it in *Gill*, concluding that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). As *Gill* recognized, the notion that a plaintiff has

standing simply because gerrymandering—whether in his own district or another—allegedly has impeded his "ability to engage in campaign activity," *id.* at 1925, has breathtaking implications. All manner of laws could plausibly be alleged to impede someone's ability to persuade people to engage in the political process. Indeed, if that were enough, why stop in Asheville: A Virginia or California voter with a keen interest in North Carolina politics would suffer comparable "injuries." In short, "non-dilutionary" is a useful shorthand for generalized injuries that do not suffice under *Gill*.

The League plaintiffs focus exclusively on their alleged "dilutionary" injuries, but to no avail. They concede that they lack "dilutionary" injuries in four districts—CD3, CD5, CD10, and CD11—because those districts remained heavily Republican under their own proposed map. LWV.Br.9 n.2. But they insist that various (still-unidentified) members have standing to challenge the nine remaining districts—even those that elected their preferred candidates. Take CD4, in which Democrat David Price has handily won 12 elections straight. According to the League, a Price-supporter has standing to challenge that district because it could have been drawn so that Price could secure a narrower win with 53% of the vote instead of 63%. LWV.Br.33.

That contention is fundamentally at odds with *Gill*. The only benefits to a Price-supporting CD4 resident of having Price re-elected more narrowly are benefits from redeploying likely Democratic voters outside the district to "influenc[e] the legislature's *overall* 'composition.'" *Gill*, 138 S. Ct. at 1931

(emphasis added). This Court has never "found that this presents an individual and personal injury of the kind required for Article III standing." *Id.* To the contrary, *Gill* squarely rejected the notion that such extra-district interests sufficed. "A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* Plaintiffs' interest in seeing voters of their preferred political persuasion more efficiently distributed elsewhere is a classic "nonjusticiable 'general interest common to all members of the public.'" *Id.*

This Court's vote dilution cases do no suggest otherwise. The kind of "vote dilution" alleged here bears no relationship to vote dilution in the one-person-one-vote context, where an individual's vote is diluted in the concrete sense that it actually carries less weight than it would in the less-populated district next door. And while plaintiffs try to analogize to §2 claims, they misunderstand the role that "vote dilution" plays in that context. Unlike overpopulating a district, "cracking" and "packing" does not "dilute" an *individual's* vote. *See City of Mobile v. Bolden*, 446 U.S. 55, 67-69 (1980) (plurality op.). It dilutes only the voting strength of a *group* of voters.

That suffices in the §2 context because Congress has prohibited laws that give "members of a class protected by" §2—*i.e.*, racial minorities—"less opportunity than other members of the electorate ... to elect representatives of their choice." 52 U.S.C. §10301(b). But neither the Voting Rights Act nor the Constitution extends the same protection to members of mainstream political parties. "Clearly,

members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group." *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). And to conclude that individuals suffer an individualized injury whenever the voting strength of *any* group with which they affiliate has been diluted would effectively empower every voter in the State to bring a lawsuit every time her district is redrawn.

That leaves (at most) three districts in which a different map might have allowed a district resident to elect his favored candidate. CC.Br.14. But even that does not state a cognizable Article III injury under the logic, if not the holding, of *Gill*. Someone who is not divvied up by race and whose vote is weighted equally does not suffer an individualized injury just because his preferred candidate is not elected. Voters are not entitled to have their districts drawn so that their preferred candidate wins, and few voters are lucky enough to live in such districts. Even a voter in a safe district favoring his own party may prefer a more conservative or moderate candidate, but being denied that opportunity, even when a different map would enable it, simply does not constitute Article III injury. Again, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Gill*, 138 S. Ct. at 1931. As long as that right is afforded, he does not have any constitutionally protected interest in a district drawn to promote his favored outcome.

II. Partisan Gerrymandering Claims Are Nonjusticiable.

Plaintiffs' claims face the even more substantial obstacle that they are nonjusticiable. Plaintiffs' first line of defense is to insist that this Court has already resolved justiciability in their favor. CC.Br.33; LWV.Br.33. That is difficult to square with this Court's conclusion just last Term that "[o]ur considerable efforts ... leave unresolved ... whether [partisan gerrymandering] claims are justiciable." *Gill*, 138 S. Ct. at 1929. In *Vieth*, a plurality of this Court decried "eighteen years of judicial effort with virtually nothing to show for it." 541 U.S. at 281. The tally has now reached 33 years, and the courts are no closer to divining judicially administrable standards. The time has come to replace plurality opinions with a definitive holding of the Court that partisan gerrymandering claims are nonjusticiable.[1] The two most important nonjusticiability factors—a textual commitment to another branch and a lack of judicially manageable standards—point in the same direction and make clear that "the judicial department has no business entertaining" partisan gerrymandering claims. *Id.* at 277.

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[1] To the extent *Bandemer* needs to be formally interred, *stare decisis* considerations fully justify that course. As the *Vieth* plurality observed, there are no meaningful reliance interests at stake, and *Bandemer*'s claim to *stare decisis* is "triply weak." 541 U.S. at 305-06.

A. The Framers Textually Committed to Congress Federal Oversight Over Excessive Partisanship in Districting.

In Article I, §4, Clause 1, the framers textually committed the power to draw congressional districts to state legislatures, and they textually committed federal oversight of whether state districting laws are "too political" or "too partisan" to Congress. In expressly delegating primary responsibility to the entity most susceptible to political and partisan influences, and delegating oversight to the federal body most subject to those same influences, the framers recognized that districting was "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality op.). The framers thus not only textually delegated federal oversight of claims of excessive partisanship to Congress, but recognized that such a role would be affirmatively inappropriate for Article III courts that depend on their independence from partisan politics to discharge their core function.

Plaintiffs' principal responses to this argument are to deem it novel and (somewhat paradoxically) "definitively rejected" in *Baker v. Carr*, 369 U.S. 186 (1962). CC.Br.35; LWV.Br.41-42. But there is nothing novel about recognizing that the framers adopted a structural solution to the inherently political problem of partisan gerrymandering. The *Vieth* plurality emphasized that "[t]he Constitution clearly contemplates districting by political actors, see Article I, § 4," and that Congress has not been shy about exercising its oversight responsibility. 541 U.S. at 285. And *Baker* certainly did not resolve—or even

address—whether there was a textual delegation with respect to partisan gerrymandering claims.

In insisting otherwise, plaintiffs miss *Baker*'s central lesson: Justiciability depends on the precise nature of the claim asserted. *Baker* reaffirmed decades of precedents finding malapportionment claims under the Guarantee Clause nonjusticiable, but nonetheless held a malapportionment claim premised on the Equal Protection Clause justiciable. *See* 369 U.S. at 226-27. And *Baker* clarified that not every "Fourteenth Amendment claim" is justiciable, as some will be "enmeshed with ... political question elements." *Id.* Similarly, in *Nixon v. United States*, this Court found a textual commitment to the Senate in the Impeachment Clause for a complaint about the Senate's use of a committee in conducting an impeachment trial, but did not suggest that a complaint about the Senate's failure to follow the Clause's "quite precise" requirements that Senators be under oath and conviction occur by a two-thirds vote would be nonjusticiable. 506 U.S. 224, 230 (1993). The central lesson of *Baker* and *Nixon* is that the existence of a textual commitment depends on the precise nature of the claim asserted.

Plaintiffs' hyperbolic claims that finding a textual commitment in this context would render nonjusticiable every case involving federal elections therefore ring hollow. LWV.Br.44; CC.Br.37. Partisan gerrymandering claims are fundamentally different from racial gerrymandering and malapportionment claims, on both the textual-commitment question and the bottom-line issue of justiciability. In the racial gerrymandering context,

the textual commitment in the Elections Clause must be reconciled with the Equal Protection Clause's clear command "to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). In the malapportionment context, the Elections Clause must be weighed against "the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964).

Again, *Nixon* is instructive. *Nixon* distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), on the basis that judicial intervention was necessary there to vindicate the Qualifications Clause. 506 U.S. at 240. Here, by contrast, as in *Nixon*, "there is no separate provision of the Constitution that could be defeated," *id.* at 237, by recognizing a textual delegation to Congress when it comes to amorphous claims that the political entity assigned responsibility for districting acted too politically. To the contrary, no provision of the Constitution suggests any textual limits, let alone judicially enforceable limits, on how much politics or partisanship is too much. And as *Nixon* recognized, the first two *Baker* factors are "not completely separate." *Id.* at 228. A textual delegation to another branch may explain the lack of any textual source for judicially manageable standards, and "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228-29.

Plaintiffs' efforts to resist the history underscoring that textual commitment fall flat. Invoking *The Federalist* No. 78, the Common Cause

plaintiffs try to infer from general statements about the role of the judiciary as "an intermediate body between the people and the legislature" that Alexander Hamilton would have welcomed judicial supervision of partisan gerrymandering claims. CC.Br.38. But far more relevant is *The Federalist* No. 59, in which Hamilton directly addressed the Elections Clause and its textual delegations of power. There, Hamilton "readily conceded[] that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." *Id.* at 360 (A. Hamilton) (Charles R. Kesler ed., 1961). Conspicuously absent from that list is any role for the judiciary—presumably because Hamilton himself recognized (in none other than *The Federalist* No. 78) that such a role would threaten the judiciary's essential independence, as "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Id.* at 465 (A. Hamilton) (quoting Montesquieu, *Spirit of Laws*, vol. i, p.181).

The League plaintiffs suggest that, during the Virginia ratifying convention, James Madison hinted at federal-court oversight of state election laws. *See* LWV.Br.45. In fact, the "sufficient security against abuse" that Madison identified was none other than *Congress'* control under the Elections Clause. 3 *Debates on the Federal Constitution* 408 (J. Elliot 2d ed. 1836); *see also id.* at 367; *cf.* Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 Harv. J.L. & Pub. Pol'y 341, 351 (2016). They also point to James Steele's comments at the North Carolina

ratifying convention. LWV.Br.45. But Steele was suggesting only that courts could intervene if *Congress* abused its Elections Clause power by passing laws that eliminated or impeded *the right to vote*. *See* 4 *Debates* 71. That neither Steele nor anyone else even hinted at the notion that federal courts could examine state districting maps for excessive partisanship is powerful evidence that "the judicial department has no business entertaining" partisan gerrymandering claims. *Vieth*, 541 U.S. at 277 (plurality op.).

B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims.

The second nonjusticiability factor points just as strongly in the same direction: As decades of unproductive "judicial effort" and "essentially pointless litigation" have confirmed, *id.* at 306, there are no "judicially discoverable and manageable standards for resolving" partisan gerrymandering claims, *Baker*, 369 U.S. at 217. The fundamental problem is that, given that the framers delegated districting authority to "political entities," virtually no one, save the district court and the Common Cause plaintiffs, thinks that *any* amount of political or partisan motivation is *malum in se*. But as a result, such claims inevitably devolve into "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.).

Predictably, plaintiffs try to duck that question. They first make the puzzling claim that this Court can hold the 2016 Map unconstitutional without deciding whether partisan gerrymandering claims are

justiciable. CC.Br.40; LWV.Br.48. But this Court cannot invalidate a state law while remaining *dubitante* on the justiciability of the doctrine that does the invalidating. Nor can this Court plausibly declare the 2016 Map "the most extreme[] partisan gerrymander," CC.Br.1, without developing a scale for what makes a partisan gerrymander problematic. Not surprisingly, plaintiffs' most-extreme-ever claim mirrors comparable claims in prior partisan gerrymandering cases almost verbatim. Last Term, the *Gill* plaintiffs insisted that Wisconsin's map was "by any measure, one of the worst partisan gerrymanders in modern American history." Compl. ¶1, *Whitford v. Gill*, No. 3:15-cv-00421-bbc (W.D. Wis. July 8, 2015), ECF No. 1. The *Vieth* plaintiffs similarly described Pennsylvania's plan as "the paradigmatic example of an extreme partisan gerrymander." Br. for Appellants 41, *Vieth*, No. 02-1580 (U.S. Aug. 29, 2003) ("*Vieth* Appellants Br.").

These repeated hyperbolic claims suggest that claiming extremity by any measure is no substitute for having a discernible standard for measurement. Certainly, the North Carolina map is not the most extreme when it comes to deviation from traditional districting principles, as it outperforms any North Carolina congressional map in recent memory on that standard. *See infra* Part IV. Instead, plaintiffs seem to view it as extreme largely because the legislature forthrightly acknowledged that it considered partisan advantage in drawing the map. But that hardly distinguishes this case from *Vieth*, in which the plaintiffs emphasized that the legislature "frankly admitted" its goal "to maximize the number of Republicans elected to Congress." *Vieth* Appellants

Br.1; *see also Bandemer*, 478 U.S. at 116 n.5 (recounting deposition testimony from Speaker that "operative" goal of map was "to save as many incumbent Republicans as possible"). More fundamentally, there can be no constitutional violation in acknowledging partisan motivation if such motivation is not unconstitutional.

Plaintiffs insist that this Court has never held that "raw partisan advantage is a permissible—as opposed to merely a common—motivation" in districting. LWV.Br.53-54; CC.Br.45. This Court has long begged to differ. *See, e.g.*, *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 551 (1999) ("[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering" (collecting cases)); *see also Vieth*, 541 U.S. at 286 (plurality op.) ("partisan districting is a lawful and common practice"); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part) (distinguishing "unconstitutional gerrymander[ing]" from "the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls"). Tellingly, the best authority plaintiffs can muster for their contrary claim is Justice Stevens' solo *dissent* in *Vieth* and a decision that "assum[ed], *without deciding*, that partisanship is an illegitimate redistricting factor." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (emphasis added).

Moreover, this Court's racial gerrymandering jurisprudence has been premised largely on the notion that racial considerations are generally impermissible, while partisan and political

considerations are fair game. *See, e.g., Cromartie I*, 526 U.S. at 551. If political considerations are off the table as well, then districting will be radically transformed. That underscores the fundamental difference between trying to eliminate an impermissible consideration like race and trying to eliminate a consideration deemed all but inevitable for two centuries. The notion that judicially manageable standards for policing the latter have been lurking unnoticed in the Elections Clause and First and Fourteenth Amendments for centuries beggars all belief.

At any rate, even plaintiffs cannot deny that this Court has repeatedly rejected the proposition that districting for partisan advantage alone renders a map unconstitutional. If partisan gerrymandering claims depended merely on determining whether the legislature districted for "raw partisan advantage," then both *Bandemer* and *Vieth* should have come out the other way. Instead, the plurality in both cases squarely rejected the proposition that "redistrict[ing] with the specific intention of disadvantaging one political party's election prospects" is itself enough to violate the Constitution, *Bandemer*, 478 U.S. at 138; *see also Vieth*, 541 U.S. at 286, and none of their colleagues disagreed.

The Common Clause plaintiffs thus fundamentally miss the mark with their strained analogy that courts do not "refus[e] to adjudicate race-discrimination or tax-fraud cases" because it "is impossible to eliminate racism from all human hearts or to prevent all tax cheating." CC.Br.46. Racism and tax-cheating are wrong even in small doses, with the

challenge being detecting impermissible motivation. The problem with partisan motivation is not that it is difficult to detect in institutions that divide themselves into partisan caucuses across literal aisles. It is that "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage" played some role in the map (and virtually all other legislation). *Vieth*, 541 U.S. at 286 (plurality op.). "As long as redistricting is done by a legislature," at least some degree of such motivation "should not be very difficult to prove." *Bandemer*, 478 U.S. at 129 (plurality op.). A test that invalidated a map any time the legislature "overt[ly]" or "[n]akedly" sought *any* "partisan advantage," CC.Br.1, 56, 58-59, thus would "commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 478 U.S. at 306 (Kennedy, J., concurring).

That is particularly true now that *Gill* has clarified that partisan gerrymandering claims, like racial gerrymandering claims, must proceed district by district. Even when legislatures are not explicit about having a statewide goal to maximize seats, they routinely draw particular district lines to advantage or disadvantage an incumbent or to capture additional Republican or Democratic voters. Thus, if this Court goes down the road of entertaining partisan gerrymandering claims, there will be no shortage of lawsuits claiming "naked," "raw," or "extreme" partisan gerrymandering.

The League plaintiffs do not defend the Common Cause plaintiffs' radical proposition that partisan gerrymandering is *malum in se*. But that leaves them in the unenviable position of trying to identify a

limited, precise, and objective test for determining "[h]ow much political motivation and effect is too much." *Id.* at 296-97 (plurality op.). Unsurprisingly, their efforts come up short. Indeed, they inevitably resort to a "form of rough proportional representation" as the constitutional baseline from which deviations can be deemed extreme, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), proposing a "partisan asymmetry" standard that turns on whether "supporters of each of the two parties are able to translate their votes into representation with equal ease," LWV.Br.15.

But proportional representation is not "consistent" with "our history, our traditions, or our political institutions," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and it does not become any more so by shifting the focus to whether each of the major political parties has a sufficiently "symmetrical" opportunity to achieve it.[2] Simply put, nothing in the Constitution or our Nation's history supports the novel proposition that the constitutionality of a map turns on how well Republicans and Democrats perform in districts as compared to their statewide numbers. If voters naturally distributed themselves into perfectly square districts at a uniform 60% Democratic and 40% Republican rate, so that

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[2] The League plaintiffs never explain why this Court should embrace a constitutional rule that assumes—indeed, effectively enshrines—a two-party system. This would be a particularly odd moment to do so given that "voters' rising partisanship," LWV.Br.25, could very well lead to fractures within that system. *See, e.g.*, Thomas L. Friedman, Opinion, *Is America Becoming a Four-Party State?* N.Y. Times (Feb. 19, 2019), https://nyti.ms/2ElO5bd.

Democrats won every district and left 40% of the State's population without representation by their preferred candidates, there would be no constitutional problem—because proportional representation is not a value enshrined in the Constitution. Intentionally drawing lines to produce the same effect neither violates the Constitution nor deviates from any constitutionally valid baseline.

Plaintiffs' efforts to measure forbidden effects are no more successful than their efforts to detect forbidden intent. To the contrary, they concede that "candidates and issues do matter," CC.Br.50 n.11, that "voters' preferences can change from one election to the next," and that "electoral shifts" can cause a plan's anticipated "asymmetry" to "evaporate," LWV.Br.59. Those concessions are unavoidable, as the subsequent history of *Bandemer*, *Vieth*, and other cases have proven the wisdom of Justice O'Connor's observation that "there is good reason to think that political gerrymandering is a self-limiting enterprise." *Bandemer*, 478 U.S. at 152; *see also Vieth*, 541 U.S. at 287 n.8 (plurality op.); Op.Br.45-46; Republican Nat'l Comm. Br.6-20. Courts' woeful inability to meaningfully measure how "extreme" or "enduring" a gerrymander is has been borne out yet again in this case: The district court declared CD9 an unconstitutionally "safe" Republican district just a few months before the Republican candidate failed to secure even 50% of the vote.[3]

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[3] CD9 is hardly the only district that deviated from the experts' predictions in 2018. CD2 had a predicted Republican vote share of 56.20%, but an actual Republican vote share of 51.27%. And CD4 had a predicted Democratic vote share of 62.32%, but an

In short, time and again it has proven "impossible to assess the effects of partisan gerrymandering" with any real confidence, which makes it just as impossible "to fashion a standard for evaluating a violation." *Vieth*, 541 U.S. at 287 (plurality op.). That is unsurprising given the framers' decision to assign that politically fraught task elsewhere. *See Nixon*, 506 U.S. at 228-29. And it reinforces the ultimate conclusion that partisan gerrymandering claims are nonjusticiable.

III. The District Court's Standards Are Not Judicially Discernible And Manageable.

The insuperable problems with the district court's four proposed tests confirm as much. Indeed, that plaintiffs themselves cannot agree on which (if any) of those tests is workable "goes a long way to establishing that there is no constitutionally discernible standard." *Vieth*, 541 U.S. at 292 (plurality op.).

1. Equal Protection Clause

The League plaintiffs defend only the district court's Equal Protection Clause test, while claiming that it somehow also manages to "capture[] ... the First Amendment injury of intentional viewpoint discrimination." LWV.Br.51. The Common Cause plaintiffs, meanwhile, defend the district court's other tests while complaining that its equal protection test is "too demanding." CC.Br.58. Plaintiffs contend that the "predominant-purpose" standard must be workable here because it has proven workable in the

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actual Democratic vote share of 72.37%. *Compare* JA290 *with* Op.Br.20 n.3.

racial gerrymandering context. CC.Br.47. Setting aside the highly debatable premise, that ignores the fundamentally different role of the inquiry in each context. Drawing districts predominantly on the basis of race is presumptively impermissible because "the purpose of segregating voters on the basis of race is not a lawful one." *Vieth*, 541 U.S. at 286 (plurality op.). "Politics is quite a different matter." *Id.* at 307 (Kennedy, J., concurring). In this context, a predominance standard identifies only "an ordinary and lawful motive," *id.* at 286 (plurality op.)—indeed, one that has often been a basis for showing that impermissible considerations, like race, did not predominate.

As for the effects prong, the League plaintiffs maintain that "a map is dilutive if" it "create[s] a large and durable advantage for the line-drawing party." LWV.Br.55. But while they have no shortage of methods by which a plaintiff may try to make this showing, they never explain how "large" or "durable" the advantage must be. Instead, they contend that it "would ... have been odd" for the district court to flesh out these seemingly critical details. LWV.Br.59. But the district court not only announced this test but purported to apply it to invalidate a duly enacted map, so supplying some details does not seem too much to ask.

Finally, no plaintiff seriously grapples with the problem that the district court's "justification" prong just reverses the burden of proof. That might work if its intent and effects tests were demanding tests that isolated rare instances of presumptively unconstitutional behavior. But shifting the burden to

the legislature based on an intent test that asks only whether legislators acted like legislators and an effects test that asks whether they were any good at implementing their intent (to some undefined degree) looks a lot more like judicial preclearance than any readily administrable test that comports with the presumption of good faith and constitutionality. Demanding that state legislatures come into court and explain why they did not draw "fairer" maps is not our usual mode of adjudication, and it is certainly not what the framers envisioned in granting districting authority to state legislators.

2. First Amendment

Unlike the League plaintiffs, the Common Cause plaintiffs wholeheartedly embrace the district court's First Amendment test, insisting that the 2016 Map "burdens protected activity" on various impermissible bases. CC.Br.54-55. But they conveniently ignore the glaring problem that partisan gerrymandering does not even regulate—let alone "restrict" or "enhance," CC.Br.54—any activity protected by the First Amendment. "Plaintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." JS.App.344. Their only complaint is that the map purportedly has made those First Amendment activities *less effective*. If that were enough to convert a law into a presumptively unconstitutional burden on speech or association, then there would be no end to the laws that could be challenged on First Amendment grounds.

Plaintiffs cannot escape that problem by trying to reconceptualize partisan gerrymandering as a form of viewpoint discrimination or retaliation, as that path "would render unlawful *all* consideration of political affiliation in districting." *Vieth*, 541 U.S. at 294 (plurality op.). Plaintiffs insist that their test is meant to capture only "*invidious* discrimination," by which they mean considering political affiliation to achieve partisan advantage. CC.Br.56. But "adding the modifier" invidious (or "raw" or "extreme"), *Vieth*, 541 U.S. at 298 (plurality op.), does not explain how a practice that the framers not only tolerated but encouraged (by assigning responsibility for districting to political actors) has suddenly become an abridgment of free speech.

The First Amendment, moreover, does not draw any distinction between "benign" and "invidious" viewpoint discrimination or retaliation. "What cases such as *Elrod* v. *Burns*, 427 U.S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*." *Id.* at 294. Accordingly, if sorting voters based on political affiliation to help the prospects of one political party is unconstitutional, then so is sorting voters based on political affiliation to make districts "more competitive." Plaintiffs cannot take what they like of First Amendment doctrine and discard the rest.

These defects are compounded by the problem that the district court's test does not even require plaintiffs to prove that a districting map had a meaningful impact on First Amendment activity; anything more than a "*de minimis*" "chilling effect"

will suffice. JS.App.287-88. Plaintiffs applaud the court's refusal to adopt a "heightened demonstration of effect or burden." CC.Br.56. But a test that would let virtually any plaintiff in the door and would invalidate any map that sought any degree of partisan advantage would require nothing short of "the correction of all election district lines drawn for partisan reasons." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

3. Sections 2 and 4 of Article I

The Common Cause plaintiffs likewise stand alone in defending the district court's Article I tests. JS.App.35. No other court in history has endorsed those tests—likely because it strains credulity to claim that the very same constitutional text that clearly contemplates districting by partisan entities is the font of administrable limits on partisanship. Indeed, when the *Vieth* plaintiffs suggested that partisan gerrymandering violates the Elections Clauses, the plurality resoundingly rejected the argument, 541 U.S. at 305, and Justice Kennedy agreed "that the standards proposed ... by the parties before us ... are either unmanageable or inconsistent with precedent, or both," *id.* at 308. No other Justice hinted that Article I supplied any answers.

The Common Cause plaintiffs nonetheless claim that partisan gerrymandering violates Article I because it allows legislatures to "dictate electoral outcomes" and "favor or disfavor a class of candidates." CC.Br.60. But if intentionally altering district lines amounts to unconstitutionally "dictating electoral outcomes," it is hard to understand how legislatures could try to achieve even proportional representation

consistent with the Constitution, as that too involves the "wiggl[ing] and joggl[ing]" of "boundary lines." *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

More fundamentally, plaintiffs overlook the problem that, under their theory, *any* map unconstitutionally "dictates electoral outcomes." After all, the legislature has to draw district lines *somewhere*, and "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Id.* at 753. By their logic, then, "All Districting is 'Gerrymandering.'" *Vieth*, 541 U.S. at 289 (plurality op.). This Court has not struggled for three decades only to embrace such a patently overinclusive and ahistoric test.

IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander In All Events.

Even if the Court were inclined to leave the door to partisan gerrymandering claims ajar, the 2016 Map should still stand. Plaintiffs do not dispute that the map beats every other North Carolina congressional districting map in recent memory as a matter of traditional districting principles. Op.Br.57-60. The map thus would survive even under the tests proposed by the dissenting Justices in *Vieth*, as each of those tests would have put maps that substantially adhere to traditional districting principles on the constitutional side of the lines they endeavored to draw. *See* 541 U.S. at 318 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting). The Common Cause plaintiffs insist that since compliance with traditional districting principles does not necessarily save a map in the racial

gerrymandering context, it should not suffice here either. CC.Br.62. But that once again draws the false equivalence between race and politics that a majority of this Court has repeatedly rejected. *See, e.g.*, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring).

Ultimately, plaintiffs' argument reduces to the claim that this Court should condemn the 2016 Map simply because the redistricting committee "overt[ly]" stated that partisan advantage was one of its criteria. CC.Br.1; LWV.Br.3. But while plaintiffs attempt to equate that to "an official state policy to maximally degrade the representation of disfavored voters," LWV.Br.3, that is wrong as a matter of fact. As is evident on the face of the committee's actual criteria, the committee sought merely to "make reasonable efforts ... to maintain the current partisan makeup of North Carolina's congressional delegation," while complying with traditional districting criteria. JS.App.20. The committee could have sought to increase Republican seats at all costs—but that would have required abandoning the traditional districting principles that plaintiffs conveniently neglect to mention were part of the same "official state policy." *See* Dkt.110-3:167-68.

Plaintiffs' argument also ignores the context in which the partisan advantage criterion was adopted, which confirms that it was overt not because the legislature sought to maximize partisan advantage at all costs, but because the legislature wanted to avoid once again falling into the trap of being accused of *racial* gerrymandering if their embrace of political considerations was insufficiently clear. Op.Br.59. The 2016 Map is thus hardly the "extreme" gerrymander

that plaintiffs contend; indeed, it is not materially different from the maps this Court upheld in *Bandemer* and *Vieth*, which were backed with similarly hyperbolic claims. Moreover, adopting a prohibition not against partisan gerrymandering, but against forthright acknowledgement of a partisan motive, would not address the problems plaintiffs perceive going forward. Instead, it would just punish the legislature for relying on *this Court's own assurance*—to the North Carolina General Assembly itself, no less—that a legislature may "engage in constitutional political gerrymandering." *Cromartie I*, 526 U.S. at 551.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

—v.—

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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Pursuant to Sup. Ct. R. 18.10, *Common Cause* Appellees file this supplemental brief to bring to the Court's attention (1) yesterday's decision of the United States District Court for the District of Maryland in *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 (Nov. 7, 2018); and (2) the results of the November 6, 2018 congressional elections conducted under the challenged 2016 Plan.

I. *Benisek v. Lamone*

In *Benisek*, "several Republican voters ... allege[d] that Maryland's Sixth Congressional District was gerrymandered ... for the purpose of retaliating against them for their political views." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam). The district court denied preliminary injunctive relief in August 2017, and this Court affirmed, finding no abuse of discretion. *Id.* at 1944.

Subsequently, at the conclusion of "extensive discovery," the plaintiffs moved for summary judgment. 2018 U.S. Dist. LEXIS 190292, at *3. Yesterday, the district court granted that motion, holding unanimously that the plaintiffs' claims were justiciable; that the plaintiffs had standing to bring those claims; and that, in drawing the challenged district, the state defendants "violate[d] the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history." *Id.* at *4.

The *Benisek* court's analysis reinforces many of *Common Cause* Appellees' arguments in their Motion to Affirm. The court recognized that voters "have a

right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." *Id.* at *46 (emphasis in original). The essence of the violation, the court underscored, is the drawing of district lines "with the *specific intent* to impose a burden on [plaintiffs] ... because of how they voted or the political party with which they were affiliated." *Id.* at *47 (emphasis in original). Once such intent has been proven, it is sufficient to show that the conduct "resulted in a tangible and concrete adverse effect" on the plaintiffs' representational or associational rights. *Ibid.* "[A] plaintiff ... need not show" that the gerrymander actually "altered the outcome of an election." *Id.* at *59; *see also id.* at *83 (Bredar, C.J., concurring) ("[N]o mention of electoral outcomes is necessary to prove such a violation....").

The *Benisek* court found the specific intent requirement met based on, *inter alia*, the admissions of Maryland's governor and Senate Majority Leader; remarks made by legislators during the redistricting process; and the map-drawer's use of a "Democratic Performance Index" metric in plotting district lines. *Id.* at *13, *53-56. Here, there is similar evidence of invidious intent—and, in addition, the 2016 redistricting guidelines are also invidiously discriminatory *on their face*. Mot. to Affirm 5-7, 27. The *Benisek* court also found the adverse effect requirement met based on, *inter alia*, evidence that "Republican voters in the [gerrymandered] Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting," 2018 U.S. Dist. LEXIS 190292, at *59-61, and testimonial

evidence that the gerrymander "burden[ed] their associational rights" by impeding "fundraising" and dampening "voter engagement," *id.* at *69-72; *see also id.* at *84-85 (Bredar, C.J., concurring). The District Court relied on analogous evidence here. Mot. to Affirm 34, 37.

Notably, in his concurring opinion, Chief Judge Bredar observed that the "line-drawing" critique Appellants raise in their Jurisdictional Statement is misplaced—at least in the context of an associational-rights claim—because "*any* [intentional] retaliation against a voter based on his or her affiliations is a constitutional violation." 2018 U.S. Dist. LEXIS 190292, at *81-82, *86-87 (emphasis added). A standard that turns on invidious intent, therefore, "does not pose ... justiciability problems," the way a standard that turns on measures of electoral impact has been claimed to do. *Id.* at *83 n.2. Likewise here, *Common Cause* Appellees have shown that a standard based on invidious intent obviates the need for arbitrary line-drawing and is well within the judiciary's competence to apply. Mot. to Affirm 28-30.

II. 2018 Congressional Election Results

Common Cause Appellees also bring to the Court's attention the results of the 2018 North Carolina congressional elections conducted earlier this week under the 2016 Plan.[1]

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[1] Figures include election-night totals only and exclude provisional ballots. Data were obtained from the website of the State Board of Elections. *See* https://www.ncsbe.gov/election-results.

The overall vote share was approximately 50.3% for Republican candidates and 48.4% for Democratic candidates. Despite these near-equal vote shares, Republican candidates once again won 10 seats (77%), and Democratic candidates only 3 seats (23%)—just as prescribed in the 2016 Plan's "Partisan Advantage" criterion. Mot. to Affirm 6. In reality, the distortive effect of the Plan was even greater than it appears, since no Democratic candidate was even willing to run in the Plan's Congressional District ("CD") 3. In the twelve contested races, Democratic candidates won a *majority* of the total vote—approximately 50.9%—but only 3 of 12 seats (25%). These results highlight the persistent harm inflicted by the 2016 Plan and validate the District Court's undisputed finding of fact "that the dilution of the votes of [the *Common Cause* voter-plaintiffs] ... is likely to persist in subsequent elections." Mot. to Affirm 36-37.

In the three districts the District Court found to be "packed" (CDs 1, 4, and 12), the victorious Democratic candidates won in overwhelming landslides (69.8%, 75.0%, and 73.0% of the district-wide vote, respectively). By contrast, none of the nine Republican winners of contested races exceeded 59.3% of the district-wide vote, with an average of 55.1%. These results underscore the extent to which Democrats were intentionally "'packed' into three specific districts (CD 1, 4, and 12)" in order to waste their votes, "and 'crack[ed]' ... across the remaining ten." Mot. to Affirm 17.

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IN THE

Supreme Court of the United States

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Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

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LINDA H. LAMONE, ET AL.,

Appellants,

—v.—

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 1.7 million members dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Maryland, ACLU of North Carolina, and New York Civil Liberties Union are ACLU statewide affiliates of the national ACLU. The ACLU of Maryland and ACLU of North Carolina have approximately 42,000 and 30,000 members, respectively. The New York Civil Liberties Union has 170,000 members.

SUMMARY OF ARGUMENT

A fundamental precept of representative democracy is that the government must regulate the electoral process in an even-handed manner. Plainly, a state that barred members of one political party from voting in an election would violate this principle. So too would a state that manipulated voting machines to discount the votes cast for one party by one-third. Nor could a legislature wait until ballots were cast and *then* draw district lines to achieve its preferred electoral outcome. In each

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[1] All parties to the cases have lodged blanket consents for the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

instance, the state's conduct would corrupt the integrity of the electoral process and impair voters' political rights.

Partisan gerrymandering is similarly incompatible with democratic principles. It subverts government's obligation to remain neutral in regulating elections. Although this Court has yet to agree on a standard to discern its limits, there is longstanding consensus that the practice lies beyond the constitutional pale.

The First Amendment requires that government officials neutrally regulate speech or expressive conduct in public forums. That neutrality principle—in the form of a prohibition against content and viewpoint discrimination—is rooted in the commitment to ideological competition as a critical component of self-government. The obligation of state neutrality under the First Amendment supplies a sufficient framework to bar a state from "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

Partisan gerrymandering violates the First Amendment where the state draws districts with the purpose and effect of entrenching—or "freezing"—partisan advantage against likely changes in voter preferences. To make out a prima facie claim, a plaintiff must show: (1) an improper legislative *intent* to entrench a partisan advantage; and (2) an impermissible *effect* of having drawn the district lines in such fashion as to insulate partisan advantage against likely changes in voter preference.

In past cases, showing intent to entrench has not been a doctrinal stumbling block. The desire to squeeze out every last iota of partisan advantage has often been explicit. The difficulty lies in the second part of the proof: how much partisan gain is too much and how is this to be established? This has been the doctrinal stumbling block until now.

What has changed over time is that courts in multiple cases have used familiar evidentiary tools to determine whether a challenged plan so deviates from neutral allocations of electoral opportunity as to entrench incumbent advantage. The courts have looked to a range of validated social science evidence to make this assessment, just as courts do in many other areas of law. There is not one way of proving entrenchment, just as there is not one way of proving disparate effect in a discrimination case or unfair competition in an antitrust action. But the courts have been able to assess multiple empirical tests to identify districts that are such outliers, and so freeze the political process, that they presumptively violate the First Amendment. Once these two elements are met, the burden should shift to the state to demonstrate the legitimacy of the governmental interests justifying the apparent political distortions.

In both cases on review, the courts properly applied the dual threshold inquiry and then found the government's asserted purpose insufficient to overcome the First Amendment command of neutrality. The record evidence showed that Maryland and North Carolina legislators acted with intent to lock in their preferred partisan advantage, and that they accomplished that goal by entrenching

the majority party against the range of likely changes in constituent preference.

ARGUMENT

I. THE STATE MUST REMAIN POLITICALLY VIEWPOINT-NEUTRAL IN ADMINISTERING ELECTIONS.

State officials cannot tailor electoral rules to insulate their majority from changes in voter preferences without violating the First Amendment. That constitutional provision protects the panoply of rights of political expression, including the rights to associate to advance political beliefs, to participate in the electoral process, and to cast a meaningful ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983); *see also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring). It prohibits the government from using its regulatory authority to skew the "marketplace of ideas." This "neutrality principle" underpins democratic self-government, which depends on free and fair electoral contests. As the Court has observed, "the core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

A. The Neutrality Principle Operates as the Principal First Amendment Mechanism to Secure our System of Free Expression.

Justice Holmes famously wrote "that the best test of truth is the power of the thought to get itself

accepted in the competition of the market ...." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). That "theory of our Constitution," *id.*, is now a cornerstone of the First Amendment. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (Breyer, J., dissenting); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Government neutrality regarding the regulation of speech is the doctrinal prerequisite to fair ideological competition. In its early application, the principle—which often takes the form of a prohibition against content discrimination—was most commonly invoked where the state policed expressive access to a public forum. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Mosley*, for example, the Court invalidated a Chicago ordinance that selectively granted access to picket on public sidewalks based on speech content and the speakers' labor union affiliation. The Court explained that the First Amendment and the Fourteenth Amendment's equal protection guarantee prohibited the government from "grant[ing] the use of a forum to people whose views it finds acceptable, but deny[ing] use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96.

This Court has long "rejected government efforts to increase the speech of some at the expense of others." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011). The core principle is that the state may not burden speech based on the viewpoint expressed without offending the First Amendment. No less neutrality is tolerable

when the government regulates the electoral system. The norms that preserve robust discourse in public forums would do little if the First Amendment did not similarly protect the electoral forum. More than a means of choosing officeholders, elections are the quintessential locus for competition in the political marketplace of ideas. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014).

B. The Neutrality Principle Applies to Regulation of the Electoral Process.

The guarantee of government neutrality that undergirds the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," and, generally, to the regulation of the electoral process. *McCutcheon*, 572 U.S. at 191-92 (citation and internal quotation marks omitted). Thus, while states have broad discretion to regulate elections, they must "observe the limits established by the First Amendment." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). This Court has been vigilant about ensuring that laws governing the electoral process comply with the neutrality principle. *See McCutcheon*, 572 U.S. at 191-94; *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 415-16 (2006) (*LULAC*); *Anderson*, 460 U.S. at 788.

For example, this Court has applied careful scrutiny to ensure that, among other regulations,

voter qualifications,[2] regulation of candidates' and parties' access to the ballot,[3] campaign finance regulations,[4] and polling place rules[5] all adhere to constitutional obligations of neutrality. Each of these laws "inevitably affects—at least to some degree—the individual's right to vote and ... to associate with others for political ends." *Anderson*, 460 U.S. at 788. This Court must continue to ensure that states exercise their authority to regulate elections "fair[ly] and honest[ly]," *Eu*, 489 U.S. at 231, with "the aim of providing a just framework within which diverse political groups in our society may fairly compete," *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

There are sound reasons for this Court's insistence on neutrality in the electoral forum. "Confidence in the integrity of ... electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). It "encourages citizen participation in

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[2] *See, e.g., Carrington v. Rash*, 380 U.S. 89, 94, 96-97 (1965) (invalidating Texas law prohibiting servicemembers from voting while on active duty service in the state).

[3] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 24-25, 32 (1968) (invalidating Ohio ballot access restriction that "favor[ed] two particular parties—the Republicans and the Democrats—and ... g[a]ve them a complete monopoly ... on the right to have people vote for or against them").

[4] *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (invalidating statute prohibiting banks and business corporations from engaging in certain campaign speech in referendum elections).

[5] *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding viewpoint-neutral restriction on electioneering within 100-feet of polling place).

the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Conversely, nothing can damage voter confidence as fully as watching the state entrench its preferred candidates or parties in office against the will of "an 'informed, civically militant electorate' and 'an aroused popular conscience.'" *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring). By ensconcing the preferred party in office and "freez[ing] the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-government through elected officials," *McCutcheon*, 572 U.S. at 227, and substantially burdens representational rights protected by the First Amendment.

C. Application of the Neutrality Principle in Regulating Redistricting is Consistent With Core Concerns of the Framers.

State neutrality in regulating the redistricting process is consistent with core principles embraced at the founding. Under the Articles of Confederation, state legislatures both appointed delegates to the Continental Congress and "enjoyed the power to establish qualifications." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 851 n.3 (1995) (Thomas, J., dissenting). The framers rejected that approach. "[I]n perhaps their most important contribution, [they] conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Id.* at 821. That ideal was "most clearly" implemented in the election of

members of the House of Representatives, *id.*, and later expanded to the Senate through the Seventeenth Amendment.

By design and from the outset, the Constitution delegated to the states powers limited to regulating the "Times, Places and Manner of holding [congressional] Elections." U.S. Const., art. I, § 4, cl. 1; *see Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) ("No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment."). That choice reflected fears that greater involvement from state legislatures would temper the federal government's accountability to the electorate.[6] Nothing in the limited "procedural regulations" the framers saw fit to delegate to the states includes "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade ... constitutional restraints." *Cook*, 531

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[6] *See* Elliot's Debates, at 75 (James McClellan & M.E. Bradford eds. 1989) (Madison: "considered an election of one branch ... by the people immediately, as a clear principle of free government [which] had the additional advantage of ... avoiding too great an agency of the state governments in the general one"); 1 The Records of the Federal Convention of 1787, at 50 (Max Farrand ed. 1911) (Wilson: argued "interference between the general and local Governm[enta] should be obviated as much as possible"); *id.* (Madison: "thought ... that the great fabric to be raised would be more stable and durable if it should rest on the ... people themselves, than if it should stand merely on the pillars of the Legislatures"); *id.* at 359 (Rufus King: argued "the Legislatures [would] constantly choose men subservient to their own views as contrasted to the general interest"); *id.* at 358-59 (Hamilton: argued allowing state legislatures to choose members of House of Representatives "would increase that State influence which could not be too watchfully guarded ag[ain]st").

U.S. at 523 (quotation marks omitted). Yet that is precisely what partisan gerrymandering does.

The founders also understood that "[t]he first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). They feared the "principal danger ... [of] the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (citing Federalist Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) (Jefferson)). As members of the Court have recognized, that "unfortunate" possibility is now reality. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring). "Whether spoken with concern or pride ... our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Id.* (citation omitted). Judicial intervention is essential to restore the First Amendment's commitment to democratic self-government.

II. PARTISAN GERRYMANDERING THAT ENTRENCHES THE STATE'S PREFERRED PARTY IN OFFICE SUBSTANTIALLY BURDENS FUNDAMENTAL POLITICAL RIGHTS AND TRIGGERS HEIGHTENED SCRUTINY.

The First Amendment safeguards voters' freedoms to associate with and advocate for a political party, vote for their candidate of choice, express their political views, and participate in the

political process. *See McCutcheon*, 572 U.S. at 191; *Anderson*, 460 U.S. at 787, 793-94. Those rights are "core ... activities" without which a representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

Cognizant that laws regulating the electoral process "will invariably impose *some* burden upon individual voters," this Court has expounded a flexible standard to assess "reasonable, *nondiscriminatory* restrictions" on those core activities. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added and citation omitted). Courts "must first consider the character and magnitude of the asserted injury to the [protected] rights ... that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789; *Burdick*, 504 at 434. The injury (or burden) is then balanced against the state's justification, *id.*, which must be "sufficiently weighty to justify" the burden imposed. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Where, as here, there is a threshold showing that the state has departed from neutrality to penalize citizens because of their political views and associations, the state's regulation must be necessary to meet important interests. *See Anderson*, 460 U.S. at 806; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Norman*, 502 U.S. at 288-89.

Purposeful efforts to entrench a favored party or candidate against shifts in the electorate cannot be subject to the "sliding scale" delineated in *Anderson* and *Burdick*. Partisan gerrymandering gravely undermines "the premise of individual dignity and choice upon which our political system rests." *McCutcheon*, 572 U.S. at 203 (citation and

internal quotation marks omitted). Such targeted state intervention is anathema to the foundational precept that the "[g]overnment is forbidden to assume the task of ultimate judgment" on "conflicting arguments," "lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791-92 n.31. When the states engage in partisan gerrymandering to predetermine the outcome of an election, they render meaningless the right to cast a meaningful vote.

It is difficult to identify a core individual political right that is left untainted by partisan gerrymandering. By weighting the electoral scales, it substantially burdens the rights of any citizens who would choose to "run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon*, 572 U.S. at 191.

Each step in the partisan gerrymandering process offends bedrock First Amendment principles protecting "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively." *Williams*, 393 U.S. at 30 (emphasis added). The process of enacting a partisan gerrymander reveals the punishing burdens it places on individual voters. First, the state engages in redistricting with the intent of drawing a map highly likely to favor candidates of a particular political party, regardless of voters' electoral preference. Second, it uses data on citizens' political preferences to identify voters whose views it wants to elevate and those whose views it wishes to subordinate. *See Ariz. State Leg.*, 135 S. Ct.

at 2658. Third, it allocates voters to specific legislative districts based on that data, with the goal of shielding preferred candidates from meaningful opposition. At each step of the way, the state engages in viewpoint-based discrimination to diminish the voting strength of citizens holding disfavored political views and to insulate the state's preferred party from "the political responsiveness at the heart of the democratic process." *McCutcheon*, 572 U.S. at 227.

When the state entrenches its preferred parties "to the exclusion of others" it "very effective[ly] imped[es] ... associational and speech freedoms ... essential to a meaningful system of democratic government." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (quoting *Elrod*, 427 U.S. at 369-70). This Court has found a substantial burden on the freedom of association where the legislature hampered voters' ability to band together with "like-minded voters to gather in pursuit of common political ends ... [and] to express their ... political preferences." *Norman*, 502 U.S. at 288. Partisan gerrymandering is pernicious for exactly that reason. It limits "independent-minded voters [from] associat[ing] in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794.

To avoid political subordination, citizens may curtail the exercise of their political rights or change them to align more closely with the state's preferences. Citizens may be less likely to join a disfavored party, contribute to or volunteer for candidates with disfavored views, or vote at all. Partisan gerrymandering entangles government in

the "dangerous business [of] ... us[ing] the election laws to influence voters' choices," vesting in the state—instead of the voters—the ultimate judgment concerning "which strengths should be permitted to contribute to the outcome of an election." *Davis v. Fed. Election Comm'n*, 554 U.S. 724,742 (2008).

Unconstitutional partisan gerrymandering is distinct from the "inevitabl[e]" political considerations and partisan effects that follow from neutral state regulation of elections. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Courts cannot and should not intervene in a neutrally-administered system where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward." *Lopez Torres*, 552 U.S. at 208. But when a state redistricts for the purpose of granting its preferred party an entrenched advantage, it disables the competitive mechanism driving the democratic process. It substantially burdens voters' rights to participate in a fair election. *See Williams*, 393 U.S. 31-32; *see also Ariz. State Legislature*, 135 S. Ct. at 2658.

III. THE CHALLENGED PLANS IN NORTH CAROLINA AND MARYLAND WERE EACH ENACTED TO ENTRENCH THE STATE'S PREFERRED PARTY IN OFFICE AND RESULTED IN IMPERMISSIBLE ENTRENCHMENT.

The Court should adopt a burden shifting analysis, familiar from other areas of constitutional law, to determine when redistricting violates the First Amendment by intentionally and effectively entrenching the state's preferred party in office.

To start, plaintiffs must establish a prima facie case of improper partisan gerrymandering. They must show: (1) that the state acted with the intent to entrench the state's preferred political party; and (2) that it accomplished its intent. If plaintiffs establish a prima facie case, the burden shifts to the state to justify its actions. Because partisan gerrymandering directly infringes fundamental First Amendment rights, the state must meet heightened scrutiny. *See supra* Part II.

District courts are responsible for determining whether the parties have met their respective burdens. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 (1999). As with the "variety" of other "constitutional and statutory disputes" in which this Court "has embraced new social science theories and empirical analyses," the lower courts are up to the task. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 857 (M.D.N.C. 2018). The tools, methods, and metrics used to draw constitutionally suspect maps have become ever more sophisticated. These developments increase *both* the ability of state officials to rig elections, *and* that of courts to identify when they do so. *See Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring) ("[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").

No single empirical test can provide the sole metric to establish partisan gerrymandering. It is the

First Amendment that defines the injury; as in other contexts, empirical analysis merely supplies evidence that a reviewing court may consider and apply.

An instructive analogy from antitrust—the law of commercial competition—can be drawn to the law of political competition. From the limited guidance provided by the antitrust statutes, federal courts developed manageable standards for determining when certain conduct harms competition, the "rule of reason," of which proof of market power is a critical component. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018). "[D]etermining the existence of market power" is a flexible inquiry that requires courts to "examine[] closely the economic reality of the market at issue." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 & n.13 (1992). Thus, this Court has left to factfinders in antitrust cases the flexibility to consider a variety of empirical tests that may assist them in determining whether a firm has a problematic level of market power—including new methods as they become available.[7]

As in antitrust cases, the empirical analyses most probative of whether a challenged plan locks up electoral competition may vary by case and will change and improve as social science evolves. But in both areas, courts can and do routinely consider expert evidence to help determine whether a legal standard has been met—and in particular, to assess

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[7] *See, e.g., In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. CV 14-MD-02503, 2018 WL 563144, at *6-11 (D. Mass. Jan. 25, 2018) (discussing a variety of expert empirical analyses probative of the existence of market power in denying summary judgment and *Daubert* motions).

improper influence in a marketplace, whether electoral or commercial.

While their approaches vary in detail, all five lower federal courts to address partisan gerrymandering claims since this Court's decision in *Arizona State Legislature* have applied similar judicially manageable standards to determine whether a challenged map or district results in the kind of entrenched partisan advantage that the First Amendment proscribes.[8] In each of these decisions, courts carefully considered the full record and a range of expert evidence to assess whether the legal standard was satisfied, and to ensure that their intervention was properly limited. That approach is consistent with the entrenchment standard the Court should embrace.

A. There Is Consensus Among District Courts That the First Amendment Supplies Manageable Standards to Adjudicate Partisan Gerrymandering Claims.

Since this Court wrote in 2015 that "partisan gerrymanders ... are incompatible with democratic principles," *Ariz. State Legislature*, 135 S. Ct. at 2658 (citation and internal quotation marks and alterations omitted), all five federal district courts to

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[8] *See Ohio A. Philip Randolph Inst. v. Householder*, No. 18-cv-357, 2019 WL 652980, at *3-4 (S.D. Ohio Feb. 15, 2019) (*OAPRI*); *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 6257476, at *4, *18 (E.D. Mich. Nov. 30, 2018) (*LWV-Michigan*); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497-98 (D. Md. 2018); *Rucho*, 318 F. Supp. 3d at 838, 860-65; *Whitford v. Gill*, 218 F. Supp. 3d 837, 884, 898 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018).

pass judgment have converged upon a justiciable standard to assess when an apportionment plan violates the First and Fourteenth Amendments.[9]

First, all five courts have required plaintiffs to prove that a challenged map or district was drawn with intent to entrench a partisan advantage.[10] Second, plaintiffs had to prove that the challenged map or district achieved the intended partisan advantage.[11] Third, each court also required proof that the challenged map could not be justified by legitimate, partisan-neutral principles.[12]

Notwithstanding some differences at the margins, there is a consistent recognition in the lower court decisions that a plan violates the Constitution when it uses redistricting methods that are designed to, and predictably do, deviate from the normal distribution of voter preferences to entrench the advantage of one party over another. The lower courts have all relied on expert analysis to help determine—under the totality of the circumstances—whether the challenged redistricting plan so deviated from acceptable redistricting outcomes that it could only be the product of extreme partisan opportunism.

Each lower court relied upon the same types of evidence in determining whether mapmakers sought to favor or punish a particular party to such an extent as to lock up the electoral marketplace. For example, each lower court has looked to analyses

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[9] *See* cases cited *supra* note 8.

[10] *See* cases cited *supra* note 8.

[11] *See* cases cited *supra* note 8.

[12] *See* cases cited *supra* note 8.

generated by the mapmakers to test whether and to what extent proposed maps would yield resilient partisan advantage.[13] They also relied upon expert analyses regarding the resilience of gerrymandered maps to electoral changes.[14] And they have considered the extent to which actual election results in fact rewarded mapmakers' efforts to insulate candidates of the state's preferred party from electoral accountability.[15]

These rulings are consistent with this Court's focus on entrenchment in defining impermissible partisan gerrymandering. *Ariz. State Legislature*, 135 S. Ct. at 2658; *cf. LULAC*, 548 U.S. at 419 ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."). As the *Rucho* court observed, "by intentionally seeking to entrench a favored party in power and make it difficult—if not impossible—for candidates of parties supporting disfavored viewpoints to prevail, partisan gerrymandering 'seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" 318 F. Supp. 3d at

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[13] *OAPRI*, 2019 WL 652980, at *9-10; *LWV-Michigan*, 2018 WL 6257476, at *2; *Benisek*, 348 F. Supp. 3d at 503-04; *Rucho*, 318 F. Supp. 3d at 869-70; *Gill*, 218 F. Supp. 3d at 891.

[14] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *7-8; *Benisek*, 348 F. Supp. 3d at 507; *Rucho*, 318 F. Supp. 3d at 876; *Gill*, 218 F. Supp. 3d at 894.

[15] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *3; *Benisek*, 348 F. Supp. 3d at 519; *Rucho*, 318 F. Supp. 3d at 884-85, 894-95; *Gill*, 218 F. Supp. 3d at 853.

800-01 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). Correspondingly, by entrenching a preferred party, the state also locks out voters who favor other candidates or parties from the political system. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

The entrenchment standard proposed by amici places a heavier burden on plaintiffs alleging partisan gerrymandering claims than the standard set by some courts to consider this issue. The proof of a defendant's intent to *entrench* a partisan advantage in the proposed test requires more than mere intent to disfavor certain voters because of their voting history or partisan affiliation. *See, e.g., Benisek*, 348 F. Supp. 3d at 515. A focus on entrenchment captures the unlawful *intent* at issue in each of these cases. It assesses whether the state seeks to shield a preferred party from accountability to the electorate by diluting the voting strength of opposing parties and their members. And entrenchment also identifies the *effect* that an unlawful partisan gerrymander achieves—namely, a deviation from neutral districting principles that resists likely shifts in the electorate. So defined, the entrenchment standard aligns with, but lends greater clarity to the "tangible and concrete adverse effect" measure that some courts have employed. *See, e.g., id.* Amici's proposal builds on the way in which at least five district courts have utilized manageable standards for weighing evidence. The problem of partisan gerrymandering can and should be solved by the customary development of evidentiary law, not by dictating that any single method of proof be

sufficient for all such challenges. Precisely because an effective, invidious partisan gerrymander is a self-perpetuating problem designed to prevent correction through the political process, the courts are not only "conspicuously well situated" to correct it—they are the only ones that can do so.[16]

B. Courts Are Well-Suited and Equipped to Determine Whether the State Acted With Intent to Entrench a Partisan Advantage.

1. Courts May Determine Intent to Entrench Through Direct or Circumstantial Evidence.

Partisan gerrymandering aims "to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. To make a prima facie claim, plaintiffs must therefore establish, first, that the state purposely and improperly set out to disadvantage one party and make its plan non-responsive to electoral shifts.

A state acts with an intent to entrench when it draws an apportionment plan deliberately to ensure that the partisan composition of the legislature will not be responsive to changes in voter preferences under the likely range of electoral scenarios. More than the mere *consideration* of politics, *see Vieth*, 541 U.S. at 315 (Kennedy, J., concurring), an intent to *entrench* exists where lines are drawn for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State*

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[16] *OAPRI*, 2019 WL 652980, at *6-7 (quoting John Hart Ely, *Democracy and Distrust* 102-03 (1980)).

Legislature, 135 S. Ct. at 2658. Any redistricting plan drawn by a legislature will be created with knowledge of the political distribution of voters. However, a state legislature cannot draw lines with the purpose of shielding candidates of its preferred party from changes in the associational choices of the citizenry.

Courts are well-equipped to undertake this inquiry through direct or circumstantial evidence. Determining motive in the context of redistricting has never proved beyond the competence of courts. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488-89 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Contemporaneous statements of decision-makers, for example, may serve as evidence of improper purpose. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69, 1475 (2017). Procedural irregularities—such as exclusion of the minority party from deliberations or "excessive weight on data concerning party voting trends," *Vieth*, 541 U.S. at 322 (Stevens, J., dissenting)—may also support a finding of intent. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (explaining that the use of detailed racial data in the districting process supported finding of discriminatory intent).

A documented history of reliance on improper purposes can also support a finding that a similar intent played a role in present redistricting. For example, in *Miller*, the Court focused on Georgia's past interactions with the Department of Justice regarding Voting Rights Act preclearance, which made clear that race was the predominant factor in the state's redistricting. 515 U.S. at 917-18. A state's history of partisan entrenchment can thus

support a finding of intent to entrench the party favored by the present redistricting map, especially where past plan performance is known and there is evidence decisionmakers seek to repeat it.

2. Plaintiffs Below Proved That Both North Carolina and Maryland Acted with Intent to Entrench Partisan Advantage.

The records from North Carolina and Maryland establish that each challenged plan was enacted with impermissible intent to entrench the state's preferred party in the challenged districts, as well as statewide. Map proponents made little effort to conceal their intent to entrench fellow partisans in office.

North Carolina. In North Carolina, Senator Rucho and Representative Lewis, redistricting committee co-chairs, directed Dr. Hofeller, their mapmaking consultant, to ensure an overwhelming Republican advantage, regardless of changes in the partisan preferences of voters. *Rucho*, 318 F. Supp. 3d at 803-05. They made clear that their "'primary goal' was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" *Id.* at 880 (quoting Hofeller Dep. 123:1-7). Hofeller received essentially all of the criteria he used to draw the challenged map from Rucho and Lewis and created a "near-final" version of the challenged plan before the redistricting committee even held its first meeting. *Id.* at 806. In designing the map, Hofeller relied on a bespoke metric to test maps based on whether Republicans could achieve a durable partisan advantage in ten districts. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 601-02, 641 (M.D.N.C. 2018), *vacated and*

remanded for further consideration in light of Gill, 138 S. Ct. 1916, 138 S. Ct. 2679 (2018). Both Lewis and Hofeller testified that they reviewed draft plans to assess their likely durability against potential electoral swings. *Rucho*, 318 F. Supp. 3d at 870.

Republican legislators dominated the redistricting process, which lacked meaningful input from Democratic legislators or the public. *Rucho*, 318 F. Supp. 3d at 868-69. During the process, Lewis remarked that the redistricting committee should focus on preserving the 10-3 Republican advantage because "he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 808 (alterations omitted). The plan passed by party-line votes at every stage. *Id.* at 808-09.

Maryland. Democrats drafting the challenged apportionment plan at issue in *Benisek* also made clear their intent to entrench their partisan advantage in the Sixth District and thereby ensure Democratic success in all but one of the remaining districts. 348 F. Supp. 3d at 502. Governor O'Malley, the Democrat who led the redistricting process, testified that "part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." *Id.* To that end, Maryland Democrats engaged and instructed a consultant to draw a map that "maximized 'incumbent protection' for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican." *Id.* at 502-03. Those were their only instructions. *Id.* at 503.

The process in Maryland also effectively excluded the out-party, Republicans. The Governor-

created Redistricting Advisory Committee held ostensible public hearings to solicit comment, but the real work on the plan was done by "staffers to the State's most senior Democratic leaders" working with hired mapmaking consultants. *Benisek*, 348 F. Supp. 3d at 504-05. Those mapmakers used a performance metric to evaluate whether potential plans produced a sufficiently large and durable Democratic advantage. *Id.* at 503.

C. Plaintiffs Below Proved That Both North Carolina and Maryland Achieved Their Intent to Entrench A Partisan Advantage.

In addition to an intent to entrench, plaintiffs asserting a partisan gerrymandering claim must show that the state's actions had their desired effect. Entrenchment is manifest where a challenged plan significantly deviates from the normal range of redistricting distributions to the benefit of the party controlling the process. The constitutional inquiry is not whether a map results in one-party rule or fails to achieve proportional representation, but whether the state significantly deviates from sound districting principles to "freeze[] the status quo ... [against] the potential fluidity of American political life." *Jenness*, 403 U.S. at 439.

1. Entrenchment Can Be Assessed Through Discernible Deviations in Normal Ranges of Partisan Balance.

A state presumptively violates the First Amendment when an intent to entrench incumbent political advantage dominates its redistricting

process, and when the resulting districting plan succeeds in that entrenchment. Maps that materially deviate from normal districting principles and ensure incumbent advantage against the range of likely political swings in the electorate impermissibly entrench partisan advantage. Evidentiary proof of the dominant partisan intent and the resulting departure from normal districting practices then shifts the burden of production to the state to justify the challenged plan as necessary to legitimate state ends.

As the orders under review and other recent decisions show,[17] there are numerous methods of identifying suspect departures from neutrality. One method that has gained acceptance among social scientists and the lower courts is to compare the challenged plan against hypothetical maps generated using neutral redistricting criteria (e.g., equipopulation, nondiscrimination requirements, compactness, and contiguity). Experts can identify whether and to what extent a challenged map evinces entrenchment effects by (1) generating a large set of hypothetical maps based on established neutral criteria; (2) identifying the median in the distribution of hypothetical maps; and (3) determining whether the challenged map produces a partisan balance that deviates significantly from that median to the advantage of the state's preferred party.[18] Several lower courts[19] (including *Rucho* as

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[17] *See, e.g.*, *OAPRI*, 2019 WL 652980, at *9-14; *LWV-Michigan*, 2018 WL 6257476, at *7-9; *Gill*, 218 F. Supp. 3d at 898-906.

[18] *See* Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 332 (2015) ("If the parti-

discussed *infra*) have considered this method among several others for comparing a challenged plan's partisan balance to a neutral baseline.

Under the entrenchment benchmark, the First Amendment only bars plans that yield the state's preferred outcome by deviating materially from expected possible distributions of electoral outcomes, as demonstrated by a variety of evidentiary tests, and always accruing to the benefit of the party in power. Thus, the inquiry would protect against imbalances that "compromis[e] the political responsiveness at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, while allowing other redistricting outcomes that reasonably reflect a state's partisan balance.

Such a standard mirrors those that courts apply to pattern-or-practice discrimination claims under the civil rights laws. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Title VII cases, for example, call on courts to identify a baseline for the relevant workforce in a given geographic market against which to measure the composition of an employer's

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sanship of a proposed plan lies in the extreme tail of the distribution of simulated plans or outside the distribution altogether, courts can make relatively strong inferences about the plan's partisan effect and intent."); *see also* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) (positing comparison of challenged map against distribution of millions of alternative maps).

[19] *OAPRI*, 2019 WL 652980, at *11, *16-17; *LWV-Michigan*, 2018 WL 6257476, at *7-8.

workforce. *See Hazelwood*, 433 U.S. at 307; *see also id.* at 311-12. As in Title VII cases, courts presiding over gerrymandering cases may then determine whether available evidence demonstrates an entrenched "gross disparity" between the settled baseline and the challenged system. *Id.* at 307-08.

In both partisan gerrymandering and pattern-or-practice cases, the law does not guarantee proportionality. *See LULAC*, 548 U.S. at 419; *Hazelwood*, 433 U.S. at 307. But in both types of cases, evidence of "gross statistical disparities" between the challenged conduct and neutral conditions can constitute prima facie evidence of intent and effect. *Hazelwood*, 433 U.S. at 307-08; *cf. Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (holding that evidence of stark impact of facially neutral law may be determinative of intent and effect).

A state's intentional entrenchment of its favored party on viewpoint-based grounds violates the First Amendment whether it has effect in a single election, or continues over time. The constitutional harm accrues at the moment the state breaches its duty to neutrally act. After-the-fact evidence of multiple electoral outcomes is not necessary to establish improper entrenchment. Plaintiffs can and must be able to immediately challenge a state's use of sophisticated technology to generate maps that lock out opponents of the state's preferred party from meaningful participation in the democratic process. If injured voters are required to wait until even a single election—let alone multiple elections—has passed before bringing a challenge, officials elected under an unconstitutional map gain

illegitimate "advantages of incumbency." *Shelby Cty. v. Holder*, 572 U.S. 529, 572 (2013) (Ginsburg, J., dissenting). Even worse, those officials would have an incentive to drag out already protracted litigation to prolong their tenures. With manageable metrics now available, courts have a constitutional obligation to permit voters to act quickly to preserve the integrity of elections and their First Amendment rights.

2. *Both North Carolina and Maryland Effectively Entrenched a Partisan Preference.*

The courts below correctly found that apportionment plans in both North Carolina and Maryland had the effect of entrenching each state's preferred party in office.

North Carolina. The district court found that North Carolina effectively entrenched a Republican majority. That finding is well-supported by actual election results as well as the testimony of three expert witnesses employing six established methods for analyzing the challenged map using current and historic election results. Moreover, the district court's finding of diminished political activity—including in fundraising, attracting candidates, and turning out voters—by Democrats reinforce the finding of an entrenchment effect. *Rucho*, 279 F. Supp. 3d at 679-80.

First, the November 2016 election, the only election to take place under the challenged plan at that time, confirmed that the state achieved its goal of electing ten Republicans to Congress, despite winning only 53% of the vote for congressional

candidates. *Id.* at 657. The district court's findings are also supported by the results of the two elections held under the 2011 plan, which yielded a grossly disproportionate Republican advantage, and led Lewis and Rucho to instruct Hofeller to make preserving that advantage the goal of the 2016 map. *Id.* at 667.

Second, the district court found that sensitivity testing performed by plaintiffs' expert demonstrated that under the challenged map in the 2016 election, even if "Democrats obtained a statewide, uniform swing of even six points—taking [the] Democratic share of the two-party vote to 52.7%—*no seats would change hands relative to the actual 2016 results*," i.e., Democrats still would have won only three seats. *Id.* at 658 (internal quotation marks omitted).

Third, the district court's finding of entrenchment was supported by three expert analyses of partisan asymmetry, each showing a significant advantage for Republicans over Democrats in terms of their ability to translate votes into Congressional seats. *See id.* at 661 (efficiency gap); *id.* at 664-65 (partisan bias); *id.* at 665-66 (mean-median analysis). Each analysis compared the challenged plan against national and/or historical state benchmarks, and showed that the North Carolina map exhibited an extreme bias in favor of Republicans.

Finally, two experts—Drs. Mattingly and Chen— each used different methods to compare the challenged plan against thousands of hypothetical maps generated using partisan-neutral criteria, revealing an entrenchment effect so extreme that it

could be explained only by intent to secure partisan advantage. Each expert tested hypothetical maps with actual election data to determine how many maps drawn with politically neutral criteria could achieve the same partisan composition of the North Carolina congressional delegation as the challenged map, i.e., a 10-3 Republican advantage. Mattingly found that 99% of 24,518 simulated maps would have led to the election of fewer Republicans than the challenged map and that even slight changes to the challenged map would yield significant changes in the partisan composition of North Carolina's congressional delegation. *Id.* at 643-45. In comparing the challenged plan to three sets of 1,000 hypothetical maps—each set drawn with partisan-neutral criteria purportedly used to draw the challenged map—Chen found not a single map resulting in the achieved 10-3 Republican advantage. Instead, 94.5% of the simulated plans would have yielded between two and four fewer Republicans than the challenged map; and most maps would have yielded either 6 or 7 Republicans. *Id.* at 646, 666-67. Both Mattingly and Chen concluded that the challenged map was an extreme outlier that had an adverse effect on supporters of non-Republican candidates, and that such an outcome could only be explained by the object of partisan entrenchment. *See id.* at 644, 646, 667, 669-70.

Altogether six analyses from three experts supported the same conclusion—one confirmed by the results of the 2016 election. The challenged map entrenched Republicans in power against even significant swings in favor of Democrats, exactly the stated objective of the incumbents in charge of the process.

Maryland. The district court's findings make clear that the challenged map was highly likely to achieve the effect intended by its Democratic sponsors—a finding further confirmed by actual election results from three cycles.

The district court relied upon two measures of impermissible effect generated prior to an election being held under the challenged plan. The first, the Partisan Voter Index (PVI), is a "well-respected" measurement of a congressional district's likely partisan performance published by the Cook Political Report, an independent non-partisan newsletter. *Benisek*, 348 F. Supp. 3d at 507. As a result of 2011 redistricting, the Sixth District's PVI changed from a "Solid Republican" rating to "Likely Democratic" before the 2012 election. *Id.* Academic research shows that Republicans win districts with a "Solid Republican" rating 99.7% of the time and Democrats win districts with a "Likely Democratic" rating 94% of the time. *Id.*

The district court also relied upon the Democratic Performance Index (DPI), the proprietary measure of partisan performance used by the Democrats' redistricting consultant, NCEC Services, Inc., to conclude that the challenged plan left Republicans in the new Sixth District with "no real chance" of electing their preferred candidate. *Id.* at 503, 519. NCEC's data showed that in the 2016 election, Democrats "almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%." *Id.* at 503. The challenged map changed the Sixth District from a DPI under 40% to 53%. *Id.* at 507.

The significant net increase of Democrats in the new Sixth District also demonstrates an entrenchment effect. *Id.* at 519. The challenged apportionment had the effect of changing the ratio of registered Republicans to Democrats from 1.3:1 to "nearly the exact inverse" in the Sixth District, providing an advantage that the DPI and PVI both showed was highly likely to be insurmountable for Republicans. *Id.*

The *Benisek* court properly stressed that under the standard it applied, plaintiffs "need not show that the linedrawing altered the outcome of an election" or that the challenged district "was *certain*" to deny them the opportunity to elect their candidate of choice. *Id.* Nonetheless, that the Democratic candidate won the challenged district in each of the three election cycles following the challenged apportionment confirms Democrats did not merely gain an opportunity to compete in the Sixth District, but insulated the Democratic candidate from accountability to voters. *Id.* at 519-20. Further findings that Republicans showed lower turnout, diminished fundraising, and voter disaffection also support the finding of partisan entrenchment. *Id.* at 523-24. Once again, intent and effects converge to create a willfully distortive political map.

In both cases before this Court, the quantity, variety, and consistency of the evidence supporting the district courts' findings of discriminatory effect are sufficient to satisfy any standard, particularly when coupled with the overwhelming evidence of overt intent to achieve just this goal. No party below, in either case, could make any claim that this was

not the precise aim of the redistricting process under challenge.

D. After a Prima Facie Showing, the Burden Shifts to the State to Demonstrate That Its Plan Was Necessary to Meet Legitimate Interests.

Once plaintiffs make a prima facie case of partisan entrenchment, the burden must shift to the state to establish that its redistricting plan was necessary to meet legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty." (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973))); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (explaining that partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). This Court has identified various such interests, including "traditional districting principles such as compactness and contiguity," "maintaining the integrity of political subdivisions," or maintaining "the competitive balance among political parties." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (internal quotation marks and alterations omitted).

Once it asserts that it pursued legitimate interests, the state must prove that the map it drew was necessary to satisfy them. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State

may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974). The state must show that other maps could not have met its legitimate interests.

The record is clear that neither challenged apportionment is necessary to advance the purportedly legitimate purposes claimed by either state.

North Carolina. Both Chen's and Mattingly's analyses demonstrate that the challenged map is such an extreme statistical outlier that its effects cannot possibly be explained by the pursuit of interests other than the entrenchment of partisan advantage. *Id.* at 670-71. Furthermore, the state's claim that Democrats were naturally "packed" into certain areas of the state was undermined by their own expert witness, who testified that the challenged map split several densely Democratic areas. *Rucho*, 279 F. Supp. 3d at 669-70. The district court properly rejected the state's attempts at justification.

Maryland. The state's proffered justifications strain credulity given direct evidence of intent to install a Democrat in the new Sixth District. Even if it were necessary to move the eastern boundary of the new Sixth District to keep the new First District from crossing the Chesapeake Bay, there is no reason that this change would coincide with a massive net influx of tens of thousands of Democrats at the same time that state Democratic leaders expressly called for a redistricting plan that brings the district under Democratic control. *See* Section III.B.2 *supra*. The district court's finding that the state's justifications

for the challenged district were implausible are well-supported and entitled to deference.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

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Date: March 8, 2019

No. 18-422

In the Supreme Court of the United States

ROBERT RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL RIGHTS UNION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Earlier this year, while *Gill v. Whitford* was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional redistricting map as a partisan gerrymander. After *Gill* was handed down, this Court vacated that decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the decision below the district court largely adopted its previous reasoning and became the first post-*Gill* court to divine a justiciable test—in fact, four tests—to invalidate a legislatively enacted map as a partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate only generalized partisan preferences, the court concluded they had standing. The court then found justiciable standards for partisan gerrymandering claims under the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clause of Article I. The court found the 2016 map to violate each of those newly articulated tests and enjoined the State from using the map after the 2018 elections.

The questions presented are:

1) Whether plaintiffs have standing to press their partisan gerrymandering claims.

2) Whether plaintiffs' partisan gerrymandering claims are justiciable.

3) Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; William Bradford Reynolds, former Assistant Attorney General for the Civil Rights Division; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the legislative role in redistricting, which the Constitution vests in the States. It carries out that mission by participating in redistricting and other case that present free speech issues in the context of

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[1] All parties consented to the filing of this brief by blanket or individual letter. *See* Sup. R. 37.3(a). Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

elections. These cases include *Turzai v, Brandt*, 139 S. Ct. 445 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (No. 17A790); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. Its work extends to cases involving redistricting and is reflected in SLF's filing of *amicus curiae* briefs in cases like *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Bethune-Hill v. Va. State Board of Elections*, 137 S. Ct. 788 (2017).

SUMMARY OF ARGUMENT

The Elections Clause of the Constitution, art. I, § 4, "clearly contemplates districting by political entities" which "unsurprisingly . . . turns out to be a root-and-branch matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). Political gerrymandering claims, thus, must necessarily distinguish between acceptable and unacceptable levels of political influence in the redistricting process. Without a clear, generally applicable, politically neutral test that distinguishes between the alternatives, court should not find political gerrymandering claims nonjusticiable.

The court below advanced four legal theories to support striking down North Carolina's 2016 congressional redistricting plan as an unconstitutional political gerrymander. ACRU and SLF will address the district court's reliance on the First Amendment in this brief. That said, it believes that none of those legal theories is viable and leaves it to Appellants, other *amici*, or both to demonstrate that.

Both the Appellees' and the district court's reliance on the First Amendment is fundamentally misplaced. Even as the First Amendment protects political speech and association, it says nothing about voting. It also allows for the exercise of specific rights, but does not guarantee that the exercise of those rights will meet with success. The vindication of those rights should be a means to an end the Constitution and the Voting Rights Act do not recognize, proportional representation.

ARGUMENT

I. Introduction

The text of the First Amendment says nothing about voting. Instead, it expressly protects the freedoms of speech, the press, peaceful assembly, and petition. U.S. Const., amend I. To the extent the Constitution recognizes voting, it does so only in Section 1 of the Fifteenth Amendment, with respect to "sex," in the Nineteenth Amendment, "poll" or other taxes in the Twenty-Fourth Amendment, and

"age" in Section 1 of the Twenty-Sixth Amendment. Even if the First Amendment reaches political expression, it does so in the context of the underlying protected rights, not as a generalized, free roaming remedy for political gerrymandering. Even so, the district court found that the First Amendment provided Appellees with a basis for relief.[2]

In this brief, *Amici* will show that the district court got it wrong: The First Amendment provides no basis for overturning the 2016 North Carolina congressional redistricting plan. As Judge Osteen noted, the majority's application of the First Amendment goes too far because it would, in effect foreclose all partisan considerations in the redistricting process." App. at 343. For these reasons, it is not an appropriate test for identifying unconstitutional political gerrymandering.

The failure of the First Amendment test is important because, as Justice Scalia pointed to "[e]ighteen years of judicial effort" to identify a standard by which to judge a claim if unconstitutional political gerrymandering "with virtually nothing to show for it." *Vieth*, 541 U.S. at 281 (plurality op.). Without a test that can be applied generally and specifically, claims of political gerrymandering are nonjusticiable.

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[2] The district court also based its grant of relief on the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause of the Constitution of the United States. *Amici* agree with Appellants' contentions that neither of those theories provides the necessary clear, manageable standard to be generally applied to future claims of political gerrymandering.

II. The First Amendment is a poor fit for political gerrymandering claims.

The First Amendment is generally unsuited for application in the political gerrymandering context. It specifically protects several rights that might apply to the political arena, but says nothing about the right to vote. In addition, applying the First Amendment to political gerrymandering claims collides with

Before proceeding, *Amici* note that any standard must toe the line of determining when "a generally permissible classification has been used for an impermissible purpose." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). The consideration of political effect in a political process is not illegitimate, but inescapable. This is particularly true when a legislative body is responsible for reapportionment because any new plan will have to garner a legislative majority to become effective. When a commission is responsible, its work remains political even if the commission doesn't have to account to the voters for its work.

More generally, this Court has repeatedly noted that the consideration of political effects in the redistricting process is not unconstitutional. That understanding originated in *Gaffney v. Cummings*, 412 U.S. 735 (1973), when the Court observed, "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752. It may have reached its apotheosis in *Easley v. Cromartie*, 532 U.S. 234 (2001), when the Court held that politics, not race, explained the shape

of challenged districts. This was true even though, "a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Id.* at 245.

Put simply, any standard found applicable cannot sweep so broadly as to preclude all political considerations from influencing the inherently political process of redistricting.

A. The text of the First Amendment does not support Appellees' claim.

The First Amendment expressly protects the rights of speech, the press, peaceable assembly, and petition. It says nothing about voting, although the Constitution protects both speech and assembly in the context of elections. *See e.g., Minn. Voters' All. v. Mansky*; *Citizens United v. FEC*, 558 U.S. 310. In contrast, the Constitution expressly identifies the right to vote in the Fifteenth, Nineteenth (sex), Twenty-Fourth (poll tax), and Twenty-Sixth (age) Amendments.

The Court has explained that the "validity of [a] claim must . . . be judged by the specific constitutional standard which governs that right, rather than to some . . . generalized standard." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also United States v. Lanier*, 520 U.S. 259, 272n.7 (2009) ("*Graham* simply requires that if a constitutional claim is governed by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed

under the standard applicable to that specific provision, not under the rubric of substantive due process."). In *Graham*, the claim arose in the context of an investigatory stop, so the governing provision was the Fourth Amendment. Given the specificity of the rights protected by the First Amendment, applying it generally to fight political gerrymandering smacks of applying due process to claims covered by the Fourth Amendment, something this Court declined to do in *Graham*.

Political gerrymandering doesn't involve the denial of the right to vote based on race, gender, or age. Likewise, it imposes no poll tax or other precondition for voting. This Court's inquiry should end because none of the constitutional amendments that specifically address voting have anything to do with political gerrymandering.

B. Applying the First Amendment to judge political gerrymandering claims raises significant doctrinal tensions.

The district court's pastiche of case law and doctrines misses the point in another way.[3] When this

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[3] For example, the district court drew its definition of political gerrymandering from *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), opining that such a practice "strikes at the heart" of the principal of equal treatment. App. at 4. If so, the outcome in the Arizona case might have been different because partisan considerations played a substantial part in the drawing of that plan. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 3109 (2016) (pointing to the district court's conclusion that "the population deviations were primarily the result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship

Court decides cases like *Minnesota Voters' Alliance* and *Citizens United*, the remedy is more speech. The same result obtains when governments try to limit campaign expenditures and other political speech to level the political paying field. In 2008, the Court noted, "Our prior decisions . . . provide no support for the proposition that this [i.e., leveling campaign opportunities for candidates of different personal wealth] is a legitimate governmental objective." *Davis v. FEC*, 554 U.S. 724, 741 (2008).

In *Davis*, the Court found the so-called "Millionaires Amendment" unconstitutional. That law increased the amount of individual contributions available to the opponent of a self-funding candidate who exceeded a specified funding limit in an effort to redress the imbalance in candidate resources. The Court explained that "the argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates." *Id.* at 742. That conclusion echoes a similar finding in *Buckley v. Valeo*, 424 U.S. 1 (1976), when the Court rejected the government's reliance on an "interest in equalizing the financial resources of

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played some role."). At oral argument, Justice Scalia noted the irony of the claim that a commission had engaged in political shenanigans. *See* Tr. of Oral Argument in *Harris v. Ariz. Indep. Redistricting Comm'n* (Dec. 8, 2015), at 29-30 ("I wish this case had come up before the case we had last term, which . . . approved your commission . . . because this commission was going to end partisanship, get politics out of redistricting. And here the very next term we have this case which . . . asserts that there has been a lot of partisanship on behalf of . . . this supposedly divine commission.").

candidates" as the basis for limiting campaign expenditures even when a failure to equalize "might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id.* at 56-57.

Political gerrymandering claims are only an attempt to enlist the courts in leveling the political playing field. If Congress cannot do that constitutionally when regulating political speech, then the courts should refrain from doing so as well.

More to the point, the district court's understanding of restriction in the First Amendment context is overbroad. "The First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988). Appellees remain free to speak, spend, associate, and assemble to their hearts' content. Judge Osteen said precisely this in his concurring and dissenting opinion below: Appellees remain free to "run for office, express their political views, endorse and campaign for their favorite candidates, vote, and otherwise influence the political process through their expression." App.at 344 (quoting *Radogno v. Ill. State Bd. of Elections*, No. 11-CV-04884, 2011 WL 5025251 at *7 (N.D. Ill. Oct. 21, 2011)). If what they say is persuasive, they may win elections.

In *New York State Board of Elections v. Torres*, 552 U.S. 196 (2008), this Court reached the same conclusion. Torres complained that the state's method of selecting candidates for judicial office violated the First Amendment because it didn't give them a fair

chance of success. The Court found that a claim seeking "a fair chance of prevailing in their parties' candidate-selection process" found "no support in our precedents." *Id.* at 203. It explained, "None of our cases establishes an individual's right to have a 'fair shot' of winning the party's nomination. *Id.* at 205.

Likewise, neither the Constitution nor the Voting Rights Act gives Appellees the right to proportional representation of their partisan interests in a legislative body. "Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.); *see also Vieth*, 541 U.S. at 288 (plurality op.) ("[T]he Constitution contains no such principle [of proportional representation]. It guarantees equal protection of law to persons, not equal representation in government for equivalently sized groups."). In the same way, the Voting Rights Act provides "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

The First Amendment cannot be applied to political gerrymandering claims unless and until the tensions described are reconciled with its use in that way.

III. The First Amendment in the hands of the district court fails to provide a judicially manageable standard.

The district court held that Appellees had standing to pursue a political gerrymandering claim and that the First Amendment, among other theories, provided a basis for relief. This Court should reject both conclusions.

A. The Appellees' claims of First Amendment injury are too generalized to constitute an injury in fact.

To establish standing, the plaintiff must show an "injury in fact," which involves the "invasion of a legally protected interest" that is "concrete and particularized." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). Simply showing a "generally available grievance about government" does not satisfy that requirement. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

The district court's conclusions on standing rest on shaky ground. To the extent those conclusions rely Justice Kagan's concurring opinion in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the critical point is that she did not speak for a majority of the Court. As Justice Kagan explained, she wanted to help the plaintiffs establish standing and to suggest that they pursue an associational theory of First Amendment injury, which was not "advance[d] . . . with sufficient clarity or completeness to make it a real part of the case. *Id.* at 1934 (Kagan, J., concurring), The Court, however, rejected her argument, stating, "The reasoning of this Court with respect to the disposition

of this case is set forth in *this opinion* [i.e., the Opinion of the Court] and *none other*." *Id.* at 1931 (emphasis added). The district court should not have relied on the "speculative and advisory conclusions" that Judge Kagan drew. *Id.*

More particularly, the district court's reliance on a theory of vote dilution is flawed. It reasoned that the Appellees were complaining about the "purpose[ful]" dilution of their votes resulting from partisan gerrymandering. App. at 68 (quoting *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016)). That is not a one-person, one-vote theory of dilution, the dilutive effect customarily alleged. Instead, it is available to anyone in a district that elects the candidate of the other party. Thus, a generalized injury that cannot establish standing.

The district court's reliance on associational harm to establish First Amendment standing is also unsound. That injury is a generalized one, extending statewide. As Justice Kagan put it, "[T]he valued association and the injury to it are statewide, [and] so too is the relevant standing requirement." App. at 69 (quoting *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring)). For an injury to be "particularized," the injury must affect the plaintiff "in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct 1540, 1548 (2016). The statewide associational injury is neither personal nor individualized; it is available to people throughout the state.

Finally, the district court's reliance on the difficulty that interested persons and organizations have in generating interest is not an injury to a "legally protected interest." As noted above, the First

Amendment protects specific rights, but it does not guarantee success. Appellees can organize, speak, spend money, and assemble, but they cannot do so successfully. If they get what they want, their success will mean failure to their opponents. Will those opponents be able to claim the same injury and force an endless round of redistricting? Not if the right can be exercised, and the Appellees should live with that same result.

Put simply, none of the injuries the district court pointed to is enough to establish standing to make a First Amendment claim.

B. The district court's First Amendment test for identifying unconstitutional political gerrymandering cannot be generally applied.

As Justice Kennedy explained, any test for identifying unconstitutional political gerrymandering must include "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). That test must also generate consistent results when applied to future cases. *Id.* at 308 ("Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent."). The district court's First Amendment test does not meet those standards.

In its decision, the district court "derive[d] a three-prong test for identifying unconstitutional political gerrymandering. App. at 286. That test looks at (1)

the challenged plan was intended to burden individuals or organizations that support the opposing party or candidate; (2) the plan "burden[s] the political speech or associational right" of those individuals or organizations; and (3) there is a causal relationship between the intent and the burden. *Id.*

That test sweeps too broadly. It provides no way of distinguishing the acceptable consideration of political affiliation from the unconstitutional. In reality, all legislative plans will include the consideration of partisan advantage, and the effect will be to disadvantage those of the opposing party. That effect will encourage defeated parties and candidates to bring political gerrymandering claims.

More to the point, the district court explained that a plaintiff can base an actionable First Amendment claim on a "chilling effect or adverse impact." App. at 288. And that it would find such a "chilling effect' can even though the plaintiff can run for office, express their political views, assemble with like-minded people, and vote. Again, it is the right, not a guarantee that its exercise will be successful, that is protected.[4]

As Judge Osteen concluded, "[T]he majority's test would in effect foreclose all partisan considerations in the redistricting process." App. at 343. So, too, did the *Vieth* plurality, when, noting the lack of a First Amendment claim in that case, observed, "[A] First

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[4] As Judge Osteen observed, "the sense of disillusionment toward the political process" that some Appellees attributed to the 2016 redistricting plan "differs from fear of enforcement due to an 'overly broad statute regulating speech.'" App. at 345 n.4.

Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for all non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality op.). That is, simply, a bridge too far. This Court should reject the district court's First Amendment test.

IV. Judicial recognition of political gerrymandering claims brings with it a host of problems.

The recognition of political gerrymandering claims promises only mischief that could otherwise be avoided.[5]

The first result will be a new and unlimited judicial intrusion into an inherently political thicket. As Justice Kennedy explained, "A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). Judicial intrusion would become all the more common: "[T]he fact that partisan districting is a common and lawful practice means that there is almost *always* room for an election impeding lawsuit contending that partisan advantage

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[5] *Amici* agree with Justices Thomas and Gorsuch, who concurred in part and concurred in the judgment in *Gill*. If plaintiffs are found to lack standing, the Court should remand this case with instructions to dismiss. *See Gill*, 138 S. Ct. at 1941 (Thomas, J., concurring in part and concurring in the judgment). This case has gone on long enough. It's now 2019, we're on the cusp of another Census, and the districts will be redrawn for 2022.

was the predominant motive; not so for claims of racial gerrymandering." *Id.* at 286 (plurality op.) (emphasis in original).

The surge in political gerrymandering lawsuits will not be good for the courts. The need to distinguish between allowable and unconstitutional political considerations can only embroil the courts in political catfights. The results will lead parties and observers to perceive the courts as political actors. "[I]n the absence of rules to limit and confine judicial intervention . . ., intervening courts—even when proceeding with best intentions— would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307.

Finally, there is no guarantee that judicial intervention is necessary. Political gerrymandering may be sticky, but it can be fixed by the voters without resort to the courts. There are limits to the degree that partisan drafters can stretch their voters, and the voters can change. As Justice Scalia explained in *Vieth*, "Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." 541 U.S. at 287 (plurality op.).

Alabama's experience provides a striking example of the fragility of overreaching political gerrymandering. In *Vieth*, the leadership of the Alabama State Senate and House of Representatives, all Democrats at the time, submitted an *amicus* brief in which they urged the Court not to get involved. They explained that the 2001 plans were the result of

cooperation between white and African-American Democratic legislators, who controlled majorities in both houses of the Legislature, and "protect[ed] both to protect reliable Democratic seats with majority-black constituencies and . . . reduce[d] the size of those majorities in order to increase the number of reliable Democratic voters in several seats closely contested between Democrats and Republicans." Brief of *Amici Curiae* Leadership of the Alabama Senate and House of Representatives, *et al.* in Support of Appellees, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580), at 2.[6] They also noted that they successfully defended their "benign" political gerrymandering handiwork in federal court, arguing that political considerations not race were the predominant motive behind the district lines. Their handiwork lasted all the way to 2010, when the Democrats were swamped and gave up a supermajority to the Republicans.[7]

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[6] http://www.votelaw.com/blog/blogdocs/Alabama%20amicus%20brief%20final%20print.pdf.

[7] Perhaps the Alabama Democrats' problem was stretching their partisans too far: "[I]n the 2002 elections, even though Republican candidates polled statewide majorities in Congressional and most statewide office contests, Democrats won 52% of the votes statewide for State Senate seats and 51% of the votes statewide for State House seats. Democrats captured 71% of the 35 Senate seats and 60% of the 105 House seats." Alabama Brief at 2.

CONCLUSION

For the reasons stated in the Appellants' Brief and this *amicus* brief, this Court should reverse the decision of the U.S. District Court for the Middle District of North Carolina.

Respectfully submitted,

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Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AND THE DISTRICT OF MARYLAND

BRIEF FOR THE AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE SUPPORTING APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The American Jewish Committee ("AJC") is a nonpartisan global advocacy organization with more than 125,000 members and supporters and 34 offices worldwide. It was founded in 1906 to protect the civil rights of American Jews and all Americans. AJC works closely with multinational institutions, governmental agencies, civil society groups, and Jewish communities to uphold and defend democratic principles and combat bigotry and fractionalization. AJC has long acted on the principle that individual rights are best protected in a functioning representative democracy in which our government officials are subject to contested elections and accountable to their constituents. Because partisan gerrymandering of the sort involved in these cases threatens to undermine democratic accountability, it compromises the values central to AJC's mission.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In *Wesberry* v. *Sanders*, this Court noted that "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 376 U.S. 1, 17 (1964). The principal way in which the People express their political preferences is, of course, at the

1. Counsel for all parties have consented to the filing of this brief. Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amicus*, or its members or counsel, made a monetary contribution to the preparation or submission of this brief.

ballot box. This Court has rightfully been vigilant when government authorities have sought to dilute the franchise in violation of the Equal Protection Clause.[2] But partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), also violates First Amendment rights, and the harms implicated go beyond those experienced on election day.

Both district courts below found that the majority parties in the North Carolina and Maryland legislatures intended to subordinate adherents of the rival political party and to entrench themselves—textbook cases of partisan gerrymandering. See Rucho J.S. App. 287–288; Benisek J.S. App. 48a–51a.

The courts below also concluded that the partisan gerrymandering effected by the majority parties in North Carolina and Maryland not only intentionally diluted the voting power of the adherents of the minority party in the legislature, but also thereby systematically burdened those political minorities' abilities to express themselves, associate with like-minded others, and advocate for their views. This Court has already determined that such partisan gerrymandering is incompatible with democratic principles. *Arizona State Legislature*, 135 S. Ct. at 2658 (citation omitted). These harms are redressable—and

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2. See, *e.g.*, *Baker* v. *Carr*, 369 U. S. 186, 206 (1962); see also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 495 (2006) (Roberts, C.J.) (noting that the same techniques at work in partisan gerrymandering, when deployed against certain identifiable racial and language minority groups, "dilute minority voting power").

should be redressed—as First Amendment violations for the reasons that follow.

I. Partisan gerrymandering undermines democracy by subverting the public's expectation that the government will be accountable to the People. It not only insulates the majority party from accountability at the polls, but also stifles the public debate that is indispensable to meaningfully contested elections. When the majority in the legislature need not fear the outcome of the next election, it is perceived to be—and, as the empirical literature shows,[3] becomes in fact—less responsive to the electorate. And, when the majority party takes advantage of its legislative dominance to draw district lines with the specific intention of entrenching its own power, polarization and extreme partisanship result.

What incentive does the public have to actively participate in the political marketplace of ideas if electoral and policy outcomes appear to be predetermined by district lines? And what incentive is there to organize in opposition to the majority if the party in power has drawn the map to enhance its own voice and to diminish that of those who hold different political views? Such lack of government neutrality offends the principles that animate the First Amendment.

II. Fortunately, the First Amendment also provides the framework for addressing these harms. In particular, applying this Court's jurisprudence on associational burdens and the flexible test adopted in *Anderson* v. *Celebrezze* would allow this Court to distinguish between partisan gerrymandering intended to subvert and burden

3. See sources cited p. 8 n.8, *infra*.

opposing political viewpoints and valid redistricting exercises in which political affiliation is considered for legitimate purposes.

Furthermore, other lines of First Amendment doctrine reflect the need to protect minority views from retaliation, viewpoint discrimination, and speaker-based discrimination. These protections have long been regarded as key to safeguarding the marketplace of ideas. The same concerns that have moved this Court to intervene in those contexts previously are present in the cases before it now.

III. Partisan gerrymandering invariably undermines the ability of the voters to remedy this issue themselves. In the absence of judicial intervention, then, partisanship becomes further entrenched and democracy erodes. This Court has the necessary competence—and the constitutional obligation—to step in before the ongoing malfunction of the marketplace of ideas turns into a durable market failure.

Therefore, AJC urges this Court to uphold the district courts' decisions in these cases and hold that the partisan gerrymander carried out by the legislatures in North Carolina and Maryland violate the First Amendment.

ARGUMENT

I. Partisan Gerrymandering Undermines Public Trust in Representative Democracy.

The background principles that animate this Court's First Amendment jurisprudence underscore that our

democracy suffers as a result of partisan gerrymandering. Our system of government is premised on the notion that citizens may effect change by electing new officials who "through words and deeds will reflect [the] electoral mandate" of the public. *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). A corollary of that premise is that "the voters should choose their representatives, not the other way around." See *Arizona State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)).

Partisan gerrymandering interferes with electoral accountability by diluting the votes of minority party-supporters, making it substantially harder for them to elect their preferred candidates and thereby enact their favored policy choices.[4] Partisan gerrymandering also compromises the exercise of First Amendment liberties that guarantees government accountability beyond election day.

The "fundamental principle of our constitutional system" is that "the opportunity for free political discussion" is necessary to ensure "that government may be responsive to the will of the people." *Stromberg* v.

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4. As scholars have noted, "the fact that it requires a shift in voter sentiment of historic proportions to cause a small change in partisan distribution of House seats shows how far we have strayed from the simple idea that elections are supposed to provide a check on the government by offering a meaningful threat to remove legislators from office in ordinary, not just extraordinary, times." Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L.J. 1121, 1135 (2007).

California, 283 U.S. 359, 369 (1931). And while the First Amendment certainly protects the speech of the "lonely pamphleteer,"[5] it also protects the national tradition of political associations in which citizens "band together in promoting among the electorate candidates who espouse their political views," *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Yet a major effect of partisan gerrymandering is to undermine that ability of citizens to band together.

This Court has already acknowledged that targeted speech suppression undermines the promise of government accountability. "[W]henever [a] constituent can be restrained in any manner from speaking, writing, or publishing his opinions," particularly when those opinions are critical of government conduct, we worry that "public functionaries" may in effect be "absolved from their responsibility to their constituents." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 297 (1964).

The same is true when a clever legislature finds a way to burden opponents' speech and expressive association without overtly making it unlawful. Public officials in charge of drawing the district lines have the ability to disrupt collective organization and chill their would-be opposition by drawing districting maps that seek to entrench themselves in power. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

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5. See *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972).

The effects here are all the more constitutionally troubling because, by Appellants' own admissions, they burden the speech and associational rights of political minorities "in order to enhance the relative voice" of the party in power, a concept that is "wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976); see also *U.S. Telecom Ass'n* v. *Federal Commc'ns Comm'n*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The First Amendment operates as a vital guarantee of democratic self-government.").[6] This outcome not only injures the Appellees—it also creates polarized political echo chambers in which citizens lack the opportunity to hear diverse political perspectives and engage in robust public debate of the underlying policy issues.

Throughout its existence, AJC has been an active participant in the marketplace of ideas. It has observed first-hand that vigorous, bipartisan dialogue has the power to bridge divides and meaningfully advance the interests of otherwise disempowered minorities.

By entrenching the power of the majority party, North Carolina and Maryland have attempted to create a "standardization of ideas * * * by legislatures * * * [and] dominant political or community groups." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 5 (1949). "There is no room under our Constitution" for such a result, *id.* at 4, whether it is accomplished by suppressing dissenting or provocative voices or by gerrymandering opponents into political insignificance. As this Court has held, when there is "an attempt to give one side of a debatable public question

6. See Rucho J.S. App. 159, 251; Benisek J.S. App. 49a–50a.

an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785–786 (1978). And even more detrimentally to our representative democracy, this lack of government neutrality undermines public confidence that the government remains responsive and accountable to the People.[7]

Indeed, beyond its demonstrable practical effects on officials' responsiveness to opposing-party constituent demands,[8] partisan gerrymandering irreparably damages the *perception* of government accountability by creating an expectation that political outcomes are

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7. In a recent poll, 69% of likely voters for 2018, across party lines, signaled that they found it "very concerning" that "partisan gerrymandering and manipulation of district lines" deprives voters of their right to hold their representatives accountable, with 89% of respondents finding that prospect at least "concerning." Lake Research Partners & WPA Intelligence, Memorandum to Interested Parties, *Partisan Redistricting—New Bipartisan Poll*, at 6 (Sept. 11, 2017), https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting.FINAL_.2.09082017%20%28002%29.pdf. Similarly, strong majorities of respondents were very concerned that "[p]oliticians in partisan-rigged districts do not accurately reflect the interests of their constituents" (65%), that such politicians are more loyal to their party than their constituents (68%), and that dominant political parties could become entrenched even when political opinions in a state or district are no longer in agreement (64%). *Ibid.*

8. As Appellees have argued, empirical literature has shown that "gerrymandering sharply skews legislatures (and the laws they pass) in favor of the line-drawing party (and against the will of the electorate)." See League of Women Voters Mot. to Affirm 6 (citing Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017)).

predetermined by district lines. The resulting loss of the public's confidence that it is possible to bring about political change and electoral turnover through the normal channels of the marketplace of ideas—not only at the ballot box but in the long road to the election—has significant effects on the exercise of First Amendment freedoms. Partisan gerrymandering operates to dissuade members of the public at large from participating in politics more generally and disrupts the ability of political parties and their members to effectively advocate for their agendas. See *Gill* v. *Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring).

These are not injuries in search of a constitutional theory—these are classic First Amendment violations.

II. The Application of Well-Settled First Amendment Doctrine Provides the Rule of Decision Here.

Traditional First Amendment principles dictate the conclusion that partisan gerrymandering of the kind in which the legislative majorities in North Carolina and Maryland engaged here unconstitutionally burdens protected expressive conduct.

A. Partisan Gerrymandering Burdens the Associational Rights of Parties and Their Members.

Partisan gerrymandering burdens the associational rights of political parties and their members by allowing an incumbent party to burden its opponents' ability to organize and thus mount an effective challenge to that party's rule. Where the associational rights of political

parties are burdened, this Court has frequently stepped in to protect those rights, even where state legislatures have a competing interest in managing the electoral process. This Court should intervene here as well.

It is undisputed on the records before the Court that partisan gerrymandering has impeded the ability of the *Rucho* and *Benisek* political parties and the voter-plaintiffs affiliated with them to associate successfully.

The district court in *Rucho* found that individual plaintiffs testified to harms including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates"—in other words, a decreased ability "of their party to perform its core functions"—that amounted to violations of their First Amendment right to associate. Rucho J.S. App. 70–72. The court also found ample evidence of associational injuries suffered by the organizational plaintiffs.[9]

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9. For example, the North Carolina Democratic Party testified that it was difficult to "raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races" in districts gerrymandered to prevent Democratic victories. Rucho J.S. App. 71–72. It was likewise difficult to recruit candidates to run in these districts because "'the deck seem[ed] to be stacked'" against them. *Id.* at 72 (quoting the deposition of George Wayne Goodwin on behalf of the North Carolina Democratic Party). The court found that this and similar harms amounted to burdens on Common Cause and the League's right "to associate for the advancement of political beliefs." *Id.* at 74 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)).

The *Benisek* court found the plaintiff members of the Republican party suffered similar harms. The court considered testimony of individual plaintiffs facing "new difficulties in their organizational efforts as a result of the redistricting." Benisek J.S. App. 26a. For example, one voter who consistently voted for Republican candidates described speaking to people in the Sixth District who felt it was no longer worth voting after the redistricting. *Id.* at 26a, 62a. The court also drew from data to corroborate individual plaintiffs' testimony—evidence showed a decline in Republican participation at the polls as well as decreased fundraising. *Id.* at 28a, 62a–63a.

In each of these cases "the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

1. The Burdens Imposed on Appellees' Associational Rights Are Severe and Unconstitutional.

This Court has struck down similar attempts by the legislature to disadvantage members of political parties and other groups by imposing severe burdens on their associational rights. In *California Democratic Party* v. *Jones*, for example, this Court concluded that mandating blanket primaries unconstitutionally burdened the associational rights of political parties. Writing for the majority, Justice Scalia explained that "the First Amendment protects the freedom to join together in furtherance of common political beliefs." 530 U.S. at 574 (citation and internal quotation marks omitted). The

imposition of restrictions, such as blanket primaries, effectively quashes the ability of the party and "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ibid.* Those same harms are implicated by the partisan gerrymandering before this Court. That Appellees remain free to register with the minority party does not alleviate the "substantial restraint" on their "exercise of the constitutionally protected right of free association" imposed by partisan gerrymandering. *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973); see also Benisek J.S. App. 62a (describing "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters").

This Court's jurisprudence acknowledges that the harms at issue here go to the core of Appellees' associational rights. In *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, this Court struck down a requirement that the Democratic National Party Convention admit delegates selected in violation of party rules. 450 U.S. 107, 123 (1981). In so holding, this Court explained that granting states the power to place delegates in a National Convention over party objections would prevent the Party from "screening out those whose affiliation is . . . slight, tenuous, or fleeting," thereby inhibiting its ability to politically associate to advance its primary objectives. *Ibid.* (alteration omitted).[10]

10. Accord, *e.g.*, *Cousins* v. *Wigoda*, 419 U.S. 477, 489–490 (1975) (explaining that parties are entitled to some control over the manner by which convention delegates are chosen); *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213, 229 (1986) (holding the same with respect to primary elections).

Here, as in *La Follette*, the partisan gerrymanders have inhibited the ability of the *Benisek* and *Rucho* organizational and voter-plaintiffs to associate to advance their primary objectives—namely, to promote the success of candidates who will advance their preferred policy objectives. See Rucho J.S. App. 69–72, 74; Benisek J.S. App. 61a–64a. That these gerrymanders did so by systematically undermining the minority parties' ability to affiliate in the first place, as opposed to by interfering with the parties' mechanisms for screening weak affiliations as in *La Follette*, only strengthens the case for judicial review. "By placing a state party [and its supporters] at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Appellees seek a remedy against a legislative action that "substantially abridged [their] ability to associate *effectively* with the party of [their] choice." *Kusper*, 414 U.S. at 58 (emphasis added).

In *NAACP* v. *Alabama ex rel. Patterson*, this Court held that the First Amendment is violated where legislative actions burden an organization's ability to recruit members. 357 U.S. 449, 462–463, 466 (1958). The NAACP was at risk of being ousted from the state of Alabama and enjoined from advancing its organizational interests because it refused to disclose its membership lists. *Id.* at 453–454. Noting that the NAACP had made an uncontroverted showing that requiring disclosure of the identity of its rank-and-file members would burden its ability to recruit, this Court held that the burdens on the associational rights of the NAACP and the individuals affiliated with it were unconstitutional. *Id.* at 462–463, 466. So, too, here: Both sets of appellants describe

difficulty recruiting members and, in North Carolina, partisan gerrymandering was found to have compromised parties' ability to recruit candidates for office.[11]

2. Even if the Associational Burdens Were Less Than Severe, Partisan Gerrymandering Would Still Fail the Flexible Test This Court Designed in *Anderson* v. *Celebrezze*.

The Court need not conclude that the associational burdens here are severe, or that strict scrutiny is required, to uphold the decisions below.[12] In *Anderson* v. *Celebrezze*, this Court acknowledged that "[c]onstitutional challenges to specific provisions of a State's election laws * * * cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." 460 U.S. 780, 789 (1983) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). Recognizing the need for holistic inquiry, this Court devised a flexible test that, if applied here, would allow it to weigh different factors to better distinguish between valid redistricting exercises and partisan gerrymandering violative of the First Amendment. In *Anderson*, this Court applied "an analytical process that parallel[ed] its work in ordinary litigation" by "first consider[ing] the character and magnitude of the asserted injury to the [plaintiff's First and Fourteenth Amendment] rights" and weighing those rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Ibid.*

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11. Rucho J.S. App. 72.

12. Indeed, the *Rucho* court applied the intermediate scrutiny standard and found that the North Carolina plaintiffs satisfied it. Rucho J.S. App. 286.

Although neither of the district courts below explicitly applied the *Anderson* framework to the partisan gerrymanders before them, both courts analyzed the burdens placed on political activity in a fact-sensitive and nuanced way that is completely consistent with this Court's flexible test. Were this Court to adopt the *Anderson* framework for partisan gerrymandering claims, it would find that Maryland and North Carolina cannot offer any legitimate justifications for the burdens they imposed on Appellees other than their naked desire to disadvantage the political opposition.[13] See Rucho J.S. App. 110 ("Legislative Defendants do not argue—and never have argued—that the 2016 Plan's express partisan discrimination advances *any* democratic, constitutional, or public interest."); Benisek J.S. App. 48a–50a ("[W]ith respect to the mapmakers' intent, the process described in the record admits of no doubt. * * * Democratic officials * * * worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat.").

B. Partisan Gerrymandering Also Flouts Other First Amendment Principles.

The Partisan gerrymandering in which the North Carolina and Maryland legislatures engaged here is also entirely inconsistent with other core First Amendment principles.

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13. The argument that an intent to help one party is not the same as an intent to harm the other was properly rejected by one of the district courts in this case. As that court explained, "[t]he First Amendment does not—indeed, cannot—distinguish between these intents because they are one and the same when applicable to two-party elections." Benisek J.S. App. 50a.

1. Partisan Gerrymandering Amounts to Unconstitutional Retaliation Against Minority Party Voters for Their Political Views Manifested in Their Past Electoral Choices.

Partisan gerrymandering "burden[s] or penalize[es]" individuals "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." See *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Fortunately, this Court can draw from a robust judicial tradition of protecting individuals from impermissible government disfavor or retaliation on account of their political affiliation to remedy these harms.

Indeed, this Court's First Amendment jurisprudence teaches that the government cannot exercise its discretion in a "narrowly partisan or political manner." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 870–71 (1982) (joint opinion of Brennan, Marshall, Stevens, and Blackmun, JJ.). That rule is based on the recognition that a single discretionary decision that burdens a person who holds different political views[14]

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14. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (applying the First Amendment to prohibit government employers from making "promotion, transfer, recall, and hiring decisions involving low-level public employees * * * based on party affiliation and support"); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715, 717 (1996) (holding that contractors, like government employees, are protected by the First Amendment from patronage dismissals because such dismissals inappropriately subject government employment "to the express condition of political beliefs or prescribed expression" and burden the right to political association).

could chill all his co-partisans. That rationale applies with all the more force to a decision by a government body to draw district lines that burden all adherents of the opposing party across the state, chilling all of its would-be supporters.

The records before this Court show that the message was heard loud and clear. The *Rucho* voter-plaintiffs tasked with "canvassing and get-out-the-vote efforts" had difficulty getting fellow Democrats to vote because "they felt their vote didn't count." Rucho J.S. App. 70. The *Benisek* plaintiffs, who attempted to encourage fellow Republicans to vote in the Sixth District, found that people generally felt that it was "not worth voting anymore," and "[felt] disenfranchised." Benisek J.S. App. 26a. The redrawn district lines resulted in widespread "confus[ion] about the candidates." *Id.* at 27a. As a result, individuals who had associated with a minority party were discouraged from expressing themselves through the electoral process, thereby insulating the incumbent party from the need to be responsive to the electorate.

In *Elrod* v. *Burns*, this Court protected government employees from being penalized on the basis of their political affiliation, holding that patronage dismissals severely curtail "the individual's ability to act according to his beliefs." 427 U.S. 347, 355–356 (1976). As in *Elrod*, the cases before this Court present government action that has the impermissible and undemocratic effect of "tip[ping] the electoral process in favor of the incumbent party" by burdening the right to political speech and association. *Compare ibid.*, *with* Rucho J.S. App. 70 (explaining that the *Rucho* voter-plaintiffs suffered "decreased ability to mobilize their party's base, persuade independent voters

to participate, attract volunteers, raise money, and recruit candidates"). This effect enables the incumbent party to rely on indirect regulation of political association to "produce a result which it could not command directly," in violation of the First Amendment. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted).

2. Partisan Gerrymandering Unconstitutionally Favors Majority Political Viewpoints over Others.

By favoring one set of political beliefs over another, partisan gerrymanders also collide with the First Amendment's prohibition on viewpoint discrimination. Indeed, though this Court has held that a state may restrict speech when necessary to advance a significant and legitimate state interest, there are some interests "such as a desire to suppress support for a minority party" that are "plainly illegitimate." *Members of the City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).[15] The two cases before this Court are partisan gerrymanders motivated *solely* by such "plainly illegitimate" interests as party entrenchment and the "desire to suppress support for a minority party." *Ibid.* Appellants concede as much. See Benisek J.S. App. 12a (quoting Governor O'Malley's Deposition confirming that he "set out to draw the borders in a way that was favorable to the Democratic party"); Rucho J.S. App. 221 ("[T]he General Assembly expressly drew the 2011 plan 'to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate.'") (quoting the deposition of one of the principal mapmakers, Dr. Hofeller).

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15. See also *Stromberg*, 283 U.S. at 369–370.

Time and time again, this Court has recognized that "governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537–538 (1980) (quoting *Police Dep't. of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972)). By extension, the government cannot constitutionally regulate speech in ways that favor some viewpoints over others. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 804. The alternative "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," an outcome that the First Amendment "places * * * beyond the power of the government." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). This background prohibition is so essential to First Amendment jurisprudence that viewpoint discrimination is presumptively unconstitutional. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

Partisan gerrymandering, like direct viewpoint discrimination, threatens to drive the minority political view out of the marketplace of ideas by diminishing the voice of the disfavored political party in favor of the majority's view. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.").

The First Amendment safeguards these minority views from regulation designed to weaken them well before they are pushed out of the marketplace. By discriminating in the drawing of the redistricting maps and ultimately imposing an electoral penalty, partisan

gerrymandering inexcusably burdens Appellees' choice to advocate for minority party positions and candidates free from government disfavor. Here, the effects of partisan gerrymandering have already taken hold. The time for judicial vindication is now. Indeed, the principle of viewpoint neutrality "protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

The mapmaking at issue here functions in the same way as a subsidy to benefit one viewpoint over another, something this Court has held violates the First Amendment.[16] Here, "[t]he direct result" of identifiably associating with, endorsing the views of, or voting for the minority parties "is a state-provided * * * subsidy to a political rival" in the form of a gerrymandered map. See *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 742 (2011) (Roberts, C.J.). And while there is some precedent for *viewpoint-neutral* government

16. See *Rosenberger*, 515 U.S. at 834 (discussing *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)); see also *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'") (citation omitted); *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").

subsidies surviving First Amendment challenge, "none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech" more effectively. *Id.* at 743.

3. Partisan Gerrymandering Imposes Discriminatory Burdens on the Basis of a Speaker's Identity as a Minority Party Adherent.

By imposing burdens based on the political affiliation—that is, the partisan identity—of the voter, partisan gerrymandering amounts to impermissible content-discrimination based on the identity of the speaker.

In each of the cases before this Court, the incumbent party drew district lines on the basis of the ascertainable partisan identity of voters with the goal of decreasing the electoral clout of the minority party. See Rucho J.S. App. 159 (quoting Representative David Lewis, one of two officials responsible for the redistricting plan, during a debate on the proposed map, stating "that he believed 'electing Republicans is better than electing Democrats,' and therefore that he 'drew this map in a way to help foster' the election of Republican candidates"); Benisek J.S. App. 21a (quoting talking points for Senate President Thomas V. Miller stating that "[i]n the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity"). These actions amount to the very same speaker-based, indirect censorship traditionally forbidden by the First Amendment, and should not be allowed to stand here.

"Premised on mistrust of governmental power," the First Amendment precludes officials from distinguishing among different speakers—or choosing favorites—out of concern that speaker-based regulations may be "instruments to censor," much like viewpoint restrictions. *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340–341 (2010). This Court has stepped in to protect against impermissible disfavor in cases comparable to the ones before it now.

For example, in *Citizens United*, this Court held that corporations are entitled to fund independent political broadcasts related to elections because political speech—an "essential mechanism of democracy" that functions as "the means to hold officials accountable to the people"—"must prevail against laws that would suppress it by design or inadvertence." *Id.* at 339. In so holding, the Court concluded that "[t]he First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech," *id.* at 364, because such distinctions "are all too often simply a means to control content," *id.* at 340. The concern is particularly acute where, like here, "[t]he State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 580 (2011).

Here, the majority party-controlled legislatures of North Carolina and Maryland did just that. That the disfavored speakers in the cases now before this Court are not subject to a complete ban does not change the outcome. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content" via targeting of certain speakers. *Id.* at 566.

The partisan gerrymanders burden the political expression of minority parties and their adherents while leaving that of the party in power and its supporters undisturbed and therefore amplified. "This the State[s] cannot do." *Ibid.*

III. Claims of Partisan Gerrymandering Are Justiciable.

A. Courts Should Intervene Because Partisan Gerrymandering Raises the Distinct Possibility That a Legislature Has Entrenched Itself and Is No Longer Accountable to the People.

This Court has used the metaphor of the marketplace of ideas to describe the "[c]ompetition in ideas and government policies" that "is at the core of our electoral process and of the First Amendment freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968). The marketplace metaphor is particularly appropriate here, for the harms of partisan gerrymandering described in Parts I and II are akin to market capture. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 692 (2013) ("What is most disturbing about political gerrymandering * * * is not that it discriminates against some discrete group, but rather that insiders capture and manipulate the very processes from which they draw their legitimacy."). As this Court has recognized, without a functioning marketplace of ideas, "the public could not freely choose a government pledged to implement policies that reflect the people's informed will." *Sorrell*, 564 U.S. at 583.

Because partisan gerrymandering makes it harder to vote the legislatures who adopted the offending

district lines out of office, it is appropriate for the courts to intervene. See *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring) ("[O]nly the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.").

In a different context that is instructive here, Chief Justice Warren noted that "the presumption of constitutionality" that often attaches to congressional or other legislative action, is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969). When a challenge calls into question that "basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." *Id.* Nor can it support any hope for a political remedy for the political process gone awry.

Partisan gerrymandering results in a malfunction of the political marketplace of ideas that is so pervasive that even advocates of minimalist or restrained approaches to judicial review would favor judicial intervention. See John Hart Ely, *Democracy and Distrust* 103 (1980) (recommending an approach in which courts intervene "when the 'market,' in our case the political market, is systemically malfunctioning"); *id.* at 117 (noting that voting rights cases "involve rights (1) that are essential to the democratic process and (2) whose dimension cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo"). The current landscape is the epitome of the "*process* * * * undeserving of trust" that characterizes market malfunction. *Id.* at 103. Here, "the ins [i.e., the political parties in control] are choking off the channels of political change to ensure that they will stay in and the outs will stay out," *and* "though

no one is actually [that is to say, literally] denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility." *Ibid.*

As AJC can attest from its decades of advocacy work around the world, a malfunctioning political process is detrimental to minority populations and can operate to "deny[ ] that minority the protection afforded other groups by a representative system." See *ibid.* That the minorities in question are the two major political parties only speaks to the precision and effectiveness of the partisan gerrymandering threat to the normal channels of the political process. Fortunately, "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." *Id.* at 183. And unlike elected politicians whose very own continuance in office may be at stake in the future of partisan gerrymandering, judges are well-positioned to command the trust of the public that they will be neutral arbiters.

B. Our Federal Courts Have Expertise in Ascertaining Legislative Intent.

In order to determine that redrawn maps violate the First Amendment, it may be necessary to determine legislative intent. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the *purpose* and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.") (emphasis added). Given the myriad legitimate considerations—

political and otherwise—that go into redistricting,[17] discerning improper legislative intent may prove essential to creating a manageable legal framework for the analysis of partisan gerrymandering. Fortunately, courts are well-equipped to identify illicit legislative intent.

In a hyper-politicized climate, the determination of legislative intent is not always difficult. Here, for instance, the intent to draw legislative maps on the basis of party affiliation is transparent. The district court in *Benisek* found the record to be "replete with direct evidence" of "the specific intent to flip the Sixth District from safely Republican to likely Democratic." Benisek J.S. App. 49a–51a. Similarly, the district court in *Rucho* found that "Plaintiffs adduced more-than-sufficient evidence to prove that, in enacting the 2016 Plan, the General Assembly predominantly intended to 'subordinate' the interests of entities and voters who supported, or were likely to support, non-Republican candidates. Rucho J.S. App. 287–288.

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17. As this Court held in *Karcher* v. *Daggett*, "[a]ny number of consistently applied legislative policies" may qualify as rational, legitimate state interests in the redistricting context, "including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. 725, 740 (1983). Some of those redistricting objectives may require limited, nondiscriminatory use of political affiliation data—particularly when it comes to incumbency protection, a valid purpose when undertaken "in the limited form of avoiding contests between incumbent[s]." *Bush* v. *Vera*, 517 U.S. 952, 964 (1996) (citation and internal quotation marks omitted; alteration in original).

But even in more challenging cases, there is nothing unusual about courts assessing legislative intent. Courts are experienced in examining a factual record and identifying impermissible intent behind statutes. As this Court has noted, "the mere recitation of a benign * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975). Moreover, this Court has time and again considered a legislature's motive in drawing congressional maps. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Shaw* v. *Hunt*, 517 U.S. 899 (1996); *Hunt* v. *Cromartie*, 526 U.S. 541 (1999). In *League of United Latin American Citizens*, this Court reiterated that "[i]t is undeniable that identifying the motive for making [the] basic decision [of the state in drawing a new congressional map] is a readily manageable judicial task." 548 U.S. at 457.

The courts play an important role in ferreting out statutes with impermissible invidious intent. Because "a denial of constitutionally protected rights demands judicial protection," *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964), that is the role the Court should assume here.

C. This Court Has Not Hesitated to Intervene When Comparable First Amendment Liberties Are at Stake.

In protecting First Amendment values in politically polarized contexts, courts not only protect the speaker herself but also safeguard against the chilling of those who, upon witnessing such use of government power, may choose to be silent rather than risk the consequences. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 800–801.

Additionally, these impositions unfairly amplify views that accord with the State's own. See *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2377 (2018) (explaining that the imposing a burden on a "curiously narrow subset of speakers * * * run[s] the risk that the state has left unburdened those speakers whose messages are in accord with its own views") (citation and internal quotation marks omitted). As this Court has shown in its myriad cases addressing these kinds of harms, it is willing and able to step in to address these harms.

To be sure, holding that partisan gerrymandering is justiciable here may invite further disputes about partisan gerrymandering, causing the Court to enter the thicket. This Court is familiar with this conundrum, as it confronted a similar situation before adopting the one-person, one-vote standard. Then, as now, for the Court "to stay out of the area altogether * * * would have meant * * * that the ins would simply have gone on maintaining their positions." Ely 124. Such an outcome in the malapportionment context would have been "no more compatible with the underlying theory of our Constitution than taking away some people's votes altogether." *Ibid.* The same is true here, because, as shown above, "partisan gerrymanders * * * are incompatible with democratic principles." *Arizona State Legislature*, 135 S. Ct. at 2658 (alteration and citation omitted).

CONCLUSION

This Court has recognized that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. The same is true of the "ability of citizens to band together" for political ends. *Jones*, 530 U.S. at 574. The partisan gerrymandering cases before this Court present serious First Amendment harms that are not susceptible to a political solution and that threaten the democratic experiment as a whole.

Upon which branch of government, if not the judiciary, can the people rely when partisan vitriol threatens to stifle the electoral voice of the minority and infringe upon the right to politically associate? Indeed, Article III courts have confronted these questions so many times and in such varied contexts, that they have developed sophisticated, detailed frameworks to remedy First Amendment violations. "The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *United States* v. *Stevens*, 559 U.S. 460, 470 (2010) (Roberts, C.J.) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803)). It is up to the courts to enforce these limits.

For the reasons urged herein, we respectfully ask that the judgments of the courts below be affirmed.

Respectfully submitted,

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Nos. 18-422, 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*, *Appellants*,
v.
COMMON CAUSE, *et al.*, *Appellees*.

LINDA H. LAMONE, *et al.*, *Appellants*,
v.
O. JOHN BENISEK, *et al.*, *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF FOR *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; COUNTY OF SANTA CLARA; DEMOCRACY 21; DEMOS; FRIENDS OF THE EARTH; GOVERNMENT ACCOUNTABILITY PROJECT; LEAGUE OF WOMEN VOTERS, MARYLAND CHAPTER; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL FEDERATION OF DEMOCRATIC WOMEN; NORTH CAROLINA JUSTICE CENTER; ONEVIRGINIA2021: VIRGINIANS FOR FAIR REDISTRICTING; AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Amici Curiae are organizations that pursue public policy goals through the American political system, and governmental entities that ensure public health and safety within the framework of laws developed through that system. Because they work extensively in, and are deeply affected by, the political system and the laws developed through that system, *amici* rely upon fair elections to ensure that elected policy makers represent and are meaningfully accountable to their constituents. Accordingly, they are particularly concerned about partisan gerrymandering, that is, the drawing of district lines to subordinate adherents of one political party and entrench the rival party in power. *Amici* submit this brief to offer an analysis of how severe partisan gerrymandering, as occurred in North Carolina and Maryland, contravenes fundamental, long-standing American democratic values and requires a judicial response to ensure that American government will continue to operate by the consent of the people.

A full list of *amici*, with descriptions of each organization, is attached as an Appendix to this brief.

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[1] Letters from the parties consenting generally to the filing of briefs by *amici curiae* are on file with the Court. Pursuant to Supreme Court Rule 37.6, no part of this brief was written by counsel for any party, and no person or entity other than *amici* and their counsel made any monetary contribution to its preparation or submission. *Amicus* League of Women Voters of Maryland joins this briefly solely with respect to the *Lamone v. Benisek* case, since the League's state affiliate is a party in the *League of Women Voters of North Carolina v. Rucho* case.

SUMMARY OF ARGUMENT

> Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

The Declaration of Independence para. 2 (U.S. 1776).

This is the bedrock principle of American democracy: government by the consent of the governed. It was implemented in 1787 through the Elections Clause of the Constitution:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

U.S. Const. art. I, § 2, cl. 1.

Four score and seven years after the Declaration, when President Lincoln sought to reunite the country in a "new birth of freedom" following the Civil War, he encapsulated the core of American democracy as "government of the people, by the people, for the people."

Consistent with the vision of Lincoln and the Founders, this Court has often considered how actions that create an unfair advantage in the electoral process undermine this foundational principle of American democracy. As early as 1964, this Court recognized that district lines can be drawn in ways that jeopardize government by the people, just as much as outright prohibitions on voting:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964). Thus, in the "one person, one vote" cases, the Court held that "[w]eighting the votes of citizens differently, *by any method or means*," is not justifiable. *Id.* (emphasis added). The Court required proportional district sizes at all levels of government, including state legislative districts (*Reynolds*), U.S. Congressional districts (*Wesberry v. Sanders*, 376 U.S. 1 (1964)), and local government districts (*Avery v. Midland Cty.*, 390 U.S. 474 (1968)).

This Court similarly held that redistricting plans cannot dilute voting power based on the race of voters. *See Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973); *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2658 (2015), this Court defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." In that case, this Court held that the Constitution, and specifically the Elections Clause, "act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to

entrench themselves or place their interests over those of the electorate." *Id.* at 2672.

In the cases now before the Court, the lawmakers who crafted the redistricting plans explicitly conceded their intent to gerrymander for partisan benefit. In both cases, the plans successfully created a partisan electoral advantage. Thus, this Court now confronts two intentional and highly effective partisan gerrymanders that have undermined the will of North Carolina's and Maryland's voters.

This Court has long recognized that severe partisan gerrymanders are "incompatible" with "democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality op.). As evident in the cases *sub judice*, incumbent lawmakers use increasingly sophisticated techniques to redraw electoral districts to entrench their power. Using map-drawing software, highly detailed data about voting patterns, and sophisticated statistical analyses and tools, incumbents "crack" and "pack" electoral districts to ensure continued control over legislatures and congressional districts under virtually any conceivable voting pattern. Voters no longer choose their representatives; party leaders and their consultants craft maps that predetermine representatives, depriving the people of a meaningful voice in government.

In *Carpenter v. United States*, this Court recognized that while the "progress of science" can provide those in power with "new tool[s] to carry out [their] important responsibilities[,]" such tools "risk[] Government encroachment of the sort the Framers . . . [sought] to prevent" and require the Court to expand its conception

of the Fourth Amendment to prevent those harms. 138 S. Ct. 2206, 2223 (2018) (citing Justice Brandeis's dissent in *Olmstead v. U.S.*, 277 U.S. 438, 473–74 (1928)). Just as the *Carpenter* decision safeguarded Fourth Amendment rights in the face of new technological tools and risks, so can the Court safeguard the constitutional integrity of the electoral process in the face of other new technologies.

The Court is not being asked to resolve a "political" question here. Claims of election manipulation have long been held to be justiciable because the Court has the authority to ensure that elections comport with the Constitution. These cases come before the Court in a pair, one partisan gerrymander favoring Republicans and the other favoring Democrats. Setting legal standards for adjudicating such cases will reinforce this Court's traditional role as an independent, nonpartisan arbiter, capable of ensuring free and fair elections conducted in accordance with our constitutional standards, while remaining outside the political process of deciding the outcomes of elections.

The questions before this Court are clear: Will this Court continue the unfinished work that previous Courts advanced when they developed legal standards in other election manipulation cases? Will it protect voters' rights from denial and debasement through the drawing of legislative district lines designed to entrench a ruling party? Will it preserve our "government of the people, by the people, for the people?"

STATEMENT OF FACTS

The facts in North Carolina and Maryland present obvious cases of "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. In both states, the redistricting was done by a single party holding exclusive control over drawing and implementing the redistricting plans. With the assistance of outside consultants who specialized in achieving partisan advantage, and using highly sophisticated technology, each party successfully created precise and durable maps that would ensure the entrenchment of the party in power for at least the next decade.

In North Carolina, State Senator Robert Rucho and State Representative David Lewis retained Dr. Thomas Hofeller to create North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan"), with the explicit goal of providing a maximal and sustainable advantage to Republicans. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 869 (M.D.N.C. 2018). Dr. Hofeller, a redistricting expert from the Republican National Committee, admitted that his "primary goal" was to draw district lines so as "to create as many districts as possible in which GOP candidates would be able to successfully compete for office" and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 803. The mapmakers admitted that they were creating a "political gerrymander" in order to "help foster" the election of Republicans, because "electing Republicans is better than electing Democrats." *Id.* at 870.

In Maryland, Governor Martin O'Malley testified that he "set out to draw the borders in a way that was favorable to the Democratic party" when creating Maryland's 2011 congressional districting plan. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502 (D. Md. 2018). Governor O'Malley readily admitted that "our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." *Id.* Eric Hawkins, an analyst from a political consulting firm to Democratic organizations, acknowledged that he was given the dual goals of protecting Maryland's incumbent Democratic Representatives and changing the overall make-up of the congressional delegation "from six Democrats and two Republicans to seven Democrats and one Republican." *Id.* at 503.

In both states, the gerrymanders were specifically drawn to create maximum partisan advantage while minimizing potential risks. In North Carolina, Representative Lewis stated that he intended to "draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Rucho*, 318 F. Supp. 3d at 808 (alterations in original). In Maryland, Governor O'Malley testified that he considered gerrymandering to flip either the First or the Sixth District to Democratic control, but decided to go for the Sixth because a gerrymandered First District "would have to jump across the Chesapeake Bay." *Lamone*, 348 F. Supp. 3d at 502.

The plans were unqualified successes. The North Carolina gerrymander produced ten Republican seats out of North Carolina's thirteen-seat congressional delegation, precisely as intended. 53.22% of North Carolina voters statewide voted for Republican congressional candidates, yet North Carolina's delegation remained 76.9% Republican. *Rucho*, 318 F. Supp. 3d at 884. Democratic voting strength was "packed" into three districts, in which Democrats won by overwhelming majorities; Republican voting strength was "cracked" across ten districts, in which Republicans won by "safe" but not overwhelming majorities, so that Republican votes that could be used in other districts would not be "wasted." *Id.* In Maryland, the existing Democratic districts remained safe, while the Sixth District was "flipped" from a district that had previously elected a Republican candidate by a 28% margin in 2010 to one that elected a Democratic candidate in 2012 by a 21% margin. *Lamone*, 348 F. Supp. 3d at 499–501.

ARGUMENT

I. Election Manipulation Through Partisan Gerrymandering Violates Fundamental American Democratic Principles of Representativeness and Accountability in Government.

Representative democracy was the animating value of the Founders. Election manipulation through partisan gerrymandering undermines faith in America's most basic civic principle: the right of the people to elect their representatives and to ensure that

their elected representatives remain accountable to them.

A. Our Founders Established a Government Built Upon the Consent of the Governed.

The United States of America exists because the Founders rebelled against a British government that did not represent the citizenry. Americans objected to acts of the British Parliament such as the Currency Act of 1764, the Sugar Act of 1764, the Stamp Act of 1765, and the Tea Act of 1773. In each case, the core of the protest was the lack of American representation in the Parliament that passed these laws. Samuel Adams explained that the protest was an assertion of the people's right to adequate representation in their government. *See generally* Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting* (Nov. 20, 1772), *reprinted in* 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970).

Members of Parliament were not elected by, and did not represent, the people they governed. This conflicted with the Founders' core value, that "Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." The Declaration of Independence para. 2.

Our Founders created a new government in which representatives would be chosen "by the People." U.S. Const. art. I, § 2, cl. 1. They adopted a Constitution that guaranteed every state "a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. As the Heritage Foundation explains, the importance and

meaning of the Guarantee Clause to the participants in the constitutional debate of 1787–1788 was that "republican government was government accountable to the citizenry." Robert G. Natelson, *Guarantee Clause, The Heritage Guide to the Constitution*, The Heritage Foundation, http://www.heritage.org/constitution#!/articles/4/essays/128/guarantee-clause (last visited Feb. 24, 2019).

Two core principles of a republican form of government are representativeness and accountability. The adoption of these core principles was the critical difference between American and British philosophies of government. The British system of government relied on social hierarchy. The ruling class and the people were represented separately. Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 Harv. J. L. & Pub. Pol'y 573, 576 (2017). American government, by contrast, was designed to represent the interests of the people, not preserve the status of a ruling class. *See* John Adams, *Thoughts on Government* (1776), *in* 1 The Founders' Constitution 108 (Philip B. Kurkland & Ralph Lerner eds., 1987) (a representative assembly "should think, feel, reason, and act like" the "[p]eople at large").

"Representativeness" does not mean that elected representatives must reflect the political make-up of the citizens in strict proportionality, but that the citizens must be able to elect their representatives free of the control of a ruling class:

> [T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in

> proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*] (A. Hamilton). In other words, representativeness means that individuals' votes must result in meaningful representation.

Our Founders also understood that representativeness in government is intertwined with accountability.[2] Once representatives are elected to office, they must be accountable to the citizenry, rather than being afforded tools to entrench their power regardless of the voters' will. In Federalist 37, James Madison explained: "[T]he genius of republican liberty seems to demand . . . not only that all power should be *derived from the people*, but that those intrusted with it should be *kept in dependence on the people*." The Federalist No. 37, at 192 (James Madison) (P.F. Collier & Son ed., 1901) (emphases added). A representative government "is futile if legislators are not responsive to the constituents that they represent." Whittington, *supra*, at 580. Citizens must have not only the right to elect their representatives, but a meaningful ability to remove them in future elections. Indeed, "[t]he crucial

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[2] Contemporary academics agree that a republican government "is one in which the people control their rulers." *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

function of the people in a democracy is not to make policy but to determine to whom 'the reins of government should be handed.'" *Id.* at 581 (citation omitted).

B. Our Founders Warned That Factions and Partisanship Had the Potential to Threaten Representative Democracy.

Our Founders understood that representativeness and accountability could not be taken for granted and foresaw that a representative democracy contained within it the seeds of its own potential destruction. The liberty provided by free association and democracy naturally leads like-minded citizens to band together to pursue their shared values. Collective political action benefits democracy, but can become dangerous factionalism when the power of a particular faction to pursue its parochial interests undermines the people's right to fair and meaningful representation.

James Madison warned of the dangers of "faction"—"a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"—but believed that our Constitution would restrain such dangers. The Federalist No. 10, at 45 (James Madison) (P.F. Collier & Son ed., 1901). In fact, Madison regarded this as one of the greatest virtues of the Constitution: "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." *Id.* at 44. While Madison understood that the root

causes of factionalism could not be eradicated (and indeed, should not, since such causes were the natural and unavoidable byproducts of liberty, freedom of thought, and freedom of association), Madison also understood that excess factionalism must be restrained by republican government: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* As he left office, George Washington likewise warned future generations that, left unchecked, political parties could

> serve to organize faction; to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

President George Washington, *Farewell Address to the People of the United States* (1796), *reprinted in* S. Doc. No. 106-21, 2d Sess., 14 (2000), https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

C. This Court Has Long Recognized the Centrality of Representativeness and Accountability to American Values.

Almost 200 years ago, Chief Justice Marshall summarized the essence of American government: "The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819); *see also Duncan v. McCall*, 139 U.S. 449, 461 (1891) (a "distinguishing feature" of the republican guarantee is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (defining a republican form of government as "one constructed on [the] principle, that the Supreme Power resides in the body of the people"), superseded in part by U.S. Const. amend. XI.

Examining provisions such as the Qualifications Clause, the Court has long held that a "fundamental principle of our representative democracy is . . . 'that the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting *Elliot's Debates*, *supra*, 257 (A. Hamilton)). In reaching this conclusion, the Court agreed with John Wilkes' address to the Parliament in 18th-century England: "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights,

that it ought to be considered as one of the most sacred parts of our constitution." *Powell*, 395 U.S. at 534, n. 65 (quoting 16 Parl. Hist. Eng. 589–90 (1769)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798, 820–21 (1995) ("an aspect of sovereignty is the right of the people to vote for whom they wish" and "the right to choose representatives belongs not to the States, but to the people"). In *Thornton*, the Court explained that the "Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *Id.* at 821; *see also id.* at 791 ("[W]e recognized [in *Powell*] the critical postulate that sovereignty is vested in the people" and that they have the right to choose their representatives "freely").

This Court has therefore long recognized that, by the design of the Framers, representativeness and accountably are the heart of American democracy. This Court is now once again called upon to protect and defend these core values of our Constitution.

II. The Court Should Continue to Safeguard the People's Right to Vote Free from Election Manipulation.

The redistricting plans in North Carolina and Maryland were designed to manipulate congressional elections for partisan advantage and, therefore, reduce or eliminate citizens' ability to elect representatives whom they could hold accountable. Such behavior is antithetical to the ideals upon which the United States was founded. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), this Court has recognized its

constitutional role, under the Founders' system of checks and balances, to exercise independent oversight over the constitutionality of the acts of other branches of government: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." As the District Court stated in *Rucho*, there is "no basis to disregard that obligation here" where the issue is as fundamental as the right to free and fair elections. 318 F. Supp. 3d at 843.

Despite the fact that the North Carolina and Maryland gerrymanders are wholly inconsistent with American democratic values, Appellants and others claim that this Court is powerless to do anything about it because:

- Judicially manageable standards have not been discovered by which partisan gerrymandering can be adjudicated;
- Such cases present a non-justiciable political question; and
- Adjudicating partisan election manipulation cases would damage the status and integrity of this Court.

Amici address each of these objections in turn. None should prevent this Court from fulfilling its obligation to safeguard the American electoral system from naked partisan manipulation. While *amici* do not address which of the multiple proposed standards should be adopted by this Court, and leave it to the parties and

other briefs to address those merits questions, *amici* respectfully submit that the Court can and should hold that the partisan gerrymandering plans from North Carolina and Maryland present constitutionally justiciable questions for which the Court can and should set standards for adjudication.

A. This Court Can Develop Judicially Manageable Standards to Adjudicate Partisan Gerrymandering Claims.

The *Rucho* Appellants argue that even though the Court has consistently recognized that severe partisan gerrymanders are incompatible with core American democratic principles, it should do nothing to protect those principles, because it is too difficult to craft a sufficiently precise standard by which to resolve all future cases. *Amici* do not share Appellants' pessimism about the Court's ability to "say what the law is." *Marbury*, 5 U.S. at 177.

i. The Court routinely develops doctrinal tests and remedies to enforce the Constitution.

Judicially manageable standards for enforcing constitutional rights are rarely embedded in the text of the Constitution itself. This Court routinely frames and devises tests or standards used to implement constitutional norms. In the Equal Protection context, for example, the Supreme Court has instructed lower courts to apply differing levels of scrutiny depending on

the classifications at issue.[3] The Court has also developed context-specific formulas to evaluate particular governmental conduct under the Equal Protection Clause, such as the permissibility of facially neutral classifications that disproportionately impact minorities, or the consideration of race when creating voting districts.[4] The Court has similarly developed doctrinal tests to enforce other constitutional rights, such as the factors governing a procedural due process analysis, the totality-of-the-circumstances test that applies to a probable cause determination, the "critical stage" test for determining when the right to counsel attaches, the *Blockburger* test to determine when the Double Jeopardy Clause is implicated, and so on.[5] In First Amendment jurisprudence, the Court has created myriad tests to evaluate governmental action, including the *Brandenburg* test to evaluate

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[3] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (use of race must be justified by a compelling state interest); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (statutes of limitations applied to paternity suits must be substantially related to important governmental interests); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (where there is no constitutionally suspect classification, action must be rationally related to a legitimate state interest).

[4] *See Washington v. Davis*, 426 U.S. 229, 239–42 (1976); *Miller*, 515 U.S. at 916.

[5] *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Illinois v. Gates*, 462 U.S. 213 (1983); *Massiah v. United States*, 377 U.S. 201 (1964); *Blockburger v. United States*, 284 U.S. 299 (1932). *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 67–101 (1997).

inflammatory speech, the *Hurley* test to ascertain expressive conduct, and the tests developed to delineate the limits of free exercise, as first articulated in *Sherbert v. Verner* and later modified in *Employment Division v. Smith*.[6]

The Court has likewise been both prudent and creative when formulating remedies to constitutional violations, such as, for example, *Miranda* warnings to protect against self-incrimination, the exclusionary rule to enforce the Fourth Amendment, and the use of school bussing to accomplish desegregation.[7]

These judicially created tests and remedies were not "discovered." They took years, sometimes centuries,[8] to develop and evolve. The Court continually reviews and refines them as needed to protect the laws and liberties safeguarded by the Constitution, and to respond to modern challenges to established principles. *See, e.g.*,

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[6] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

[7] *See Miranda v. Arizona*, 384 U.S. 436 (1996); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Milliken v. Bradley*, 433 U.S. 267 (1977).

[8] It took nearly 200 years to establish the current constitutional limits on the government's power to punish speech that is "seditious" and "subversive." For example, the incitement test first urged by Judge Learned Hand in his 1917 opinion in *Masses Publishing Company v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd* 246 F. 24 (2d Cir. 1917), did not become incorporated into the Supreme Court's First Amendment jurisprudence until 1969, when it decided *Brandenburg v. Ohio*, 395 U.S. 444.

Carpenter, 138 S. Ct. at 2213–15 (advances in technology, such as "more sophisticated surveillance" and the "immense storage capacity" and tracking capabilities of cell phones, have led the Court to "expand[] [its] conception of the [Fourth] Amendment to protect certain expectations of privacy"); *United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990) (courts need to "develop" standards "for determining whether a bill is 'for raising Revenue' or where a bill 'originates,'" but finding "no reason that developing such standards will be more difficult in this context than in any other"); *Oregon v. Kennedy*, 456 U.S. 667, 675–79 (1982) (rejecting prior formulations for determining when the Double Jeopardy Clause applies and adopting a more "manageable" test). "[T]he mechanisms for orderly change" constitute the "very heart of the process by which justice can be achieved through law." Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929, 937 (1951).

These judicially created tests were not formulated with the type of precision the *Rucho* Appellants contend is required in order to be "judicially manageable." Balancing tests play a prominent role in constitutional law, despite being "incapable of precise definition or quantification into percentages because [they] deal[] with probabilities and depend[] on the totality of the circumstances." *Maryland v. Pringle*, 540

U.S. 366, 371 (2003).[9] Judicial tests also often rely upon broad notions of "fairness" and "justice."[10]

The *Rucho* Appellants argue that it will be impossible for lower courts to fairly determine "how much politics is 'too much.'" Appellants' Br. in No. 18-422 ["*Rucho* Br."] 1; *see also* Appellants' Br. in No. 18-726 ["*Lamone* Br."] 33 (casting District Court's test as "a standardless excessiveness inquiry"). But the Court has never held that legal standards must be so exact as to permit mechanical application by the lower courts. In *Reynolds*, the Court recognized it was "a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 578. The Court trusted lower courts to discharge their duty and uphold the Equal Protection Clause by ensuring that states "make an honest and good faith effort to construct districts" by applying the legal standard announced in *Reynolds*, despite the lack

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[9] *See, e.g., United States v. Banks*, 540 U.S. 31, 36 (2003) ("[W]e have treated [Fourth Amendment] reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.").

[10] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (suggesting that "fairness and justice" determine when a taking has occurred); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (the existence of personal jurisdiction turns on "traditional notions of fair play and substantial justice" (citation omitted)).

of mathematical precision. *Id.* at 577. Most recently, in *Timbs v. Indiana*, No. 17-1091, 586 U.S. ___ (2019) (slip op., at 2), the Court held that the Eighth Amendment's Excessive Fines Clause applies to state conduct, and left it to lower courts to decide when a state's civil asset forfeiture crosses the line into being "excessive" and "grossly disproportionate." The Court has always relied on the ability of the lower courts to faithfully apply guidelines and standards set forth in its decisions. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–65 (2005) (Scalia, J.) (highlighting various situations in which specific implementation of guidelines set forth by this Court is entrusted to the discretion of the lower courts and other government officials).

ii. The Court has historically rejected justiciability arguments and developed manageable standards to uphold a fair election process.

This Court is adept at creating and refining manageable standards that preserve our nation's fundamental promise of a government of, by, and for the people. It has faced similar challenges to the justiciability of cases involving elections, but has, over time, consistently concluded that its duty to protect and defend constitutional guarantees cannot be curtailed by the difficultly of the task of developing such standards.

In *Giles v. Harris*, 189 U.S. 475, 487 (1903), the Court determined that it lacked jurisdiction to intervene on behalf of a class of African Americans in

Montgomery County, Alabama who were denied the right to register to vote, because "equity cannot undertake . . . to enforce political rights . . . ." In *Colegrove v. Green*, 328 U.S. 549, 556 (1946), the Court likewise concluded that it should not "enter th[e] political thicket" and address Illinois's malapportioned congressional districts.

With time, and a deeper understanding of the consequences of nonintervention, the Court's views evolved. In *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960), the Court held that it could adjudicate claims challenging the redrawing of municipal boundaries that disenfranchised nearly all African-American residents of City of Tuskegee, by excluding them from the newly defined city.

Two years later, the Court likewise held that malapportionment cases were justiciable and not political questions. *Baker v. Carr*, 369 U.S. 186, 232 (1962). It took another two years for the Court to announce standards for adjudicating such cases. *Wesberry*, 376 U.S. at 7–8; *Reynolds*, 377 U.S. at 577. The Court continued to refine those standards in cases such as *Fortson v. Dorsey*, 379 U.S. 433 (1965), *Gaffney v. Cummings*, 412 U.S. 735 (1973), and others. In addition to the malapportionment cases, the Court continued to redress racial gerrymandering by rejecting plans that draw district lines that dilute voting power based on the race of voters. *See, e.g., White*, 412 U.S. at 765–70.

Thus, the Court has often considered how manipulation of elections undermines American democracy and proceeded, step by step, to develop

standards for adjudicating such cases. Over time, the Court provided manageable guidance in malapportionment cases and remedies for racially motivated attacks against participation in elections. Partisan election manipulation is amenable to exactly the same treatment.

In *Fortson v. Dorsey*, the Court recognized that a redistricting scheme may not "comport with the dictates of the Equal Protection Clause" if it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439. Years later, in *Davis v. Bandemer*, 478 U.S. 109, 124 (1986), the Court reaffirmed the justiciability of partisan gerrymanders and the Court's role in ensuring that "each political group in a State should have the same chance to elect representatives of its choice as any other political group." A plurality concluded, however, that the Indiana Democrats challenging that gerrymander had failed to prove an Equal Protection violation. *Id.* at 136.

Fifteen years ago, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a majority of the Court declined to disturb the central justiciability holding of *Bandemer*. In a controlling concurrence, Justice Kennedy held that, despite the justiciability of their claims, the appellants could not prevail because "in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights . . . ." *Id.* at 313. Yet all of the Justices reaffirmed that "severe partisan gerrymanders," as Justice Scalia, writing for the

plurality, phrased it, threaten basic democratic values. *Id.* at 292, 311–312, 317, 331, 356.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court recognized the need to "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." 135 S. Ct. at 2672. There is a conflict of interest "inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *Id.* (alterations in original) (citation omitted). That conflict of interest undermines the core values of representativeness and accountability that the Constitution was designed to ensure.

Most recently, in *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018), the Court took another step toward "safeguard[ing] against manipulation of electoral rules[,]" *Arizona State Legislature*, 135 S. Ct. at 2672, by providing guidance for establishing standing in challenges to partisan gerrymanders. The *Rucho* and *Lamone* cases now present the Court with the opportunity to advance the work this Court has already begun by articulating standards for adjudicating such claims.

iii. Judicially manageable standards for adjudicating a partisan gerrymandering claim exist.

Modern technological advances, most notably the use of computerized analysis of voting patterns, have allowed partisan election manipulation to become more extreme and durable in its entrenchment of those in

power, whether by way of the Republican gerrymander in *Rucho* or the Democratic gerrymander in *Lamone*. Armed with these tools to all but ensure permanent entrenchment that overrides the will of their constituents, the *Rucho* Appellants ask this Court to permanently foreclose judicial review. They argue that because the Court has not yet agreed upon a legal standard, it will never be able to do so.

However, as Justice Kennedy emphasized in his concurrence in *Vieth*, the passage of time is not a basis for determining that no judicially manageable standards can exist: "by the timeline of the law 18 years is rather a short period" since the Court had issued its decision in *Bandemer*, and the fact that the lower courts did not discover a better standard during that time only reflects the fact that "the lower courts could do no more than follow *Davis v. Bandemer* . . . ." 541 U.S. at 312. Justice Kennedy explained that Appellants' heavy burden is not just to prove that a claim currently has no workable standard, but to prove the "categorical negative" that "no standard could exist." *Id.* at 311.[11] Appellants can make no such showing here.

Both the *Rucho* and *Lamone* District Courts did precisely as Justice Kennedy asked: they developed

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[11] As the *Rucho* District Court observed, "[A] majority of the Supreme Court never has found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." 318 F. Supp. 3d at 842, n.19.

workable and replicable legal standards.[12] *Rucho*, 318 F. Supp. 3d, at 866–67, 949, 950; *Lamone*, 348 F. Supp. 3d at 515. They did so armed with tools that the *Bandemer* and *Vieth* courts did not have: The very same technology (computers, sociological methods, statistical analysis, metrics to measure partisan symmetry, etc.) used to gerrymander for partisan advantage can also be used to determine the existence of such partisan gerrymandering, measure its impact, and adjudicate these claims. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 805 (Dr. Hofeller created the "aggregate variable" "to predict partisan performance" in North Carolina); *Lamone*, 348 F. Supp. 3d at 503 (Mr. Hawkins used the "Democratic Performance Index" to predict partisan performance in Maryland).

Judicially manageable standards to adjudicate severe partisan gerrymandering not only exist, but have been articulated by the District Courts in their opinions below, which draw directly from this Court's teachings. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 929 (partisan gerrymander violates the First Amendment when: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the

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[12] In fact, legal standards for adjudicating partisan election manipulation cases have been articulated under the Equal Protection Clause, the First Amendment, and § 2 and § 4 of Article I. The *Rucho* Appellants argue that this multiplicity of theories, combined with this Court's failure to adopt a controlling test, means that there can never be a single legal test for adjudicating such claims. *Rucho* Br. 47. In doing so, they ignore that an action can, of course, be unconstitutional for multiple reasons.

districting plan in fact burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan"); *id.* at 861 (partisan gerrymander violates the Equal Protection Clause if (1) it was passed with "discriminatory intent," and (2) it produces "discriminatory effects," that (3) cannot be attributed to "another legitimate redistricting objective"). These standards are comparable in scope, substance, and manageability to other tests adopted by this Court. This process—lower courts expanding upon and developing the teachings of this Court—is entirely consistent with the way legal tests and standards develop through constitutional and common law jurisprudence.

If, however, this Court finds that the District Courts applied erroneous standards, the remedy should be to correct the standard and remand for further proceedings. The Court need not choose between demanding an unrealistic level of "precision" and concluding that no meaningful standard can possibly exist. "Abdication of responsibility is not part of the constitutional design." *Clinton v. New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

iv. The Court can provide guidance on the types of evidence that can be used to establish an unconstitutional partisan gerrymander.

Judicially manageable tests should not be confused with the types of evidence used to prove a violation of these standards. As is evident from the robust record below, there is a great deal of sophisticated evidence that can be used to provide proof of unconstitutional election manipulation, such as the efficiency gaps, computer models, and technical tools used to create the gerrymander; evaluations of partisan asymmetry; etc. Indeed, it is the advances in technology that both make partisan gerrymandering such a threat to democracy and that distinguish the recent spate of cases from the Court's previous consideration of the issue.

Modern redistricting software enables pinpoint precision in designing districts, allowing mapmakers to render extreme and durable partisan districts that still conform to traditional districting requirements, such as contiguity and compactness. But these same advancements in technology can provide objective evidence of what entrenched legislators intended to achieve when drawing these maps, and how successful they were in achieving their partisan goals.

In *Rucho*, for example, the District Court found that the empirical analyses plaintiffs relied on

> provide *evidence* that the 2016 Plan violates a number of well-established constitutional standards—that the government act impartially,

> not infringe the right to vote, not burden individuals based on the exercise of their rights to political speech and association, and not allow state legislatures to dictate electoral outcomes or interpose themselves between the voters and their representatives in Congress.

318 F. Supp. 3d at 853 (emphasis in original). This Court "long has relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law[,]" particularly in the Equal Protection context. *Id.* (emphasis in original).

To the extent that the Court has concerns about the reliability or relevance of certain types of evidence offered by litigants to prove (or disprove) that a legal standard has been met, the solution is to provide guidance about what kind of evidence is most material or probative. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . Departures from the normal procedural sequence might also afford evidence that improper purposes are playing a role."). Through such guidance, this Court can "promote the equal treatment of like cases, enhance predictability, foster judicial restraint by limiting judges' discretion, and encourage judicial steadfastness by providing judges a 'solid shield' when they resist popular pressures." Richard H. Fallon, Jr., *Judicially Manageable Standards & Constitutional Meaning*, 119 Harv. L. Rev. 1275, 1284, n. 34 (2006) (citing Antonin

Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-80 (1989)).

B. Adjudication of Severe Partisan Gerrymanders Is Not Barred by the Political Question Doctrine.

The *Rucho* Appellants argue that "the framers delegated the delicate task of federal oversight of state regulations concerning congressional elections to Congress, not federal courts" and that this delegation means the courts have no role to play. *Rucho* Br. 31. This argument misstates the respective roles of the co-equal branches of government. The states have the authority to choose the time, place, and manner of elections; Congress has the authority to make laws regulating such activities; and the judiciary has the authority to determine whether such activities comport with the Constitution. This responsibility has rested with the federal courts since *Marbury v. Madison*. 5 U.S. at 177–78 ("It is emphatically the province and duty of the judicial department to say what the law is. . . . The judicial power of the United States is extended to all cases arising under the constitution.").

Appellants are attempting to re-litigate precisely the arguments rejected in *Baker v. Carr*, and in numerous cases since. As stated in *Baker*:

> An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature. The first cases involved the redistricting of States for the purpose of electing Representatives to the Federal Congress. When

> the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, s 4, of the Federal Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction . . . .

369 U.S. at 201. *Baker* established that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'" *Id.* at 209 (citation omitted).

This Court again considered and rejected such arguments in *Reynolds v. Sims* when it held: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." 377 U.S. at 566. The same argument was also rejected in *Wesberry v. Sanders*: "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." 376 U.S. at 7.

As discussed above, the intent and effect of the partisan gerrymanders at issue was to undermine the ability of North Carolina's and Maryland's citizens to elect accountable representatives. It therefore endangers the American concept of governmental power derived from the consent of the governed. Over fifty years ago, the Court provided judicial review for a redistricting claim because "a denial of constitutionally protected rights demands judicial protection . . . ." *Reynolds*, 377 U.S. at 566. For the more than fifty years since *Reynolds*, the Court has consistently

reaffirmed its jurisdiction to determine whether a manipulation of the electoral process violates the Constitution.[13]

The Court should not cast aside such long-standing constitutional protections of our electoral processes. The need for judicial protection is just as critical today in these cases. Severe partisan gerrymanders cannot be resolved by the democratic political process, because, by their very nature, they subvert the democratic political process. Without this Court's intervention, our system will devolve into precisely what our Founders declared our independence from: government administered by an entrenched ruling class, rather than by the consent of the people.

C. Judicial Inaction in Partisan Election Manipulation Cases Would Damage the Status and Integrity of the Court.

At oral argument in *Gill v. Whitford*, Chief Justice Roberts articulated what he perceived to be the "main problem" with partisan election manipulation cases: The Court will be perceived as picking one political party or the other in each individual case, thus enmeshing itself in political elections and causing "serious harm to the status and integrity of the decisions of this Court in the eyes of the country." Tr. of Oral Arg. 36–38, 138 S. Ct 1916 (2018).

Amici have no interest in enlisting the Court in determining election outcomes. Instead, *amici* ask the Court to enforce the rules of elections so that they are

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[13] *See Rucho*, 318 F. Supp. 3d at 847 (collecting cases).

conducted in a manner consistent with the Constitution. The citizens of the United States view the Court, and *amici* believe that the Court views itself, as obligated to safeguard the rule of law and to protect citizens' constitutionally guaranteed political rights against politicians' attempts to render those rights meaningless. As this Court recognized in *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973): "[V]oting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government." Claims of election manipulation have long been understood to be justiciable, not because the Courts have a right to interfere with elections, but because they have a duty to protect elections from interference.

Moreover, *amici* respectfully submit that inaction by the Court would run the same risk. The concern about the perception of the Court enmeshing itself in political elections must be balanced against the countervailing concern that the Court may suffer similar serious harm to its status and integrity if it is perceived as incapable of safeguarding the most fundamental cornerstone of republican democracy: free and fair elections untarnished by naked partisan manipulation. The Maryland and North Carolina gerrymanders come before the Court together, each major political party complaining of severe partisan gerrymandering by the other. The Court is not being asked to "pick[] one political party or the other." Both parties agree that partisan gerrymandering is

improper, at least when they find themselves on the losing end of such a gerrymander. Nevertheless, given the current legal uncertainty, each party continues to employ the practice when it believes it can benefit from it, and will bring claims when it is negatively impacted.

Setting legal standards for adjudicating these claims will reinforce this Court's role as an independent and nonpartisan arbiter. The Court will not be siding with one political party or the other, but siding, as it always must, with the core American value of ensuring a free and fair election process that fulfills the promise of a government by the consent of the governed.

Adjudicating these cases is unlikely to result in an "onslaught of litigation," as the *Rucho* Appellants suggest. *Rucho* Br. 1. It is precisely the lack of such standards that has prompted the recent slew of partisan gerrymandering cases. As occurred in other election manipulation cases, once this Court sets appropriate standards, efforts will be made to comply with those standards. For example, after the Court articulated the "one person, one vote" standard in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), Georgia could have modified the County Unit System, but instead chose to move to using a simple popular vote system in primary elections. States have made similar efforts to comply with the racial gerrymandering standards articulated in *Shaw v. Reno* and *Miller v. Johnson*.

Similar effects have been seen in other areas: efforts at education integration following *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955); the development of

standard warnings to criminal defendants after *Miranda v. Arizona*, 384 U.S. 436 (1966). Here, the knowledge that their redistricting plans will be subject to judicial review will counterbalance legislators' impulse to gerrymander for their own partisan benefit. The risk of having their redistricting plans struck down as unconstitutionally partisan will make partisan gamesmanship less likely.

III. This Court Should Declare the North Carolina and Maryland Gerrymanders Unconstitutional To Ensure That the American Promise of Representative Democracy Is Fulfilled.

The records in the two cases before the Court make clear that these partisan gerrymanders present exactly the type of redistricting schemes that violate core American democratic values of representativeness and accountability. By their own admission, the drafters of these plans sought to put their own political preferences ahead of the political will of the people. In the judgment of the drafters in North Carolina, "electing Republicans is better than electing Democrats." *Rucho*, 318 F. Supp. 3d at 809. The drafters in Maryland "set out to draw the borders in a way that was favorable to the Democratic party." *Lamone*, 348 F. Supp. 3d at 502. Such plans serve only to "subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Legislature*, 135 S. Ct. at 2658, and for the reasons explained in the decisions below, were properly deemed unconstitutional.

If this Court fails to set limits on partisan election manipulation schemes like North Carolina's 2016 Plan or Maryland's 2011 Plan, the promise of government by the people enshrined in the Declaration of Independence, the Constitution and the Gettysburg Address will suffer greatly. Because the very nature of the problem is a political system that has been rigged to resist the will of the people as expressed in elections, and because partisan election manipulation offends basic constitutional rights and principles, this Court is uniquely positioned as the only American institution that carries both the ability and the responsibility to safeguard our foundational American democratic ideals.

At Gettysburg, President Lincoln encapsulated the vision of our Founders as a "government of the people, by the people, for the people." It now falls to this Court to ensure that a "nation so conceived and so dedicated, can long endure."

CONCLUSION

The judgments of the courts below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: List of *Amici Curiae*

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all backgrounds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Its founding charter, which proclaimed that ADL's mission would be "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens," guides ADL's work to this day. ADL believes that the Constitution requires that each person in our nation receive equal treatment under the law, and that severe partisan gerrymanders undermine the right of every voter to have a meaningful say in the democratic political process.

The **County of Santa Clara** ("County") is a charter county organized and existing under the laws of the State of California. Its mission is to protect the health, safety, and welfare of 1.9 million County residents. As an entity subject to federal law, as well as a governmental entity with a responsibility to protect the welfare of its residents, the County has a strong interest in promoting and protecting core democratic principles at the local and national levels. The County also administers local, state, and federal elections.

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics, to ensure the integrity and fairness of our elections and government decisions, and to promote citizen

participation in the political process. It supports campaign finance, voting, redistricting and other political reforms to ensure that American democracy is representative and accountable, conducts public education efforts for these ends, participates in litigation involving the constitutionality and interpretation of campaign finance and other democracy reform laws, and works for the proper and effective implementation and enforcement of those laws. Democracy 21 has participated as counsel or *amicus curiae* in many cases before this Court involving the constitutionality of campaign finance and other government reform laws.

Demos is a national public policy organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. Demos works to advance voting rights and curb the undue influence of big money in politics, in addition to promoting economic opportunity and racial equity. Severe partisan gerrymandering undermines Americans' right to full and equal participation in our democracy, and therefore directly threatens Demos' goals. Demos has regularly submitted briefs as *amicus curiae* to this Court, and appeared as counsel before the Court in the October 2017 Term in *Husted v. A. Philip Randolph Institute*, No. 16-980.

Friends of the Earth ("FoE") is a non-profit organization, founded in 1969, with offices in Washington, D.C. and Berkeley, California. FoE has close to 300,000 members in all 50 states. FoE's mission is to defend the environment and champion a healthy and just world. FoE works to create, maintain,

and enforce stronger and more effective environmental laws and policies. As part of that mission, FoE's democracy campaign fosters more responsive democratic political institutions by opposing (a) gerrymandering and voter suppression methods that suppress the voice of American voters, and (b) the use of unrestricted money in politics to unfairly influence the public agenda, especially environmental concerns.

The **Government Accountability Project** ("GAP") is a non-profit, non-partisan public interest organization that promotes government and corporate accountability by litigating whistleblower cases, publicizing whistleblowers' concerns, and developing legal reforms to support the rights of employees to use speech rights to challenge abuses of power that betray the public trust. Representative democracy, like whistleblowing, is a mechanism to promote institutional accountability. Severe partisan gerrymandering undermines a functional and fair government accountable to the people. GAP, as an organization committed to protecting civil society from the effects of an unaccountable government—corruption, illegality, abuses of authority, and dangers to public health, safety and the environment—joins this brief.

The **League of Women Voters, Maryland Chapter** ("LWVMD") is a nonpartisan, nonprofit corporation organized under the laws of the State of Maryland. LWVMD works with and through 16 local leagues around the state and is part of the League of Women Voters of the United States, which has 700

state and local leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. LWVMD reaches more than 375,000 residents annually and works to expand informed, active participation in state and local government, giving a voice to all Marylanders. LWVMD joins this brief solely with respect to the *Lamone v. Benisek* case, since the League's state affiliate is a party in the *Rucho* case.

The **National Council of Jewish Women** ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with its Principles and Resolutions, NCJW joins this brief.

The **National Federation of Democratic Women** is a grassroots organization giving voice to women in the Democratic Party. It is made up of member states who have statewide organizations recognized by their state party and who adhere to the bylaws of the NFDW in conformity with the Democratic National Committee. Its mission is to unite Democratic women, cultivate Democratic women candidates and activists, and support candidates and elected officials who advocate for the rights of women and the ideals of the Democratic Party.

The **North Carolina Justice Center** is a leading research and advocacy nonprofit organization. Its mission is to eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services and fair treatment it needs to achieve economic security. Achieving its mission requires the full and free participation of all North Carolinians in our democracy. The Justice Center joins in this brief because severe partisan gerrymandering burdens its efforts to create a North Carolina that works for all.

OneVirginia2021: Virginians for Fair Redistricting ("OneVirginia2021") is a nonprofit corporation organized to initiate a comprehensive effort to remove partisan gerrymandering from the redistricting process in Virginia. OneVirginia2021 pursues reform through public education, participation in litigation, and other means. Severe partisan gerrymandering undermines our democratic institutions, weakens the rule of law, violates the rights of citizens to Equal Protection, and allows the government to disadvantage voters whose political views differ from those of incumbent legislators. OneVirginia2021 is committed to electoral districts that fairly represent the viewpoints of all voters, no matter where they fall on the political spectrum.

The **Southern Poverty Law Center** is a nonprofit civil rights organization dedicated to advancing and protecting the voting rights of all citizens, especially racial minorities and those living in economically disadvantaged communities. The SPLC advocates on behalf of individuals and groups to help ensure their

full and equal participation in our democracy, including at the state and other local levels. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. The organization's lawsuits have toppled institutional racism in the South, and it continues to work towards expanding the franchise to those traditionally excluded from the political process based on their race, color, national origin, and economic status. As part of its work, SPLC has filed multiple *amicus curiae* briefs in the Supreme Court of the United States and the United States Courts of Appeals.

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BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE[1]

Amici curiae are current and former Members of the House of Representatives from both major political parties—20 Republicans and 20 Democrats. Amici hail from over 20 States, representing every corner of our Nation: from Florida to Maine; from the Great Lakes to the Great Plains to the West Coast and in between. Despite many political and regional differences, amici are united in the belief that, in our system of government, power flows from the People to their political representatives and not the other way around. Amici are equally united in the belief that removing the most extreme forms of partisan manipulation from the legislative redistricting process is essential to ensuring principled and constituent-first representation.

Amici understand the nature of the redistricting process from first-hand experience. They know what it means to represent the people of a community in what Madison called the "popular branch" of our federal government, and they have seen first-hand how districting decisions affect the incentives a Member experiences. Amici hope that by describing their experiences they will help the Court understand why basic, enforceable constitutional limits on extreme partisan gerrymanders will make Congress better serve the People and thus more faithfully fulfill its constitutional role.

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made any monetary contribution to its preparation and submission. All parties have filed blanket consents with the Court.

Amici are the following Members and former Members of the U.S. House of Representatives, in alphabetical order:

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2. Rep. Don Beyer (D-Va.)
3. Fmr. Rep. Rod Blum (R-Iowa)
4. Rep. Earl Blumenauer (D-Or.)
5. Rep. Brendan Boyle (D-Penn.)
6. Fmr. Rep. William Brock (R-Tenn.)
7. Fmr. Rep. Russ Carnahan (D-Mo.)
8. Fmr. Rep. Mike Castle (R-Del.)
9. Fmr. Rep. William Clinger (R-Penn.)
10. Rep. Jim Cooper (D-Tenn.)
11. Fmr. Rep. Carlos Curbelo (R-Fla.)
12. Rep. Ted Deutch (D-Fla.)
13. Fmr. Rep. Vic Fazio (D-Cal.)
14. Rep. Brian Fitzpatrick (R-Penn.)
15. Fmr. Rep. Dan Glickman (D-Kan.)
16. Rep. Josh Gottheimer (D-N.J.)
17. Rep. Raul Grijalva (D-Ariz.)
18. Fmr. Rep. Richard Hanna (R-N.Y.)
19. Rep. Andy Harris (R-Md.)
20. Fmr. Rep. David Jolly (R-Fla.)
21. Rep. Marcy Kaptur (D-Ohio)
22. Rep. Dan Kildee (D-Mich.)
23. Rep. Peter T. King (R-N.Y.)

24. Fmr. Rep. Steven Kuykendall (R-Cal.)
25. Fmr. Rep. Larry LaRocco (D-Idaho)
26. Rep. Dave Loebsack (D-Iowa)
27. Rep. Alan Lowenthal (D-Cal.)
28. Fmr. Rep. Pete McCloskey (R-Cal.)
29. Rep. Greg Meeks (D-N.Y.)
30. Fmr. Rep. Connie Morella (R-Md.)
31. Rep. Chellie Pingree (D-Maine)
32. Rep. Tom Reed (R-N.Y.)
33. Fmr. Rep. Claudine Schneider (R-R.I.)
34. Fmr. Rep. Chris Shays (R-Conn.)
35. Fmr. Rep. Peter Smith (R-Vt.)
36. Fmr. Rep. Olympia Snowe (R-Maine)
37. Rep. Thomas Suozzi (D-N.Y.)
38. Fmr. Rep. Richard Swett (D-N.H.)
39. Fmr. Rep. Zach Wamp (R-Tenn.)
40. Fmr. Rep. Lynn Woolsey (D-Cal.)

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, addressing an annual gathering of the Republican Governors Association, President Ronald Reagan decried partisan gerrymandering. President Reagan explained that what the country needed was "an end to the antidemocratic and un-American practice of gerrymandering congressional districts."[2] He was right. Yet, three decades later, amici and their constituents continue to experience the corrosive effects of partisan gerrymandering. Since President Reagan's call to action, both major political parties have used partisan gerrymandering with ever-greater frequency and efficiency, hurting voters of all stripes and undermining faith in our institutions of government. Amici therefore believe that the need is greater than ever to enforce basic constitutional boundaries on the worst forms of partisan gerrymandering.

This brief makes three overarching points.

First, extreme partisan gerrymandering harms our political system, and harms the functioning of the House of Representatives in particular. It puts raw partisan position ahead of the maintenance of coherent political communities and sensibly shaped districts based on traditional districting criteria. A cascade of negative results follows: artificially drawn "safe" districts tend to make general elections less competitive and give party insiders, or small groups of "base" primary voters, much greater influence than the general electorate; political parties gain power to obstruct independent, constituent-first representation; compro-

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[2] Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987).

mise becomes politically impossible even when Representatives on both sides of the aisle share areas of principled agreement and even when the voters want it; and the People grow frustrated with the capacity of the House to govern effectively, causing disillusionment with and disengagement from our democratic processes.

Second, extreme partisan gerrymandering cannot be reconciled with the Framers' conception of the House of Representatives as directly accountable to the People. The premise of extreme partisan gerrymandering is that politicians choose their voters rather than voters choosing their representatives. That stands on its head the Framers' understanding that the House was to be the institution most directly connected to and representative of the People themselves.

Third, this Court has a crucial role to play in fixing the problem. The cycles of extreme partisan gerrymandering are self-perpetuating, with partisanship and mistrust begetting still greater partisanship and mistrust. This Court's role in our constitutional order includes safeguarding the fundamental predicates of the political process when necessary. The modicum of judicial involvement required here—recognizing basic constitutional safeguards against the worst partisan gerrymanders—will allow the political process to begin to correct itself. Such involvement is fully consistent with the Court's constitutionally assigned role.

Partisan gerrymandering makes it more difficult for Members to do the one job voters expect above all: delivering results for their constituents. We can and must do better.

ARGUMENT

I. Extreme Partisan Gerrymandering Undermines The Healthy Functioning Of The House

Members of the House must be free above all else to follow the desires of their constituents. But partisan gerrymandering creates obstacles to that fundamental pursuit. It subverts traditional districting criteria that tie members to coherent political communities. It undercuts the types of principled, bipartisan or nonpartisan cooperation that most voters crave. And it makes the People feel like their government is rigged against them.

A. Partisan Gerrymandering Subverts Traditional Districting Criteria

Traditional districting principles, such as compactness, regularity, and maintenance of communities of interest, have long played a critical role in fostering coherent political communities with shared identities, concerns, and interests. *See, e.g.*, *Evenwel* v. *Abbott*, 136 S. Ct. 1120, 1124 (2016). Extreme partisan gerrymandering subverts these traditional principles and the local identities and communities they respect and promote. By definition, the dominant consideration in a partisan gerrymander is benefit to the party drawing the lines, even at the expense of the needs of existing communities.

Traditional districting principles help ensure that districts have coherent geographic and political identities, and thus help maintain a deep connection between a Member and his or her constituents. As Representative Scott Tipton, Republican of Colorado, has explained, it is important for a district to have coherent identity. Discussing his district, Representative Tipton said that issues affecting the state's rural communities,

such as water issues, give his district a common language and an "essence."[3] Representative Tipton credits the strong identity of his district as encouraging political competition and warding off needless partisanship. In Colorado's Third Congressional District, he explained, "we've elected Republicans, we've elected Democrats." "[I]rrespective of ... heritage," "irrespective of geography," "irrespective of party[:] we elect the person."[4]

Traditional districting criteria also aid effective representation by helping Members work more effectively with local officials in serving their constituents.[5] In Colorado, that might mean working with county governments, which administer major federal programs such as Medicaid and food stamps.[6] In other States, those principles might ensure strong relationships with the cities and towns that are included within a Member's district.

Without constitutional limits on partisan gerrymandering, traditional districting principles can be subverted whenever a single political party gains control of the redistricting process and seeks to maximize its political advantage no matter the cost. *See, e.g.*, *League of United Latin Am. Citizens* ("*LULAC*") v. *Perry*, 548 U.S. 399, 481 (2006) (Stevens, J., concurring in part and dissenting in part) (political gerrymander-

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[3] Tr. of Testimony of Rep. Scott Tipton ("Tipton Tr.") 1321, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 17, 2011).

[4] *Id.* at 1334, 1338.

[5] *E.g.*, Tr. of Testimony of Rep. Michael Coffman (R-CO) 2573-2574, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 21, 2011).

[6] *Id.* at 2572.

ing "subordinate[s] traditional politically neutral districting principles ... to political considerations." (original brackets omitted) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995))). A map drawn solely to achieve partisan ends undermines the benefits that come from compact districts that respect existing geographic and political boundaries such as county lines.

Consider, for example, Representative John Shimkus, Republican of Illinois. The 2011 redistricting process dramatically changed his district. Representative Shimkus's hometown of Collinsville, with a population of just 25,000, was divided among three congressional districts.[7] And the area of his district was massively expanded to include all or part of *33 counties*. This geography makes it much more difficult for Representative Shimkus to interact with constituents across the district—nearly impossible, for example, to hold town halls in every community across the district in the same way that he could in a district that was drawn using traditional principles.[8]

Or consider amicus Representative Andy Harris, Republican of Maryland. Representative Harris's district had long been centered on Maryland's Eastern Shore, a coherent geographic, economic, and cultural region defined by the Chesapeake Bay, which separates it from the rest of the state. In 2010, as part of a map

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[7] Pearson, *House Members Blast Illinois' New District Map in Court*, Chi. Trib. (Nov. 18, 2011).

[8] *See also* Steinhauer, *Hello, Illinois? Your Congressman Is Getting Off the Phone*, N.Y. Times (Apr. 24, 2012) (former Rep. Tim Johnson (R-IL) lamenting that Illinois' "grossly gerrymandered congressional map" would have forced him into a district in which "two-thirds of the voters have never been represented by" him).

that was later challenged in one of the cases now before the Court, 135,000 people from areas on the Bay outside of Annapolis and Baltimore were pulled out of the district and replaced by about 115,000 people in north central Maryland, a landlocked area on the other side of Baltimore along the Pennsylvania border. This change served partisan ends—*i.e.*, packing a higher percentage of Republican voters into Representative Harris's district—by diluting the district's coherent, Eastern-Shore-based identity.[9]

Districting changes that interfere with the relationships between Members and the communities they serve are not fair to anyone—and especially not to the voters.[10]

Traditional districting considerations are meant to reinforce the role of representatives as leaders in and members of particular political and geographic communities. That is how representation works best in our democracy. As Madison wrote, a Representative should possess "a local knowledge of their respective districts" and remain "acquainted with the interests and circumstances of his constituents." Federalist No. 56. Representative Tipton echoed that idea in discuss-

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[9] Johnson, *Is This How Maryland's 3rd Congressional District is Supposed to Look?*, Wash. Post (Sept. 21, 2014).

[10] Partisan gerrymanders also frequently lead to incumbents running in what are effectively new districts drawn with no particular goal beyond partisan ends. Sometimes that means that two incumbents' districts have been smashed together, eliminating established political communities and forcing experienced Representatives to run against one another. *See* Iyer, *Redistricting and Congressional Control Following the 2012 Election*, Brennan Center for Justice (Nov. 28, 2012) (finding that, in 2012, 40 incumbents, evenly split by party, left office at least in part due to districting changes).

ing how he got into politics. He was taught that there is a "public responsibility to participate," which means citizens going to "precinct caucuses and county assemblies, because that's how the process works. You had an opportunity to be able to see who was going to cast your vote in the state legislature and Congress and the city council."[11]

Traditional districting principles reflect that sense of participation and community identity. But extreme partisan gerrymanders sacrifice those values in favor of whatever map will most benefit the party in power.[12]

B. Partisan Gerrymandering Devalues Pragmatic Problem-Solving And Constituent-First Representation In The House

Extreme partisan gerrymandering also rewires a district's internal political dynamics—pushing Members towards the ideological poles, encouraging Members to eschew principled, bipartisan compromise, and transferring power from voters to political parties. These shifts undercut the cardinal rule of serving as a representative of the People: Standing with one's constituents, regardless of the partisan calculus.

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[11] Tipton Tr. 1315.

[12] As Representative Rodney Davis (R-IL) has explained, extreme partisan gerrymanders make it unnecessarily difficult to "form districts that better reflect the interests of [the] citizens." Press Release, Rep. Alan Lowenthal, *Congressman Lowenthal Leads Bipartisan Amicus Brief to Supreme Court Defending Voters' and States' Rights* (Jan. 26, 2015).

1. Partisan gerrymandering creates artificially uncompetitive districts

One of the most baleful consequences of extreme gerrymandering is that it entrenches "safe" districts, that is, districts in which general elections are rendered uncompetitive due to partisan line-drawing. This is achieved through "packing" a disfavored party's supporters into a small number of districts, thus creating majorities for the dominant party in many or all of the remaining districts and thus "cracking" the disfavored party's support in those districts. Regardless of the statewide totals, the line-drawing party can use these techniques to make itself the presumptive victor in a majority of the state's districts. As a result, as amicus former Representative Rod Blum, Republican of Iowa, explained, in the 2016 election cycle "you probably ha[d only] 25-35 congressional districts that [we]re actually competitive."[13] Amica former Senator and Representative Olympia Snowe, Republican of Maine, was even more pessimistic in advance of the 2014 elections, explaining that "as few as seven seats are considered to be tossups in this election" due largely to partisan gerrymandering.[14]

Representatives Mike Gallagher (R-WI) and Ro Khanna (D-CA) have explained that politicians should not be "allowed to gerrymander their districts and choose their own voters" in this manner precisely because "[t]he less competitive a district becomes, the

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[13] Burke, *Rep. Rod Blum: I'll Walk the Walk on Term Limits*, Newsmax (May 29, 2015).

[14] Fleury & Wright, *A Chat With Olympia Snowe*, Downeast (Oct. 2014).

more general elections become formalities."[15] In a "safe" district, with the general election result foreordained, the focus of political activity shifts to the primary election of the dominant party. Power thus shifts from the general electorate to party insiders with influence over the nomination process and to lower-turnout primary elections that principally attract a relatively small number of "base" voters.[16] As a result, as amicus Representative Earl Blumenauer (D-OR) explained in an op-ed with then-Representative Jim Leach (R-IA), "[p]rimary elections in districts that are overwhelmingly Republican produce candidates generally to the right of the average Republican, while more liberal Democrats usually emerge from primaries in districts that are overwhelmingly Democratic."[17]

The elevation of primaries over the general election can effectively make Representatives responsive to a minority rather than a majority of voters in their districts. As Representatives Darin LaHood (R-IL) and Dan Lapinski (D-IL), explained in 2017, "as a result

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[15] Gallagher & Khanna, *Two congressmen offer a bipartisan plan to 'drain the swamp'*, Journal Sentinel (June 1, 2017).

[16] *See* Tarr & Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Rather, legislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system.").

[17] Blumenauer & Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003); *see also, e.g.*, Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (2005) ("[P]oliticians who are elected to office only have to cater to voters from one party, and such politicians—either out of conviction or out of political prudence—tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected.").

of years of gerrymandering congressional districts, some of our elected public servants are winning their offices by a minority of a minority of a minority."[18] This dynamic can change Members' political incentives. A Member in a "safe" district has strong incentives to appeal to party insiders, or to highly partisan primary voters who hold the key to re-election. As Representative David Price (D-NC) noted, those incentives "really affect[] the way members behave once they come [to Congress]. I've heard some guys say they might be more moderate, but they just can't be .... It all adds up to pretty extreme behavior. The gerrymandering really exacerbated that."[19]

The result is a phenomenon that amici see all too often: intense pressure to be driven by partisanship over all other considerations, leaving more moderate voters—voters from the party that drew the district lines, independent voters, *and* voters from the disfavored party (including those who could have been cross-over voters)—feeling voiceless and unrepresented in the House.[20] Amicus Representative Jim Cooper

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[18] *Congress of Tomorrow Project - Introduction*, Congressional Institute.

[19] Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017).

[20] This Court has recognized a similar dynamic in the context of racial gerrymandering. *Cf. Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) ("When a district obviously is created solely to effectuate the perceived common interests of one [] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."). So have prominent legal scholars. *See* Levinson & Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2335 (2006) ("The absence of a general election

(D-TN) laid bare the broad scope of the problem: Gerrymandering, he explained, "is not only unfair to independent voters, but *all voters*, because it creates a Congress of highly-partisan representatives when most Americans are centrists."[21]

Competitive districts, by contrast, tend to produce more constituent-centered representation. A competitive district, as Representative David Joyce (R-OH) has explained, "forces you to evaluate each piece of legislation and not just answer to the fringes of the parties."[22] Winning in a politically competitive district demands that Members actively engage with, and craft policy positions designed to help, a broad cross-section of their constituents from across both parties.[23] Former Representative Steve Pearce, also a Republican, noted that representing his competitive New Mexico

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threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners."); *see also* Tarr & Williams, *Introduction*, 37 Rutgers L.J. at 878 ("Partisan gerrymandering encourages extreme partisanship and extreme positions.").

[21] Press Release, Rep. Jim Cooper, *Cooper, Tanner Work to Stop Gerrymandering* (Apr. 21, 2010) (emphasis added).

[22] Akron Beacon Journal Staff, *Ohio's 14th Congressional District race: Andrew Jarvi, Dave Joyce, Michael Wager*, Akron Beacon Journal (Oct. 19, 2016).

[23] *See* Adams, *Toward a System of "Fair and Effective Representation": A Common Cause Report on State and Congressional Reapportionment* 24 (1977) ("Safe districts remove the incentive to grant political concessions to constituent interests ... or create electoral coalitions [that] ensure representation of diverse points of view."); Raviv, *Unsafe Harbors*, 7 U. Pa. J. Const. L. at 1068 (arguing that safe districts encourage polarization in decisionmaking bodies).

district meant he needed to "talk to a lot of Democrats" and to "go into areas that have never seen a Republican."[24] In those more competitive districts, Members must actively work to represent their whole constituency, and citizens reciprocate with more robust civic engagement.

For those same reasons, Members from more competitive districts are also freer to drive efforts to develop pragmatic results for constituents. Amici Republican Representative Tom Reed of New York and Democratic Representative Josh Gottheimer of New Jersey, for example, co-chair the Problem Solvers Caucus, which, as its name suggests, is designed to overcome partisan polarization and deliver practical solutions for the American people.[25] Similarly, amicus former Republican Representative Carlos Curbelo co-chaired the bipartisan Climate Solutions Caucus, which explores policy solutions designed to address the impacts of our changing climate, with his fellow amicus Florida Democratic Representative Ted Deutch.[26]

Representative Will Hurd (R-TX) perhaps best summed up the benefits of competitive districts in July 2017 when he said: "My district is competitive, and

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[24] Hayden, *Pearce talks endangered species, Trump*, Carlsbad Current-Argus (Aug. 18, 2016).

[25] *See* Marcos, *Lawmakers set up bipartisan Problem Solvers Caucus for new Congress*, The Hill (Feb. 3, 2017).

[26] Press Release, Rep. Carlos Curbelo, *Curbelo, Deutch Welcome 50 Members to Bipartisan Climate Solutions Caucus* (July 25, 2017) https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1603.

that's a good thing ... because it forces people to talk to a broader sense of the community[.]"[27]

2. Partisan gerrymandering enhances the influence of political parties at the expense of independent-minded Members and the constituents they serve

Unfettered partisan gerrymandering also alters the dynamic between Members and their political parties. Power shifts to party insiders, who dictate the literal party line and demand that Members abide by it, irrespective of the preferences of a Member's constituents. If an independent-minded Member breaks with his or her party in order to follow the wishes of constituents, party insiders can use the next redistricting process to make re-election difficult for that Member or eliminate his or her seat altogether. This power dynamic distorts the proper functioning of the House and makes it less responsive to the People.

In amici's experience, if partisan gerrymandering remains unchecked, party insiders will use the redistricting process to threaten or punish independent-minded Members. For example, in 2011, Representative Jim Jordan (R-OH) was threatened with the erasure of his district by party officials after he took independent stands.[28] In the case of Representative Justin Amash (R-MI), the party actually did redraw his district in an unsuccessful attempt to thwart his re-

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[27] Stewart, *Hurd Defends District Lines in Court*, Roll Call (July 17, 2017).

[28] Joseph, *Jordan in redistricting crosshairs after bucking Boehner*, The Hill (July 28, 2011).

election because of commitment to faithfully representing constituents independent from party dictates.[29]

Using the redistricting process to pick winners or enforce internal party discipline is anathema to Members' faithful and independent representation of voters' interests. As Freedom Caucus co-founder Representative Mark Meadows (R-NC) has emphasized: "There should never be a punishment for voting the will of the people. ... To do otherwise would be to be putting party over people, and most Americans have a strong distaste for that."[30]

3. Partisan gerrymandering harms the House as an institution

More artificial "safe" seats and greater party influence over the districting process have helped produce an unprecedented rise in partisanship in the House. Partisan grandstanding and unprincipled obstruction reign supreme while independent-minded, results-oriented representation suffers.[31]

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[29] Harger, *Is the GOP throwing Justin Amash under the bus?*, Michigan Live (June 24, 2011); *see also* Amash, Twitter (May 25, 2017) ("Gerrymandered by Republicans and the Michigan Chamber of Commerce to prevent my re-election. It didn't work.").

[30] Israel, *A Matter of Principles: Mark Meadows Speaks Conservatism*, Mida (July 2, 2017).

[31] *See generally* Mann & Ornstein, *It's Even Worse Than It Looks* (2012) (discussing the rise of hyper-partisanship and "vehemently adversarial" politics); Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005) (discussing effects of "excessive partisanship"); Issacharoff & Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004) ("The result is not only less electoral accountability

Amici know that there are areas where Members from different parties share common ground notwithstanding their deeply held beliefs. But even on issues where bipartisan agreement exists, the "play-to-the-base" and "tow-the-party-line" dynamics that partisan gerrymandering encourages often cause Members to leave common-sense policy solutions on the table. Some deem it more advantageous to attack the other side in the media rather than sit down, grapple with real differences, and explore areas of genuine common ground that exist.[32] The bottom line, as amicus former Representative Zach Wamp, Republican of Tennessee, explained, is that, "[a]s the political lines become more skewed, successful candidates are increasingly more interested in political rhetoric than solutions and serving the public."[33]

Amici can attest that the dynamics that flow from hyper-partisan gerrymandering contribute to the growing partisan rancor in the House. As amicus Representative Blumenauer and former Representative Leach have explained, as a result of gerrymandering,

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but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.").

[32] *See* Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 306-307 (1991) ("[T]he beneficiaries of gerrymanders ... are also less needful of being near the political center of their districts. They are, in brief, more likely to be ideologues"); Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, 430 (2004) (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party").

[33] Hill Staff, *Wamp backs Dem redistricting plan*, The Hill (June 23, 2005).

"Members are less inclined to talk and cooperate, much less compromise," and "[t]he legislative agenda is shaped more to energize the political base than to advance the common good."[34] For Members who occupy artificial "safe" seats, the dynamics described above can apply with particular force. And even for Members who are not directly subject to such electoral disincentives, compromise is more difficult in an environment where there are no limits to the pursuit of partisanship in the shaping of electoral rules. Members who want to work from a position of principled independence have fewer potential partners on the other side.

Perhaps the saddest aspect of this dilemma is that, as amici know well, lack of cooperation begets distrust, which only further erodes the potential for cooperation. Members who strike a difficult bargain on one issue develop trust that then allows them to work together again—seeking out other areas where cooperation can lead to common-sense solutions to the problems our Nation faces. In earlier, less hyper-partisan eras, the result was a virtuous cycle of building trust. In today's climate, a vicious cycle predominates, fostered in substantial part by extreme partisan gerrymandering.

None of this is to suggest that Members should reflexively embrace bipartisanship for its own sake. Members of Congress can, will, and should hold principled beliefs that simply are not up for compromise. What matters is that Members are guided *only* by *their* judgment about how to deliver solutions for *their* constituents. When serving one's constituents calls for toeing the party line, a Member should do that; likewise, when serving one's constituents calls for working towards a bipartisan compromise, a Member should do

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[34] Blumenauer & Leach, *Redistricting*, *supra*.

that too. The problem with partisan gerrymandering is that it encourages partisanship for its own sake. That, amici strongly believe, is something no Member should feel compelled to embrace.

The effects of extreme partisan gerrymandering harm the House as an institution. The dramatic increase in partisanship in recent years has been accompanied by an equally dramatic decrease in major bipartisan legislative accomplishments that leaders on both sides of the aisle were able to forge throughout much of the 20th Century. As amicus Representative Brian Fitzpatrick, Republican of Pennsylvania, has explained, "[p]artisan gerrymandering has exacerbated electoral complacency ... and contributed to the growing divide of partisanship that grinds the gears of government to a halt."[35] The overall productivity of the House has declined as a result, diminishing the House's role in our government.

Virtually no one who has served in Congress actually supports limitless, unchecked partisanship in the districting process. Even former Speaker of the House Newt Gingrich has candidly acknowledged that, with extreme partisan gerrymandering, each party "get[s] to rip off the public in the states where they control," but "the public gets ripped off in [all] circumstances."[36] According to Gingrich, "[i]n the long run, there's a downward spiral of isolation."[37] On that point, amici all

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[35] Ripon Advance News Service, *Fitzpatrick leads bipartisan resolution calling on House to end political gerrymandering*, The Ripon Advance (May 11, 2017).

[36] Eilperin, *The Gerrymander That Ate America*, Slate (Apr. 17, 2006).

[37] *Id.*

agree: When partisan gerrymanders devalue general elections and encourage partisan grandstanding for the base over independent judgment or delivering results for constituents, we all lose.

C. Extreme Partisan Gerrymandering Hurts The People Themselves

The reduction in constructive dialogue among Members and the increased perception that general election outcomes are foreordained cause voters of all stripes to lose faith in the electoral process. As one bipartisan commission including a number of distinguished former Members explained: "Th[e] overtly political [districting] process sows distrust among the electorate about the fairness of the districts as drawn and adds to the rancor between the political parties when one feels that the other is assigning lines that disadvantage their political opponents."[38]

As more and more elections become reserved to those core partisans who tend to vote in party primaries, many other citizens increasingly view their votes as hollow gestures.[39] Voters understand when, as amicus Representative Harris has explained, a districting

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[38] Bipartisan Policy Center, Commission on Political Reform, *Governing in a Polarized America* 30 (2014).

[39] Potter & Viray, *Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003) (electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process" but "[i]t stands to reason that voter turnout decreases when voters feel that their votes are inconsequential. This would occur most often when the outcome of an election appears so clearly predetermined as to make the election a formality.").

map is "not fair to citizens throughout the state."[40] Gerrymandered seats lead voters to feel left out of the conversation entirely.[41]

As a result, faith in the integrity of elections has dropped precipitously in recent years. The Gallup Poll found that between 2009 and 2016, the percentage of Americans who "have confidence" in the "honesty of elections" tumbled from 59 percent to 30 percent, while those lacking faith rose from 40 percent to 69 percent.[42] A November 2013 poll found that 64 percent of respondents (including a majority of Republicans, Democrats, and Independents) believed that the redrawing of districts is often used to take power away from voters.[43]

In light of these trends, proposed electoral reforms, such as the introduction of independent or bipartisan redistricting commissions, have proven increasingly

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[40] Zheng, *Reform seeks public input on redistricting in Md.*, WMDT (Nov. 1, 2016).

[41] *See generally* Issacharoff & Karlan, *Where to Draw*, 153 U. Pa. L. Rev. at 574 ("Noncompetitive elections threaten both the legitimacy and the vitality of democratic governance"); *see* Cox, *Partisan Gerrymandering*, 2004 Sup. Ct. Rev. at 433 n.66 (discussing how efforts to gerrymander may cause the public "to see the political process as somehow less legitimate and thereby skew the incentives to participate").

[42] *See* Gallup, *Update: Americans' Confidence in Voting, Election* (Nov. 1, 2016). This rapid shift can be attributed only in part to the highly partisan 2016 presidential election. As early as 2014, 59 percent of Americans said they lacked confidence in the honesty of elections, while only 40 percent held such confidence—a mirror image of the poll results from 2009. *Id.*

[43] *See* The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013).

popular with voters across the political spectrum. In the most recent midterm elections, for example, voters in Michigan, Missouri, and Colorado overwhelmingly passed ballot initiatives aimed at districting reform.[44]

Amici embrace the States' role as laboratories for redistricting reform. But amici also know that enacting redistricting reform can be exceedingly difficult when one party controls the machinery of the districting process. In Illinois, voters have sought an amendment to the state constitution that would prevent any districts that are "drawn to purposefully or significantly discriminate against or favor any political party or group, and not considering the residence of any person."[45] The dominant political party in the State has blocked this proposed reform. Even for amicus Representative Alan Lowenthal, who played a significant role in California's transition to an independent commission, the path to that result was long, difficult, and beset by partisan opposition from his own party.[46]

There must be basic limits on the ability of majorities to gerrymander for purely partisan gain. The health of the House, especially its ability to serve the People with clear-eyed independence, as the Framers intended, depends on it.

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[44] *E.g.*, Lapowsky, *Good News: Midterm Voters Drew the Line on Gerrymandering*, Wired (Nov. 7, 2018).

[45] Duncan, *Group seeks to change redistricting*, The Southern Illinoisan (Mar. 23, 2014).

[46] *See* Ingraham, *One easy way to end gerrymandering: Stop letting politicians draw their own districts*, Wash. Post (June 2, 2014).

II. Extreme Gerrymandering Is Inconsistent With The Nature Of Representation In Our Form Of Government

The Framers gave the House of Representatives a special and critical role: to be the authentic voice of the People. They intended Members of the House and the communities they serve to share strong bonds. Extreme partisan gerrymandering is inconsistent with these basic principles on which our government was founded.

A. Members Of The House Are Direct Representatives Of The People

The Framers conceived of a government in which institutions would reflect different forms of political authority. *See* Federalist No. 40 (Madison); *see also, e.g.*, Wood, *The Creation of the American Republic 1776-1787*, at 553-562 (1998). The President and the Senate, each indirectly elected to lengthy terms, were meant to reflect aspects of constitutional monarchy and aristocracy, respectively. *Id.*[47] But the House, then as now, was to be the bastion of democracy—"the grand depository of the democratic principle of the Gov[ernmen]t," as George Mason put it, 3 *The Records of the Federal Convention of 1787*, at 48 (Farrand ed. 1911) ("Farrand").

The House's direct connection to the People was designed to be its essential quality. As the Court explained a generation ago, "[t]he House of Representatives ... was to represent the people as individuals, and on the basis of complete equality for each voter." *Wes-*

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[47] Originally, the Constitution provided for Senators to be chosen by state legislatures rather than by the People. *See* U.S. Const. art. I, § 3, cl. 1. Direct election of Senators was not permitted until ratification of the 17th Amendment in 1913.

berry v. *Sanders*, 376 U.S. 1, 14 (1964). That direct connection is so vital because, in our constitutional order, "all political power flows from the people." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) ("*AIRC*"); *see also, e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803, 821 (1995) (Framers created "a Federal Government directly responsible to the people"); *id.* at 839 (Kennedy, J., concurring) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it."); *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819) ("[W]hen ... it was deemed necessary to [bring forth] an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."); *accord* U.S. Const., Preamble ("We the People of the United States ... do ordain and establish this Constitution for the United States of America.").

The Framers repeatedly emphasized their vision of a House of Representatives that was close to the People, directly responsive to them through the mechanism of frequent and broad-based elections, and thus capable of giving them a powerful voice in the Nation's decision-making. "'Who are to be the electors of the Federal Representatives?' Madison asked. "Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States." Federalist No. 57 (Madison); *see also* Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in 1 *The Founders' Constitution* 252

(House members are the "immediate Representatives of the People"); 2 *Debates on the Federal Constitution* 28-29 (J. Elliot ed., 1876) ("*Elliot's Debates*") ("The federal representatives will represent the people; they will be the people.") (J.C. Jones) (Mass.).

The Framers built these principles into the structure of Article I. They provided for direct elections for the House "by the People of the several States" every two years. U.S. Const. art. I, § 2, cl. 1. They ensured that apportionment of House seats would be done "according to [the People's] respective numbers" in the States, *id.* cl. 3. And they provided that any person who could vote for "the most numerous Branch of the State Legislature" would be eligible to vote in elections for the House as well. *Id.* cl. 1.

Frequent, broad-based elections are designed to create a "direct line of accountability between the National Legislature and the people who elect it," conceived as broadly as possible. *Cook* v. *Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring). In the Framers' thinking, it was "particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people." Federalist No. 52 (Madison). Competitive elections were "unquestionably the only policy by which this dependence and sympathy can be effectually secured." *Id.* Those in power, Madison explained, were to "be kept in dependence on the people" as a matter of "republican liberty." Federalist No. 37.

Notably, the People's representation in the House was to serve one of the fundamental goals of our constitutional structure: elimination of excessive faction. *See* Federalist No. 10 (Madison).

One imperative is thus clear from both the Framers' statements and the constitutional design they es-

tablished: The role of the House in our constitutional order—to reflect the will of the People—depends on the electoral relationship between Members and the People. The People's ability to choose their representatives was an essential guarantee of both popular sovereignty and liberty. The Framers' concerns resonate across the centuries—and amici feel them every day as part of our lived experience.

B. Extreme Gerrymandering Distorts The People's Voice In Contravention Of The Framers' Vision

Extreme partisan gerrymandering threatens the Framers' vision of a directly accountable national legislature.

The Framers envisioned frequent, broad-based, competitive House elections that would create a relationship of "dependence" and tie House Members closely to the People. The entire point of extreme gerrymandering is to undercut that tie in order to achieve a narrow partisan political result. *See, e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 537-538 (1969) (Fortas, J., concurring) (describing "gerrymandering" as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes").

The Framers themselves repeatedly expressed concern that, through the manipulation of electoral districts, "the House of Representatives should not really represent the people," thereby undermining the republican character of the nascent government. *E.g.*, 4 *Elliot's Debates* 303 (C. Pinckney); *accord* 3 *Elliot's Debates* 367 (Madison) (warning that improper "unequal" apportionment could "deprive[]" the people of "the right of suffrage"). They knew that, without some external check,

the rules of the political process could be manipulated.[48] Their concern on this point makes sense in light of their overall project, for "'the true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell* v. *McCormack*, 395 U.S. 486, 540-541 (1969) (quoting 2 *Elliot's Debates* 257 (Hamilton)).

This Court has described extreme gerrymandering as incompatible with this fundamental principle of our form of government. Extreme gerrymandering turns the "true principle" of our Republic on its head, permitting politicians to choose the people whom they represent rather than the reverse. *See AIRC*, 135 S. Ct. at 2677 (noting "the core principle of republican government ... that the voters should choose their representatives, not the other way around" (internal quotation marks omitted)) (quoting Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)). Partisan gerrymanders "[are incompatible] with democratic principles." *AIRC*, 135 S. Ct. at 2658 (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (Scalia, J.) (plurality opinion) and citing *id.* at 316 (Kennedy, J., concurring in judgment)). They threaten the very notion of a representative government, in which, through the mechanism of broad-based popular elections, "legislatures ... should be bodies which are collectively responsive to the popular will." *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964).

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[48] *Compare* Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1053-1054 (2005) ("[B]ecause gerrymanders involve the rigging of elections themselves, the regular political process is not entirely trustworthy in policing them") *with* Federalist Nos. 56 & 57 (Madison) (discussing rotten borough and pocket borough representatives in Parliament as overcome by faction due to structural defects, and asserting that broad elections by the whole People would remedy such defects).

This is not to say that politics has no place in districting. Far from it. It is an inescapable fact that "the location and shape of districts" can determine "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Some variation in the shape of districts is natural, so long as those variations "are based on legitimate considerations incident to the effectuation of a rational state policy," such as keeping towns, counties, or cohesive political communities together. *E.g.*, *Reynolds*, 377 U.S. at 579.

But true representation, consistent with the special role of the House as the voice of the People, is diminished when district lines are designed to insulate Representatives from the People and instead to achieve a preordained, partisan result. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). Extreme partisan gerrymandering impedes the "direct link" between the People and their representatives in the House that the Framers intended, *Thornton*, 514 U.S. at 803.

III. Recognizing Basic Limits On Extreme Partisan Gerrymandering Is Appropriate And Consistent With The Court's Role In Our Constitutional Order

Because extreme partisan gerrymandering works to skew a zero-sum districting process, there are few political incentives that can entice a dominant party in a given state to end the practice. The problem is thus uniquely difficult to fix through the regular functioning of the political process.

Action by this Court, to recognize constitutional limits on hyper-partisan gerrymandering, is both essential and in keeping with the Court's role in our constitutional order. The Court can do so without becoming entangled in endless political disputes; indeed, merely articulating an outer boundary on the most extreme gerrymanders will do much to jumpstart corrective measures from within the political process itself.

A. Extreme Partisan Gerrymandering Represents A Breakdown In The Political Process

Members of this Court and others have repeatedly expressed the concern that partisan gerrymanders distort the electoral process and result in the "frustration of the will of a majority of the voters." *E.g.*, *Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality op.); *accord AIRC*, 135 S. Ct. at 2677. Partisan gerrymanders are also politically self-insulating. If a gerrymander is done effectively, voters will find it difficult or impossible to punish the political party that carried out the gerrymander, even if the decision to distort the political process is profoundly unpopular.[49]

This self-insulating quality means that, as gerrymanders become more effective, the "temptation to use partisan favoritism in districting in an unconstitutional manner will grow." *Vieth*, 541 U.S. at 312 (Kennedy, J.,

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[49] *See* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1328-1329 (1987) (partisan gerrymandering is "not merely [a] consequence[] of constitutionally suspect politics" but also a "fundamental *cause*[] of it").

concurring).[50] And, aided by technology, partisan gerrymandering has become far more effective in recent years.[51] *See, e.g.*, *Gill* v. *Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").[52]

This Court has long recognized its role in ensuring the proper functioning of the political process. *See, e.g.*, *Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014) (describing the right of citizens, "through the political process, [to] act in concert to try to shape the course of their own times and the course of a nation"); *see also, e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) (political rights are "fundamental" because they are "preservative of all rights"). The Court has accordingly identified breakdowns in the operation of the political process as warranting judicial intervention. *See, e.g.*, *LULAC*, 548 U.S. at 440 (redistricting measures that "'hinder[ed] [certain groups'] ability to participate effectively in the political process'" were impermissible); *see also, e.g.*, *Colorado Republican Fed.*

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[50] *See also, e.g.*, Aguilera, *Drawing the Line:* Whitford *v.* Gill *and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. Cin. L. Rev. 775, 777-778 (2018).

[51] *E.g.*, Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L. J. 2505, 2516 (1997) (late-twentieth-century gerrymandering was more extreme than gerrymandering in previous decades); *see also, e.g.*, *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (per curiam) (due to redistricting software, maps that once took months to prepare could be generated in a matter of hours).

[52] While a few states have used the initiative and referendum to enact districting reforms in recent years, such efforts still face significant political headwinds, *see supra* p. 24—and they are not even possible in the majority of states that lack the initiative and referendum to begin with.

Campaign Comm. v. *FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J. concurring in the judgment and dissenting in part) ("What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 n.16 (1983) ("[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the ... rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny."); *see also generally United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (greater judicial scrutiny required where legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").[53] Extreme partisan gerrymandering is akin to other breakdowns in the electoral process that the Court has identified as calling for judicial action. *See, e.g., Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *Carolene Prods.*, 304 U.S. at 153 n. 4)); *see also, e.g., LULAC*, 548 U.S. at 423-443 (discussing the use of gerrymandering to stymie the increasing electoral power of one growing ethnic group in violation of Voting Rights Act).

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[53] *See also* Ely, *Democracy and Distrust: A Theory of Judicial Review* 106 (1980) ("Courts must police inhibitions on ... political activity because we cannot trust elected officials to do so[.]").

B. Basic Limits Are All That Is Needed To Resolve The Breakdown

Until now, legislative map-makers have had no political incentive to police their own excesses, and no standard by which to do so. Articulation of a constitutional outside limit in this area will force map-drawers to curb the worst excesses and thus prevent some litigation before it starts. Recent events in Colorado exemplify this dynamic. There, partisan warfare and judicial intervention into the redistricting process in the wake of the 2010 census culminated in the imposition of a judge-drawn map, which in turn led both parties to support creation of an independent commission.[54] This Court need not craft a comprehensive legal standard that resolves all potential partisan gerrymandering challenges. Even minimal guidance will provide impetus for restraint.[55]

Amici do not favor frequent or extensive judicial intervention in the political process; indeed, amici appreciate this Court's historical reluctance to enter the "political thicket" surrounding redistricting. *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (plurality opinion); *see also Vieth*, 541 U.S. 267 (2004) (plurality opinion). But in light of the constitutional principles that animate our role as Members of the House, and the grave threat that hyper-partisan gerrymanders poses to our Republic, we need constitutional ground rules that ensure

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[54] *See* Brasch, *Anti-Gerrymandering Effort Sails Through The Colorado Capitol On Its Way To The Ballot*, Colorado Public Radio (May 7, 2018).

[55] Indeed, while all amici agree that some constitutional boundaries are essential to police the growing negative effects of partisan gerrymandering, amici take no position on the effectiveness of the different specific legal tests that might be used for enforcing such boundaries.

basic standards of fairness and broad-based competition. That is possible without subjecting the districting process to judicial second-guessing. Intervening, in a measured way, to address a breakdown in the political process, is entirely consistent with the Court's role in our constitutional order.[56]

Recognizing basic constitutional limitations on partisan gerrymandering will encourage political parties and voters to change course and enable them to mend the broken parts of our political process. This Court should give the Nation that chance.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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[56] *See, e.g.*, Charles & Fuentes-Rohwer, *Judicial Intervention As Judicial Restraint*, 132 Harv. L. Rev. 236, 256 (2018) (suggesting that the Court's categorical noninvolvement in partisan gerrymandering cases will signal to political elites and the mass public that the Court has taken a side in the political debate over the issue).

Nos. 18-422 and 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,

v.

COMMON CAUSE, ET AL.,
Appellees.

LINDA H. LAMONE, ET AL.,
Appellants,

v.

O. JOHN BENISEK, ET AL.,
Appellees.

On Appeal from the United States District Courts for Maryland and the Middle District of North Carolina

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including through work to protect the right to vote and ensure fair and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on electoral practices and redistricting and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center has a significant interest in this case, given the Center's longstanding concern about the growth of extreme partisan gerrymandering—a relatively rare but pernicious redistricting tactic that deeply offends the constitutional principles that form the foundation of our representative democracy. On the basis of its own research and studies undertaken by others, the Brennan Center has identified several readily discernible evidentiary signposts that can help the Court differentiate be-

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

tween lawful redistricting and unlawful, extreme partisan gerrymanders like those that have occurred in North Carolina, Maryland, and a few other congressional maps this past redistricting cycle.

The Brennan Center hopes that its perspective will encourage the Court to overturn North Carolina's and Maryland's unconstitutional partisan gerrymanders, and help the Court define a manageable standard that will limit both the likelihood of such extreme gerrymanders recurring in the upcoming decade and judicial intervention into normal political processes. The continued vitality of our constitutional democracy depends on it.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve a particularly pernicious but relatively rare variety of gerrymandering where a political party manipulates the redistricting process to maximize its seats in a legislative body or delegation and insulate those seats from foreseeable future changes in voter preferences. The Court has recognized that such extreme partisan gerrymanders are "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quotation and brackets omitted) (decrying "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality op.) (concluding that "an *excessive* injection of politics is *un*lawful"). The main question facing the Court in the instant cases is how to develop a legal standard

to adjudicate and vindicate those constitutional norms.

The Brennan Center submits this brief to explain how the Court can invalidate the extraordinary constitutional abuses that occur with extreme gerrymandering, while avoiding judicial interference with the large number of maps created through the ordinary "'pull, haul, and trade'" of politics. *See, e.g.*, *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 507 (2006) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

Appellees have provided the Court with several manageable legal standards. And by any of these measures, the maps in North Carolina and Maryland are unconstitutional. That outcome is unsurprising. The various standards share, by and large, the same general structure, calling for plaintiffs to demonstrate the map-makers' intent to disadvantage their political opponents, success in disadvantaging their political opponents, and an absence of a legitimate justification for doing so.

Regardless of how the Court ultimately decides to address partisan gerrymandering as a broader problem, the Court can—at the very least—use a version of these common elements to strike down the most extreme partisan gerrymanders. Such a standard would flag a remediable constitutional violation where, as here, the party in control of the redistricting process (1) intentionally sought to maximize its statewide partisan advantage and insulate its seats from changing voter preferences, (2) succeeded in do-

ing so, and (3) lacked any legitimate justification for its mapping decisions.

Under this standard, both North Carolina's and Maryland's maps would be unconstitutional. In both North Carolina and Maryland, politicians *expressly* redrew congressional maps in a one-sided process to create and lock in the maximum possible partisan advantage for their party, an advantage they historically lacked. Indeed, it would be difficult for mapmakers to do anything more extreme from the perspective of partisan advantage than they did in North Carolina and Maryland.

Targeting extreme partisan gerrymanders such as North Carolina's and Maryland's will neither trigger excessive amounts of new litigation, nor authorize judicial interference in healthy political processes. Indeed, extreme partisan gerrymanders like North Carolina's and Maryland's are anomalous, extraordinarily anti-democratic, and impervious to normal political solutions.

The Court can address any remaining concerns about the manageability of this legal standard by incorporating one or more additional limiting factors into its inquiry. The appropriate factors are highly correlated with, and help confine judicial intervention to, extreme partisan gerrymanders. Single-party control of the redistricting process, for example, is a prerequisite for a governing majority to use its domination of the process to entrench itself in power. Further, a recent history of close statewide elections provides both the motive and the opportunity for a temporary majority to undertake an extreme power grab. In addition to these factors, ir-

regularities in the redistricting process may also be useful for separating constitutionally unproblematic maps from problematic ones.

The record in these cases demonstrates the point. Take North Carolina, for example. North Carolina is essentially evenly divided between Republicans and Democrats, as statewide elections have repeatedly demonstrated. Yet during the last redistricting cycle, following a wave election, Republicans gained control of both chambers of North Carolina's legislature. They therefore had the opportunity to manipulate North Carolina's district lines to guarantee themselves large congressional majorities into the future, even if they were to lose a majority of the statewide vote. And they grabbed it. After courts ordered the North Carolina congressional map redrawn to remedy racial gerrymandering violations, Republicans proclaimed that they would redraw the map to be "a political gerrymander," adopting written criteria requiring that any map have a 10-3 Republican advantage, the maximum partisan advantage Republicans believed they could achieve. They shut Democrats out of the congressional map-drawing process and pushed through a map that was intentionally designed to, and effectively did, entrench Republicans in power. That conduct transgressed the boundaries of normal politics, and because it was carried out in a closely divided state by a party enjoying sole control over the redistricting process, this Court should be highly skeptical of appellants' post hoc justifications for the resulting map. A similar, and similarly straightforward, analysis reveals that this Court should also invalidate the Maryland map at issue in *Benisek*.

Policing such extreme abuses of the redistricting process in the ways discussed will amount to a limited judicial intervention to protect our representative form of government, while safeguarding against interference in normal redistricting processes, which can easily be differentiated by applying the above-referenced factors.

Striking down the aggressive anti-democratic abuses in North Carolina and Maryland will not politicize or delegitimize the federal courts. To the contrary, the Court's confirmation that extreme partisan gerrymanders like North Carolina's and Maryland's are unconstitutional and will be struck down will promote the vitality and integrity of all our nation's governmental institutions, including this Court itself. Politicians have interpreted the absence of judicial limits on partisan gerrymandering as tacit consent to create extreme partisan gerrymanders. A clear pronouncement from this Court barring these gerrymanders will likely have a strong prophylactic effect heading into the next round of redistricting in 2021. Such a pronouncement will also reaffirm long-standing American norms against government action designed to entrench the power of our elected officeholders.

Given the extreme facts of these cases and the stark threats they pose to our core constitutional values, the Court has never been better positioned than it is today to erect basic guardrails around the redistricting process. The Court should affirm the judgments below and hold North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

ARGUMENT

I. EXTREME PARTISAN GERRYMANDERS SUCH AS NORTH CAROLINA'S AND MARYLAND'S ARE RARE, JUDICIALLY MANAGEABLE CONSTITUTIONAL VIOLATIONS.[2]

Appellees have offered the Court a variety of manageable approaches to policing unconstitutional abuses of our redistricting processes. These approaches share several common features, including a near-universal focus on map-drawers' impermissible intent to disadvantage members of an opposing party, their success in doing so, and an absence of a cognizable justification for the map. At a minimum, the Court can use these basic building-blocks of partisan gerrymandering claims to target the problem of extreme partisan gerrymanders.

A clear constitutional standard barring extreme partisan gerrymandering would have three elements: first, the party that controlled the redistricting process intentionally sought to maximize its *statewide* partisan advantage and insulate it from

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[2] Because the Brennan Center previously submitted a brief detailing why the Maryland map at issue in *Benisek* should be deemed unconstitutional, this brief focuses primarily on the facts and circumstances that make North Carolina's extreme gerrymander unconstitutional. *See* Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellants, *Benisek v. Lamone*, No. 17-333 (S. Ct. Jan. 29, 2018) ("*Benisek* Brennan Br."), https://www.brennancenter.org/sites/default/files/legal-work/Benisek_Brennan_Center%20Amicus_Brief.pdf. The legal and institutional arguments presented throughout this brief apply equally to both cases.

normal political swings; second, the party succeeded in doing so; and, third, the party can provide no legitimate justification for its mapping decisions.[3]

A three-part inquiry of this kind is limited and manageable. As the Brennan Center's research demonstrates, this type of legal standard would direct courts' focus to a very narrow set of maps that are extraordinarily anti-democratic and immune to correction through the normal push and pull of electoral politics. This standard would thus ensure that the federal courts do not become overly involved in redistricting processes, while simultaneously focusing the courts' attention on those situations where the need for their intervention is at its highest.

A. The North Carolina And Maryland Maps Are Unquestionably Extreme Partisan Gerrymanders.

As the court below found, the evidence of the North Carolina Republican map-makers' intent to discriminate against voters based on their political viewpoints and entrench Republicans in power could not be clearer. *See* App. 155-87. Their ultimate objective was to retain the same 10-to-3 advantage that

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[3] The Court has clear models for applying each element of this standard, from abundant evidentiary guidelines for assessing legislative intent, *see, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to substantial social science evidence for evaluating the partisan effects of particular maps, *see, e.g.*, Br. of *Amici Curiae* Political Science Professors in Support of Appellees and Affirmance, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017), https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_PoliticalScienceProfessors_InSupportof%20Appellees.pdf.

Republicans enjoyed over Democrats under a 2011 congressional map that this Court struck down as an unconstitutional *racial* gerrymander in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). The legislators charged with drawing North Carolina's map directed the primary map-drawer to consider "Partisan Advantage," a criterion expressly requiring "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App. 20. They also included a "Political Data" criterion specifying that, aside from population counts, "[t]he only data ... to be used to construct congressional districts shall be election results in statewide contests." *Id.* And they explained that the sole reason for using political data was "to gain partisan advantage." *Id.* at 22.

The Republican map-makers also candidly admitted that their overriding purpose in drawing North Carolina's map was to maximize their party's power. App. 157. Representative Lewis, one co-chair of the redistricting committee, "acknowledge[d] freely that [the map] would be a political gerrymander," and emphasized that "the goal" was "to elect 10 Republicans and 3 Democrats." *Id.* at 22-23; *see also id.* at 157 (emphasizing that the Republicans "did seek a partisan advantage in drawing the map"); *id.* at 159 (admitting map was drawn "in a way to help foster" the election of Republican candidates). Senator Rucho, the committee's other co-chair, echoed Representative Lewis's sentiments. *See id.* at 157. And the map-makers confessed that they did not give Republicans a greater partisan advantage only because it was impossible "to draw a map with 11 Republicans and 2 Democrats." *Id.* at 22, 183. North Caro-

lina's map, in other words, personifies the facially-discriminatory statute that several Justices suggested—and the attorneys for Wisconsin and Maryland conceded—would be unconstitutional during the Court's partisan gerrymandering arguments last Term. *See Gill* Tr. 20-21, 26-27; *Benisek* Tr. 45-48.

The partisan skew of North Carolina's map is likewise and unsurprisingly immense, and it almost surely will persist over time. *See* App. 187-214 (district court finding that North Carolina's map "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office").

The first two elections held under the 2016 map confirm Republicans' success in maximizing and entrenching their seats. In the 2016 election, the Republicans "achieved [their] unambiguously stated goal: North Carolina voters elected a congressional delegation of 10 Republicans and 3 Democrats." App. 188. At the same time, the statewide vote was split roughly equally between Republican and Democratic congressional candidates, and a Democrat was elected governor. *Id.* at 189. This advantage persisted through the 2018 election, despite Democrats increasing their share of the statewide vote by nearly 2.3 points.[4] And appellees' experts presented evi-

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[4] This figure reflects the statewide vote *excluding* the results of the uncontested race in the Third Congressional District. The fate of the Republicans' tenth seat has yet to be determined. On February 21, 2019, the North Carolina State Board of Elections unanimously called for a new election for the Ninth Congressional District following discovery of an election fraud scheme that favored Republican candidate—and initial winner—Mark Harris. *See* Brian Murphy, *et al.*, *NC State*

dence that this pronounced imbalance would persist for the foreseeable future. *Id.* at 190-97, 209-12. Their analysis showed, for example, that "all [of North Carolina's 13] districts ... are 'safe,'" i.e., "highly unlikely to change parties in subsequent elections." *Id.* at 190.

It is equally plain that there is no legitimate justification for North Carolina's map. *See* App. 215-22. As the district court explained, the map-makers "drew a plan designed to subordinate the interests of non- Republican voters not because they believe doing so advances any democratic, constitutional, or public interest, but because, as the chief legislative mapmaker openly acknowledged, the General Assembly's Republican majority think[s] electing Republicans is better than electing Democrats." *Id.* at 6 (emphasis and quotation omitted). In this litigation, the Republican map-makers have claimed that their map was justified by (i) North Carolina's political geography and (ii) the legislature's interest in protecting incumbents. *Id.* at 215. But the map-makers themselves created at least two draft maps that performed as well as their chosen map in terms of these traditional districting criteria and yet were far less skewed. *See generally* Ex. 4022. Notably, using the same non-partisan criteria, appellees' expert also randomly generated thousands of comparator maps—all of which equaled or exceeded the chosen map's performance in terms of the non-partisan

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Board Votes for New Election in 9th District After Harris Calls for New Race, News & Observer (Feb. 21, 2019), https://www.newsobserver.com/news/politics-government/article226561504.html#topicLink=election-fraud-investigation.

criteria, and none of which exhibited its extreme partisan skew. App. 168-71, 220-22.

In short, North Carolina's Republicans devised and carried out a plan to win as many seats as possible and to extend their control over the state's congressional slate through at least the decennial period, without any legitimate justification.

As detailed in the Brennan Center's prior *Benisek* brief, the Maryland map at issue in that case is similarly extreme. It too was avowedly drawn to maximize the Democratic share of the congressional delegation, and abundant record evidence shows that the Democrats' plan was a success and lacked any reasonable justification. *Benisek* Brennan Br. 8-9.

B. Extreme Partisan Gerrymanders Are Relatively Rare.

Even with the widespread and pernicious belief among map-drawers that the courts will not police extreme partisan gerrymandering, *see infra* Section III, the extreme gerrymandering on display in North Carolina and Maryland ha appeared only rarely this decade. The Brennan Center studied congressional election results from this decade's races to assess the extent and the durability of "partisan bias"—the degree of systematic advantage one party receives over another in turning votes into seats. Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* 1, 3 (2017).[5] According to this analysis, only seven states' congressional maps displayed persistent, extreme levels of partisan bias.

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[5] https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

Id. at 1, 2, 14.[6] Other studies show that approximately a dozen state legislative maps displayed similar levels of partisan bias. *See, e.g.*, Expert Report of Simon Jackman at 73, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. Jan. 22, 2016), ECF No. 58-1.

These studies do not assess the *intent* underlying these extremely skewed maps. But logic dictates that requiring plaintiffs claiming a constitutional violation to demonstrate not only a partisan skew, but also an intent to achieve such a skew could only narrow the set of potentially unconstitutional maps. By setting a legal standard focused on such extreme partisan gerrymanders, the Court thus would not create a large pool of potentially meritorious claims.

C. Extreme Partisan Gerrymanders Are Deeply Anti-Democratic And Offend Basic Constitutional Principles.

While the Court should be hesitant to interfere with ordinary inter-party politics, what happened in North Carolina and Maryland—and what is likely to be at issue in any case where a governing majority that happens to be in charge at the time of redistricting seeks to entrench itself in a perennially competi-

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[6] Two of those states—Ohio and Michigan—have enacted legal reforms that reduce the risk of extreme partisan gerrymandering during the upcoming round of redistricting. *See* Sam Levine, *Ohio Voters Pass Gerrymandering Reform Measure*, Huff. Post (May 8, 2018), https://www.huffingtonpost.com/entry/ohio-gerrymandering-reform_us_5af1a93ee4b0ab5c3d6a0bd2; Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Detroit Free Press (Nov. 6, 2018), https://www.freep.com/story/news/politics/elections/2018/11/06/proposal-2-michigan-gerrymandering/1847078002/.

tive state—is not normal, but extraordinary and deeply anti-democratic.

Indeed, extreme partisan gerrymanders, such as North Carolina's and Maryland's, violate at least three related constitutional norms, all of which lie at the heart of our constitutional democracy: government accountability, legislative representativeness, and neutral treatment of political expression and association. Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellees at 21-36, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017) ("*Gill* Brennan Br.").[7] When a court strikes down such maps, it is policing only maps that fall far outside the bounds of legitimate democratic governance. Moreover, it is striking down only those maps that cannot be corrected through the normal political process.

1. Extreme partisan gerrymandering undermines legislators' accountability to the people. *See id.* at 21-27. These gerrymanders create "lock[ed]-in" or "safe" seats, and legislators "elected from such safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to political minorities within their district." *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also Reynolds v. Sims*, 377 U.S. 533, 570, 576 (1964) (decrying "a minority strangle hold on the State Legislature" and "frustration of the majority will"); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., con-

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[7] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BrennanCenterforJustice_InSupportofAppellees.pdf.

curring) (noting lack of "practical opportunities" for the "majority of the people" to correct malapportionment at the polls). We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). But a legislature essentially held hostage by one party or the other is not the responsive body the Constitution envisions. This Court's intervention is necessary to preclude that unconstitutional result.

2. Extreme partisan gerrymandering also locks in a legislative delegation that comes nowhere close to reflecting the political diversity of the state's populace, thereby undermining another core value undergirding our democratic system of government: legislative representativeness. *Gill* Brennan Br. 27-33. Representativeness is critically important not only in and of itself, but also because it guarantees that the legislature will be accountable to *all* of the people it represents.

When the governing majority of the day permanently entrenches itself in power, the legislative bodies no longer "think, feel, reason, [or] act like" the people at large. John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies; In a Letter from a Gentleman to his Friend (Apr. 1776). States that may have vibrant political cultures with diverse perspectives are left with one-note legislatures. The debates held in legislative bodies and the policies lawmakers enact into law bear little resemblance to the fuller conversations among voters in homes and public spaces throughout the state.

To be sure—as appellants and their *amici* unrelentingly, if misguidedly, reiterate—the Constitution does not require precise proportionality of the nation's legislative bodies or that every voter be able to elect the candidate of her choice. But that does not mean the opposite is true, i.e., that legislative bodies should bear little resemblance to the polity they represent. Simply put, the Constitution demands at the very least that there not be a gross disconnect between a representative body and the people it purports to represent. That kind of gross disconnect is the product of entrenchment, and tolerating it ignores our nation's foundational precept that "the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (quotation omitted).

3. Extreme partisan gerrymandering also transgresses crucial First Amendment limits on legislative decision-making.

The First Amendment requires the government to remain neutral regarding its citizens' ideological affiliations. "[A]bove all else," the Court has held, "the First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). That neutrality principle has particular force in the context of elections, because the political acts of voting and associating to advance political causes are quintessential exercises of First Amendment rights. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (noting regulation of voting burdens First Amendment rights); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (recogniz-

ing rights of voters "to cast their votes effectively" and "to associate for the advancement of political beliefs" (quotations omitted)). These two rights are related, allowing individuals to band together for purposes of advancing their candidates through the ballot. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1248-49 (2003) (citing *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296 (1981); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

Extreme partisan gerrymandering—which involves the government's intentional burdening of the efficacy of citizens' votes "*because of* their participation in the electoral process, their voting history, their association with a political party, or their expression of political views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (emphasis added)—is plainly irreconcilable with those First Amendment principles, *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (recognizing that "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment'" (alteration in original) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment))). It is governmental action to disadvantage voters, parties, and political organizations "on account of their political [expression or] association" which, this Court has recognized, contravenes the First Amendment. *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996).

The First Amendment harms caused by extreme partisan gerrymanders are even more damaging be-

cause they undercut the constitutional values of legislative accountability and representativeness discussed above. By selectively impacting the expressive and associational rights of one group, severe partisan gerrymandering limits legislators' "responsive[ness] to the political minorities within their district," locking out of political processes the party that is in the minority when the maps are drawn (much like racial minorities are locked out as a result of a racial gerrymander). *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality op.) ("those who govern should be the *last* people to help decide who *should* govern"); *id.* at 227 ("responsiveness" to constituent views "is key to the very concept of self-governance through elected officials"). Likewise, by undermining voters' foundational right to associate to further their political beliefs through the "pull, haul, and trade" of ordinary politics, extreme partisan gerrymandering negates their ability to choose a government that represents their diverse needs and interests. *See, e.g.*, *Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Citizens Against Rent Control*, 454 U.S. at 296; *Kusper*, 414 U.S. at 57. And as Justice Kagan recognized in *Gill*, "what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations)," because "[b]y placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." 138 S. Ct. at 1938.

D. North Carolina's And Maryland's Extreme Partisan Gerrymanders Violate Those Constitutional Principles.

The constitutional harms generated by "severe partisan gerrymanders" explain why North Carolina's and Maryland's extreme gerrymanders are "incompatib[le] ... with democratic principles" and must be held unlawful by this Court. *Vieth*, 541 U.S. at 292 (plurality op.). The map-makers drew North Carolina's and Maryland's maps to reduce the responsiveness and representativeness of the legislature with respect to a large segment of constituents, specifically because of those constituents' chosen political affiliation. Such action undermines principles of popular sovereignty, governmental accountability, and equal treatment that are embodied in the First and Fourteenth Amendments and lie at the heart of our system of democracy.

Already, this Court "has recognized" that such severe "[p]artisan gerrymanders ... [are incompatible] with democratic principles." *Ariz. State Legislature*, 135 S. Ct. at 2658 (second alteration in original) (quoting *Vieth*, 541 U.S. at 292 (plurality op.)). Indeed, *every* Justice in *Vieth* agreed that "an *excessive* injection of politics is *un*lawful." 541 U.S. at 293 (plurality op.). Both this Court and individual Justices, moreover, have on several other occasions specifically identified actions that entrench a political party as constitutionally impermissible. *See, e.g.*, *LULAC*, 548 U.S. at 419-20 (expressing concern with map "that entrenches an electoral minority" and seeking "a standard for deciding how much partisan dominance is too much"); *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting) ("The bottom line is that

courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected."). The Court should take the next step towards realizing those constitutional freedoms here, by holding North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

E. Appellants' Contentions That Partisan Gerrymandering Claims Are Non-Justiciable Lack Merit.

Appellants claim that the Court is incapable of discerning a judicially manageable standard for distinguishing between unconstitutional partisan gerrymanders and ordinary political processes. Claiming as much does not make it so: appellees, the Brennan Center, and other *amici* in these and prior cases before this Court have provided *many* viable partisan gerrymandering standards.

Moreover, those tests' multiplicity does not, as appellants would have it, demonstrate the impossibility of this Court's agreeing upon one manageable standard. Rather, the array of tests available in this case reflects only the multi-faceted constitutional problems with extreme partisan gerrymanders.[8] As

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[8] Although several of the tests proposed by appellees and the lower courts in these and other partisan gerrymandering cases are district-specific, the constitutional harms (as with all extreme partisan gerrymanders) are not limited to individual voters or individual districts, but also spread across the entire state. The redistricting party sets out to enhance its *statewide* power by categorizing voters around the state based on their political beliefs and associations, and by shifting district lines on that basis to secure a statewide advantage. Consequently, the district-specific harms on which some of appellees' tests

shown, these extreme maps trammel multiple foundational principles running throughout the Constitution. The standards on offer provide the Court with different avenues to address different facets of this constitutional problem. But all provide a viable route forward. The Court can choose which best addresses the harm before it. By choosing, the Court will then eliminate any lack of clarity that the lower courts might have created by adopting a variety of standards.

II. STRAIGHTFORWARD FACTORS CAN HELP COURTS DETECT EXTREME PARTISAN GERRYMANDERS.

To the extent the Court has any remaining concerns about the manageability of a standard targeting extreme partisan gerrymanders, additional factors exist that can be built into the inquiry to further enhance its manageability. Indeed, several clearly discernible, objective factors are highly probative of extreme partisan gerrymanders. The Court can use these factors to narrow the scope of judicial intervention to extreme cases and signal to litigants what types of claims are likely to be meritorious.

As the Brennan Center explained in both *Gill* and *Benisek*, several objective criteria can act as gatekeepers by helping courts identify political circumstances that are likely to give rise to constitutional violations, and their presence here confirms that North Carolina's and Maryland's maps are unconstitutional partisan gerrymanders. *See Gill*

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focus are simply one facet of a greater constitutional problem whenever politicians deploy an extreme partisan gerrymander.

Brennan Br. 11-19; *Benisek* Brennan Br. 9-12. Those factors include single-party control of redistricting, a recent history of close elections, and significant departures from normal political processes. These intuitive criteria are relevant to and help determine whether the political party in power intended to and did entrench itself and its supporters at the expense of the other party and its supporters. Using these indicia to evaluate partisan gerrymandering challenges will help courts more easily identify potentially problematic redistricting processes. And it will enable both courts and prospective litigants to focus on the most biased, constitutionally offensive maps, leaving the vast majority of redistricting processes untouched.

1. The first criterion—single-party control—is a prerequisite for an extreme partisan gerrymander. Before a party can implement an excessive gerrymander, it must have the means to do so. *See* Anthony J. McGann, *et al.*, Gerrymandering in America 147 (2016). When a single party is in control, a minority party is much less able to influence the redistricting process, and normal political checks and balances are much less likely to safeguard against unconstitutional overreach. *See id.* at 147-48; *cf.* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371, 377 (2004) (explaining that "[w]hen there is unified party control of state government, or when one party has a veto-proof majority in the state legislature, the process is streamlined and a plan is usually adopted quickly"); App. 156 (observing that "when a single party exclusively controls the redistricting process, it should not be

very difficult to prove that the likely political consequences of the reapportionment were intended" (quotation omitted)).

The second factor—a recent history of close statewide elections—is not a prerequisite for extreme partisan gerrymanders, but it can be a highly probative signal because it helps identify states where map-drawers have the opportunity and incentive to maximize and entrench their power statewide. *See* McGann, *supra*, at 148-49. In highly competitive states with closely fought elections, the geographic distribution of each party's supporters often is more or less even, and therefore—absent deliberate intervention—power is likely to shift back and forth over the course of a decade. If, after redistricting, one party suddenly gains a new advantage and, more importantly, that advantage appears immune to normal political swings, it is highly suggestive of untoward conduct. Moreover, map-makers in states with a history of close elections will have a powerful incentive to undertake a severe, enduring gerrymander—and can easily do so by strategically joining precincts together to engineer a durable entrenchment. In a state without close elections, by contrast, the dominant party can often maintain its majority whether or not it gerrymanders.

Empirical data confirm these intuitions. The Brennan Center's study of congressional election results from this decade's races reveaied that the most biased districting maps of this decade, in both Republican- and Democratic-controlled states, share the two objective features discussed above. *Extreme Maps*, *supra*, at 1, 2, 6, 9, 15.

2. Other facts about a state's political geography might, in certain instances, also create both the opportunity and incentive for extreme gerrymandering even in the absence of a history of close statewide elections. For example, regions of a state that contain large and cohesive pockets of a political minority group can assist—or threaten—the majority party's attempts to maximize its seats. In these subregions of a state, map-makers can still eke out an improper partisan advantage by carefully packing and cracking voters for the minority party. Likewise, map-makers must pay particularly careful attention to the ways in which they draw lines in these sub-regions, lest they gift the minority party with unintended additional seats. These incentives to squeeze out an incremental advantage can be especially compelling when, for example, a political party has sole control of the line-drawing process in a state and it is at a nationwide disadvantage in the number of congressional seats for which it can draw the lines.

3. Likewise, a redistricting process that is one-sided or procedurally unusual can be a useful signal that an unconstitutional partisan gerrymander may have occurred. Easily ascertainable factors that can be woven into a judicial inquiry include: whether the majority party conducted the redistricting in secret; whether map-drawers and legislators drew and approved maps with unusual haste (and without providing voters or the other party with sufficient time to evaluate the maps); whether the dominant party altered redistricting rules (including oversight mechanisms) in a way likely to favor that party; and whether the dominant party moved unusually large

numbers of voters from precinct-to-precinct when redrawing the map. *Cf. Arlington Heights*, 429 U.S. at 267-68 (recognizing that "[t]he specific sequence of events leading up [to a] challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history," among other things, could be relied upon to show improper purpose); App. 140-41 (citing *Arlington Heights* and explaining that "the historical background" and "the legislative process" of a redistricting plan "may be probative of discriminatory intent" for partisan gerrymandering claims (quotations omitted)); *League of Women Voters of Mich. v. Johnson*, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (similar). These factors all reflect deviations from "normal politics" in the redistricting process and can indicate that the redistricting party sought and achieved unconstitutional goals.

4. Against this backdrop, North Carolina's map, for example, is plainly the product of a deeply broken political process, and precisely the type of outlier that should be held unconstitutional. To start, North Carolina's map satisfies the main prerequisite for a partisan gerrymander—single-party control of the redistricting process. When the challenged map was drawn, Republicans dominated both chambers of North Carolina's legislature. App. 10. And the final map was approved along party lines. *Id.* at 24.

It is little surprise, then, that North Carolina is one of the most heavily gerrymandered Republican states in the country. *Extreme Maps*, *supra*, at 1, 6-10, 12-13, 22, 25, 28. Without any influence over the redistricting process, North Carolina Democrats were unable to protect their supporters' interests,

allowing the Republican majority to place severe burdens on Democratic voters on the basis of their political beliefs and affiliations.

In addition to single-party control, other characteristics of North Carolina's politics and political geography show that Republicans had a strong incentive and opportunity to enact an extreme partisan gerrymander. The statewide electorate is about evenly split between Democrats and Republicans, and, indeed, prior to redistricting in 2010 Democrats held a narrow 7-6 advantage in the state's congressional delegation, with several seats consistently competitive. And certain regions in North Carolina have cohesive Democratic populations that provided Republicans with both the opportunity and incentive to crack and pack in order to maximize the Republican share of the state's congressional delegation. By rejiggering district lines to dilute Democrats' voting strength in congressional elections, Republican mapdrawers guaranteed that they will have a secure grip on a 10-3 majority in North Carolina's congressional delegation for the course of a decade, even, as in 2016, when they receive only about half of the votes and even, as in 2018, when Democrats' statewide vote share increased substantially.

Finally, the record plainly shows that North Carolina Republicans departed from normal politics in the redistricting process, much like Wisconsin Republicans did in *Gill* and Maryland Democrats did in *Benisek*. This departure strongly suggests an untoward objective. North Carolina Republicans in this case exploited their majority position by instituting a secretive, rushed redistricting process that almost entirely excluded Democrats from the map-drawing

exercise. They put in writing ground rules for the redistricting process that required map-makers to maintain the 10-to-3 advantage that Republicans had initially gained through their unconstitutional racial gerrymander. The map that North Carolina Republicans eventually approved was designed behind closed doors by a Republican map-drawer acting on instructions from North Carolina congressional Republicans (and Republicans alone). App. 14-18. The map-drawer also understood that his mandate was to maximize Republicans' seats. *Id.* at 17. By all objective metrics, in other words, North Carolina's map-drawers clearly engaged in unconstitutional partisan discrimination.

5. The objective factors identified by the Brennan Center can also be easily applied in other cases to distinguish between those maps that pose severe constitutional problems and those maps that do not.

For instance, Maryland's 2011 congressional map challenged in *Benisek* also triggers those readily-observable indicia, raising the prospect that they too are likely outside constitutional bounds. *Benisek* Brennan Br. 14-17. Democrats controlled all three branches of Maryland's government at the time of the gerrymander. *Id.* at 15. Maryland's Democrats likewise had a strong incentive and opportunity to enact an extreme partisan gerrymander in Maryland, given Maryland's political geography. *Id.*

The Maryland Democrats also departed from normal politics in the redistricting process. The map was designed behind closed doors by a Democratic consulting firm acting under instructions from Maryland's Democrats. *Id.* at 16. The map-makers

moved hundreds of thousands more people than were necessary to achieve population equality among the new districts and moved them at a volume that is unusual in comparison to other redistricting processes undertaken during the same time period. Brennan Ctr. for Justice, *Maryland's Extreme Gerrymander* (Mar. 8, 2019).[9] Further, the map was signed into law just three days after it was introduced. *Benisek* Brennan Br. 16. This gave essentially no time for ordinary political forces to act as a check on Maryland Democrats' power grab. In a testament to the degree of Democratic dominance over the process, Democratic state lawmakers were remarkably blunt about the plan's intent, candidly explaining that they supported it because it meant "more Democrats in the House of Representatives." *Id.* at 16-17.

By contrast, under the type of judicial inquiry the Brennan Center proposes, Virginia's 2011 state house map may not warrant close judicial scrutiny, even though it exhibits high levels of partisan bias in favor of Republicans. This is because the Virginia map was drawn under split-party control. Rosalind S. Helderman & Anita Kumar, *Virginia Assembly Approves New Legislative Maps*, Wash. Post (Apr. 7, 2011).[10] Virginia's Democrats could have marshalled the votes necessary to stop the Republicans' seat grab, but they chose not to. *Id.* Virginia's Dem-

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[9] https://www.brennancenter.org/analysis/marylands-extreme-gerrymander.

[10] https://www.washingtonpost.com/local/politics/virginia-assembly-approves-new-legislative-maps/2011/04/07/AFRjhrxC_story.html?utm_term=.5b8cdda90950.

ocratic governor likewise could have vetoed the map, sending the process back to the legislature or to the courts. He did not. In other words, it was not extreme partisan gerrymandering of the sort only the courts can police, but rather a failed political strategy that allowed Virginia's Republicans to take control of the Virginia state house in 2011.

As these examples demonstrate, the Court is well-equipped to help courts distinguish between unconstitutional partisan gerrymanders and normal political processes.

III. INVALIDATING EXTREME PARTISAN GERRYMANDERS WILL ENHANCE THE LEGITIMACY OF THE COURTS AND OUR SYSTEM OF GOVERNMENT.

This Court is not just capable of holding extreme partisan gerrymanders like North Carolina's and Maryland's unconstitutional, however. It is also in the institutional interests of the Court, the federal courts more broadly, and our democratic system of government to do so.

1. As the Court is well aware, the problem of extreme partisan gerrymandering has dramatically worsened in recent years, and it will only get worse over time as technological advances continue making it exponentially easier for map-drawers to gerrymander. *Gill*, 138 S. Ct. at 1935, 1941 (Kagan, J., concurring); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Given the serious constitutional harms caused by extreme partisan gerrymandering, *see supra* at 13-20, that trajectory should be extremely alarming to the Court, *see Reynolds*, 377 U.S. at 566 (the "denial of constitu-

tionally protected rights demands judicial protection").

The Court is the only neutral institution realistically capable of remedying this worsening constitutional problem and providing guidance before the 2021 round of redistricting. While it is theoretically possible for Congress to legislate limits on excessive partisanship, the prospects for such legislation are far from certain. Any legislative relief likely will not arrive in time for the next round of federal redistricting efforts (which start as early as February 2021 in many states), and it will not impact state-level redistricting.

2. Appellants argue that the Court's holding extreme partisan gerrymanders unconstitutional will delegitimize the federal courts, but precisely the opposite is true. The Court's intervention will promote the legitimacy of all our governmental institutions, including the Court itself. *See generally* Guy-Uriel Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236 (2018).

a. Judicial tolerance of extreme partisan gerrymandering "sends a clear message to political elites that partisanship is justifiably the coin of the realm." *Id.* at 274. The Court's failure to intervene, therefore, will only encourage politicians to press their advantage in future rounds of redistricting.

North Carolina perfectly demonstrates the issue. The Court's decision to refrain from policing partisan gerrymandering to date led one of the Republican co-chairs of North Carolina's redistricting committee to openly declare that their map was a "political ger-

rymander" and therefore "not against the law." App. 22. The Court should not tolerate that state of affairs, especially given its unanimous recognition that partisan gerrymandering is, in fact, *un*constitutional. *See supra* at 2, 19.

Politicians nationwide have been emboldened by this Court's inaction, which they have interpreted as a green light for increased efforts to insulate themselves from the will of voters by manipulating maps. *See Davis v. Bandemer*, 478 U.S. 109, 172-73 (1986) (Powell, J., concurring in part and dissenting in part) ("The failure to articulate clear doctrine in this area ... signal[s] the constitutional green light to would-be gerrymanderers." (quotation and footnote omitted)). That effect will only become more pronounced because of the increased polarization of the country and the always-improving technology and data available to make maps ever more extreme.

As this practice spreads, its threats to our democracy will only multiply. As Justice Kagan recognized last Term, "the evils of gerrymandering seep into the legislative process itself," undercutting incentives for legislators to collaborate and form bipartisan partnerships, and breeding distrust, dysfunction, and hostility that spills over into legislative sessions. *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring) (pointing to amicus briefs filed by bipartisan groups of congressional members and state legislators that described the "cascade of negative results" from extreme partisan gerrymandering); *see generally* Br. for *Amici Curiae* Bipartisan Group of 65 Current and

Former State Legislators in Support of Appellees, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017).[11]

b. The Court's invalidation of extreme partisan gerrymandering now also will send a clear message reinforcing core American norms against political entrenchment that are currently under assault from more than just gerrymandering.

Take, again, the example of North Carolina. The gerrymandering of North Carolina's congressional map is simply one of many legislative measures designed to entrench the dominant party's power by dramatically changing governmental institutions, including both the political branches and the courts. For example, in December 2016, after incumbent Republican Governor Pat McCrory was unseated by Democrat Roy Cooper, North Carolina's Republican-controlled legislature held multiple special sessions to pass laws limiting the newly-elected governor's powers before he took office. Among other things, the legislature severely restricted Governor Cooper's appointment authority by giving North Carolina's Senate veto power over his cabinet picks and reducing the total number of gubernatorial appointees from 1,500 to 425. Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper's Power*, News & Observer (Dec. 19, 2016)[12]; Tara Golshan, *North Caro-*

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[11] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BipartisanLegislators_InSupportofAppellees.pdf.

[12] https://www.newsobserver.com/news/politics-government/state-politics/article121885658.html.

lina Republicans' Shocking Power Grab, Explained, Vox (Dec. 16, 2016).[13]

Similar developments played out in Pennsylvania, another (formerly) severely gerrymandered state. In 2018, the Pennsylvania Supreme Court held that Pennsylvania's congressional map violated the Pennsylvania Constitution because it was an extreme partisan gerrymander drawn to discriminate against Democrats and entrench a lopsided 13-5 Republican majority in a state that is 50/50 politically. *See* Katie Meyer, *Pennsylvania Chief Justice Criticizes Impeachment Moves*, NPR (Mar. 22, 2018).[14] In response, Republicans introduced resolutions to impeach several of the Court's sitting justices. *Id.*

These developments are symptomatic of substantial stresses on—if not outright erosion of—longstanding American norms against entrenched power. Striking down egregious gerrymanders designed to entrench the map-drawing party in power will signal that these norms retain their value and their force.

Time and again, the Court has successfully intervened in the political process to vindicate such constitutional norms. *See, e.g.*, Charles & Fuentes-Rohwer, *supra*, at 266-70, 275; Br. of Heather K. Gerken, *et al.*, as *Amici Curiae* in Support of Appellees at 7-10, *Gill v. Whitford*, No. 16-1161 (S. Ct.

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[13] https://www.vox.com/policy-and-politics/2016/12/16/13971368/republican-power-grab-north-carolina-explained.

[14] https://www.npr.org/2018/03/22/596172829/pennsylvania-chief-justice-criticizes-impeachment-moves.

Aug. 30, 2017)[15]; McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1538-42 (2018). It should do so here too. At this stage, when gerrymandering and the political climate have progressed to such extremes that legislatures have deemed it open season to act in ways that are profoundly antidemocratic, any costs of not intervening far outweigh the risks of intervention.

***

Recognizing that extreme partisan gerrymanders are irreconcilable with the Constitution, this Court has long sought a standard that courts could use to provide a reliable and limited answer to the question: "[h]ow much political motivation and effect is too much?" *Vieth*, 541 U.S. at 297 (plurality op.). Armed with the objective limiting factors discussed herein, the Court is readily capable of identifying those rare maps that are intended to and actually will durably entrench a political party in power, all while avoiding judicial interference in normal politics. The conditions that generate those maps are unusual, easily identified, and easily incorporated into a judicial inquiry. Those maps cause the political system to become unresponsive to a particular segment of voters on the basis of their political affiliation. Those maps make the legislature grossly unrepresentative of the state's populace as a whole. And those maps impair voters' First Amendment rights to equal political expression and association.

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[15] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_HeatherK.GerkenEtAl_InSupportofAppellees.pdf.

Those maps, in other words, subvert our democratic system of government, all while stripping voters of their ability to protect themselves through the electoral process. For the sake of those foundational constitutional principles and the institutional interests of the federal courts, the Court should redress those constitutional harms by holding North Carolina's and Maryland's extreme maps unconstitutional.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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March 8, 2019

No. 18-422

IN THE

Supreme Court of the United States

ROBERT RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF COLLEAGUES OF PROFESSOR NORMAN DORSEN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether an extreme partisan gerrymander that intentionally pre-selects the overwhelmingly likely winner in each of North Carolina's 13 Congressional Districts violates the First Amendment by:

1. discriminating of the basis of viewpoint;
2. imposing depressed levels of campaign funding, speech, and electoral activity typically associated with non-competitive elections; and
3. denying voters of all political stripes the ability to exercise a meaningful personal choice over who is to represent them in the legislature?

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(2) LOCKING AS MANY VOTERS AS POSSIBLE INTO VIRTUALLY UNCONTESTABLE ELECTION DISTRICTS CHARACTERIZED BY DEPRESSED AND UNEQUAL LEVELS OF CAMPAIGN SPENDING, DIMINISHED LEVELS OF POLITICAL SPEECH AND ASSOCIATION, AND DISAPPOINTING LEVELS OF VOTER PARTICIPATION; AND

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INTEREST OF *AMICI*

Amici, more fully described in an Appendix following this brief, were colleagues of Professor Norman Dorsen, who died peacefully on July 1, 2017.[1] Professor Dorsen devoted his career to the teaching, study and passionate defense of the United States Constitution. His academic career at NYU School of Law spanned fifty-six years, from 1961-2017, culminating as Frederick I. and Grace A. Stokes Professor of Constitutional Law, Co-Director of the Arthur Garfield Hays Civil Liberties Program, and Counsellor to the President of New York University. Professor Dorsen's tireless defense of the United States Constitution included distinguished service from 1969-1991 as General Counsel and then President of the American Civil Liberties Union (ACLU).

In the months preceding his death, Professor Dorsen was engaged in preparing material for submission to this Court opposing the constitutionality of excessive partisan gerrymandering, which he viewed as a paramount threat to American democracy. Sadly, Professor Dorsen died before completing his work. *Amici*

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[1] Blanket consents to the filing of briefs *amici curiae* herein have been filed with the Clerk of the Court by all parties. Counsel represents, pursuant to Rule 37.6, that no party, or counsel for a party, has played a role in the drafting or preparation of this brief *amici curiae*; nor did any person or entity other than *amici* contribute financially to the drafting, preparation, or filing of this brief. This brief reflects the personal views of *amici* and does not purport to express the views of New York University School of Law, or of any other entity or institution.

have pledged, in his memory, to complete Professor Dorsen's unfinished project.

Amici submitted a brief *amici curiae* in *Gill v. Whitford*, No. 16-1165 (June 18, 2018) reflecting many of Professor Dorsen's ideas. Since the constitutional issues posed by extreme partisan gerrymandering are, once again, before the Court in this appeal, *amici*, with the blanket consent of all parties, respectfully submit this brief *amici curiae* further developing Professor Dorsen's ideas in the hope that the Court will find it of assistance in confronting the challenge to American democracy posed by uncontrolled partisan gerrymandering.

SUMMARY OF ARGUMENT

Until very recently, most constitutional challenges to extreme partisan gerrymandering have focused on its unconstitutionally corrosive effect on equality and fair political representation, enabling a transient electoral majority to acquire, exercise, and entrench legislative power significantly in excess of its electoral support in the relevant community. Faced with highly plausible claims that extreme partisan gerrymandering violates the guaranty of equal protection of the laws codified in the 14th Amendment, this Court has repeatedly recognized the practice's unfair and pernicious effects. For more than three decades, this Court has struggled to develop manageable judicial standards that, in the view of a majority of the Court, would enable judges to determine when politically gerrymandered voting and representation is so unfair as to become unconstitutionally unequal. E.g.,

Davis v. Bandemer, 478 U.S. 109 (1986); *Vieth v Jubelirer*, 541 U.S 267 (2004); *LULAC v. Perry*, 548 U.S. 299 (2006).

As Justice Anthony Kennedy recognized in his concurrence in *Vieth*, however, the constitutional harms imposed by extreme partisan gerrymandering do not stop at the Equal Protection Clause. 541 U.S. at 314. See also *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (Kagan, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, JJ). In addition to being unconstitutionally unequal under the 14th Amendment, extreme partisan gerrymandering violates three strands of First Amendment doctrine: (1) the First Amendment equality principle that forbids government, in the absence of a compelling justification, from discriminating on the basis of viewpoint, or treating similarly-situated speakers differently, E.g., *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (viewpoint); *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (speaker); (2) the ban on government regulation likely to depress the level of protected First Amendment activity, especially in an electoral context. E.g., *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008); and (3) a voter's First Amendment right to exercise a meaningful personal choice over who will speak for the voter in the halls of legislative power. *Terry v. Adams*, 345 U.S. 466 (1953); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). See also *Burdick v. Takushi*, 504 U.S. 428, 446-49 (1992) (Kennedy, J., dissenting).

While natural sorting of the population into contiguous homogeneous political groupings may

make it unduly difficult to draw genuinely contestable electoral districts in certain areas, in settings like North Carolina, a "swing state," where it is eminently feasible to draw district lines rendering the majority of Congressional elections genuinely contestable, the First Amendment does not tolerate a carefully gerrymandered electoral map that discriminates on the basis of viewpoint and locks voters into rigged elections where everyone believes that the highly probable winners and losers have been preselected by officials wielding state power.

Judicially manageable, generally accepted metrics exist in the political science literature that assess the probable contestability of a given election. Briefly put, measured at the commencement of an election campaign, districts displaying a 60/40 partisan spread are deemed uncontestable "landslide" districts; a 55/45 partisan spread creates a virtually uncontestable "safe" district; 54/46 and 53/47 districts tilt in favor of one candidate, but are, nevertheless, "contestable;" while 52/48 districts are statistical ties deemed "swing" districts. [2]

Appellants challenge the accuracy of the predictive literature described *infra* in n.7, pointing out, correctly, that it failed to predict future electoral contestability in *Vieth*. Appellants' Br. at 45. But appellants confuse the difference between absolute certainty and overwhelming probability. A day of rain in the desert does nothing to counteract the overwhelming likelihood that the next day will be dry. Most importantly,

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[2] See *infra* at n.7 for a brief description of the political science literature underlying the classifications.

since the predictive accuracy of the contestability classifications is widely accepted by both political leaders and voters alike, a widespread belief exists, borne out by common sense and experience, that in the overwhelming majority of elections neither "landslide" nor "safe" districts are genuinely contestable. Cf. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (recognizing the importance of "appearance" in regulating electoral behavior).

(1)

Extreme partisan gerrymandering is a paradigm violation of the First Amendment duty to treat viewpoints and similarly-situated speakers equally. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). See generally, Kenneth Karst, *Equality as a Central Principle of the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). The very purpose and effect of an extreme partisan gerrymander is to disadvantage and frustrate the speech, association, and electoral efforts of a disfavored political grouping.

(2)

By pre-ordaining the highly probable electoral outcome, extreme partisan gerrymandering sucks the proverbial First Amendment oxygen out of the campaign process, creating a series of non-competitive electoral boxes within which the level of campaign spending, speech and association is necessarily depressed by the widespread belief that all the speech and association in the world is highly unlikely to alter the outcome of a rigged election. *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

(3)

At the core of the republican form of government guaranteed by Article IV, section 4 are the First Amendment rights of eligible voters to exercise "an effective voice in the governmental affairs of their country, state or community." *Terry v. Adams*, 345 U.S. 461, 466 (1953) (quoting from the 5th Circuit's rejection of the exclusionary practice). An extreme partisan gerrymander, by minimizing (even eliminating) the occurrence of genuinely competitive elections in a given political unit, unconstitutionally degrades the act of voting by draining it of much of its political power. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

ARGUMENT

THE FIRST AMENDMENT BARS THE NORTH CAROLINA LEGISLATURE FROM:

(1) DISCRIMINATING ON THE BASIS OF VIEWPOINT IN DRAWING VIRTUALLY UNCONTESTABLE DISTRICT LINES CONCEDEDLY DESIGNED TO FAVOR A SINGLE POLITICAL PARTY;

(2) LOCKING AS MANY VOTERS AS POSSIBLE INTO VIRTUALLY UNCONTESTABLE ELECTION DISTRICTS CHARACTERIZED BY DEPRESSED AND UNEQUAL LEVELS OF CAMPAIGN SPENDING, DIMINISHED LEVELS OF POLITICAL SPEECH AND ASSOCIATION, AND DISAPPOINTING LEVELS OF VOTER PARTICIPATION; AND

(3) DENYING NORTH CAROLINA VOTERS A MEANINGFUL PERSONAL CHOICE CONCERNING WHO WILL REPRESENT THEM IN CONGRESS

Introduction and Factual Summary

The court below was confronted with a ruthless partisan gerrymander of all 13 of North Carolina's Congressional Districts that intentionally "packs" many of the state's reliably Democratic voters into three overwhelmingly Democratic "landslide" districts that, predictably, generate massive

pluralities for the Democratic candidate,[3] while carefully spreading most of the state's reliably Republican voters over the remaining 10 Congressional districts, so that, in each of those districts, the Republican candidate, based on voter registration figures and past voting patterns, enjoyed at least a 10 percentage point edge at the commencement of the 2018 Congressional campaign.[4]

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[3] The three "packed" Democratic "landslide" districts are the 1st, with a Democratic edge in the last three Congressional elections of 52, 47, and 40 percent; the 4th, with a Democratic edge in the last three Congressional elections of 49, 56, and 35 percent; and the 12th, with a democratic edge in the last three Congressional elections of 59, 53, and 34 percent. Not surprisingly, in 2018, the Democratic candidates in the three "landslide" districts prevailed by landslides of 70/30; 72/24; and 73/27, respectively. The figures are drawn from https://www.politico.com/2014-election/results/map/house/north-carolina/#.XHQIJC2ZOgQ (last visited February 28, 2019); https://www.politico.com/2016-election/results/map/house/north-carolina/ (last visited February 28, 2019); https://www.politico.com/election-results/2018/north-carolina/ (last visited February 28, 2019).

[4] The ten carefully constructed Republican-leaning districts are the 2nd, with a Republican edge of 14, 18, and 13 percent in the last three Congressional elections; the 3rd, with a Republican edge 26, 36, and 34 percent; the 5th, with a Republican edge of 15, 22, and 17 percent; the 6th, with a Republican edge of 22, 17, and 18 percent; the 7th, with a Republican edge of 22 percent in the last two Congressional elections; the 8th with a Republican edge of 30 and 18 percent in the last two Congressional elections; the 9th with a 16 point Republican edge in the 2016 Congressional election; the 10th, with a Republican edge of 14, 22, and 26 percent in the last three Congressional elections; the 11th with a Republican spread of 15, 26, and 28 percent and the

The conceded purpose and effect of the North Carolina gerrymander was to pre-determine the winner in each of North Carolina's 13 Congressional districts. The plan worked. Despite polling approximately 50% of the vote in the 2018 statewide elections, all four of which were won narrowly by Democrats,[5] Democrats were unable to dent the Republican wall of 10 "safe" or "landslide" Congressional seats, leaving the North Carolina Congressional delegation at 9 Republican-3 Democratic, with one unresolved election that had apparently been won narrowly by the favored Republican candidate rendered void by irregularities in the handling of absentee ballots.[6]

The 2018 results did not come as a surprise. Generally accepted guidelines based on the known attributes of individual voters comprising the electorate, such as past voting patterns and party registration, measure the statistical likelihood

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13th, with a Republican edge of 14, 15, and 12 percent. The figures are drawn from the sources cited in n. 3.

[5] The four state-wide races were judicial elections. According to the official North Carolina vote tabulation, one state Supreme Court race was won by the Democratic candidate with 49.6% of the vote. Three state Court of Appeals races were won by Democratic candidates with 50.8, 48.8, and 48.6% of the vote, respectively. See https://www.wral.com/north-carolina-election-results/17944806/?group=judges (last visited February 28, 2019).

[6] North Carolina election official have ordered a new election in the 9th CD on the basis of mishandling of absentee ballots. Election day tabulations had indicated a 900-vote victory for the favored candidate.

that a given election will be contestable with a high degree of accuracy.[7] As *amici* have noted, 60/40 election districts are generally viewed as "landslide" districts that are virtually certain to elect the favored candidate; 55/45 election districts are "safe" districts that are highly likely to elect the favored candidate; 54/46 and 53/47 districts are deemed "contestable," allowing both sides to entertain a reasonable hope for victory. 52-48 election districts are "swing" districts where each candidate has a virtually equal chance to win.

Thus, a well-executed extreme partisan gerrymander – like the partisan gerrymander of North Carolina's 13 Congressional districts before the Court in this appeal – is nothing less than a

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[7] A massive political science literature discusses the relationship between political gerrymandering and competitive elections. For a useful summary, see Heather K. Evans, *Competitive Elections and Democracy in America: The Good, the Bad, and the Ugly* (2014). See also Keena Lipsitz, *Competitive Elections and the American Voter* (U. Pa. Press 2011). See David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295, 304 (1974) (defining as "reasonably safe" districts in which the majority party routinely captures 55% or 60% of the vote); see also Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections*, 1946-1988, at 26 ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats."). A popular practical measure, the Cook PVI, compares "how each district performs at the presidential level compared to the nation as a whole." http://cookpolitical.com/introducing-2017-cook-political-report-partisan-voter-index (last visited February 28, 2019).

successful conspiracy by a transient electoral majority to minimize (even eliminate) the occurrence of genuinely competitive elections in a political unit. While the art of gerrymandering is as old as the Republic itself,[8] its transformation into a dangerous science rests on three modern factors: (1) extraordinary advances in technology making possible the gathering, storage, and manipulation of a wide swath of information revealing the political preferences of individual voters;[9] (2) the unfortunate polarization of our political process, motivating political leaders of both major parties to go to extremes in seeking to gain short-term electoral advantages over political rivals, regardless of the long-term harm to American democracy; and (3) advances in political science making it possible to calibrate the likely degree of competitiveness of virtually any electoral configuration with a high degree of accuracy. See n. 7, *supra*.

If one looks forward in time from an intensely gerrymandered election, one almost always

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[8] The derivation of the phrase dates from Governor Elbridge Gerry's effort to draw 1812 electoral lines in Massachusetts favoring his political allies. In fact, the practice emerged earlier, when Patrick Henry altered the electoral lines in the 1788 Virginia Congressional elections to require James Madison to run against James Monroe. See Elmer C. Griffith, *The Rise and Development of the Gerrymander* (1907).

[9] For a summary of technological changes, see Vann Newkirk II, *How Redistricting Became a Technological Arms Race*, The Atlantic (Oct. 28, 2017), available at https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ (last visited February 28, 2019).

observes an unfairly skewed legislature that over-represents the transient electoral majority in control of the gerrymandering process.[10] If one looks backward in time, the landscape is littered with soporific election campaigns characterized by depressed and unequal levels of campaign spending, desultory exercises in speech and association, and disappointing voter turnout.[11] Since rigged election campaigns in intensely gerrymandered districts are: (1) concededly intended to distribute electoral benefits and burdens unfairly on a viewpoint-based basis; (2)

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[10] The partisan gerrymander before the Court in this appeal took an evenly divided North Carolina electorate and intentionally produced a 2016 Congressional delegation consisting of 10 Republicans and 3 Democrats, and a 2018 Congressional delegation of 9 Republicans and 3 Democrats, with one district undecided pending a new election due to the improper handling of absentee ballots.

[11] Applying the generally accepted guidelines measuring an election's competitiveness, not a single North Carolina Congressional election district would qualify as "swing" or "contestable." Viewing the elections as of the commencement of the 2018 campaign, the 1st, 3rd, 4th, 7th, 10th, 11th, and 12th were at least 60/40 "landslide" districts; and the 2nd, 5th, 6th, 8th, 9th, and 13th were at least 55/45 "safe" districts. Even the currently undecided 9th CD, where a Democrat almost closed the "safe" seat gap, appears to have validated the statistical prediction that the 55/45 favored candidate would win, albeit by less than one thousand votes. While it is not impossible to "flip" a "landslide" or a "safe" district, (it may happen in the 9th CD), it happens rarely, usually because of a local scandal, a national crisis, population shifts, or a surge in the voter participation of newly enrolled voters. Perhaps most importantly, landslide and safe districts have the appearance of inevitability that is fatal to a robust campaign. See *Buckley*, 424 U.S. at 28 (recognizing that the "appearance" of corruption justifies limiting the size of campaign contributions).

naturally characterized by depressed levels of political activity because they take place against the widespread belief that all the speech and association in the world is highly unlikely to affect the outcome; and (3) destructive of the power of voters of all political stripes to exercise a meaningful personal choice over who will serve as their representatives, the decision by appellants to lock every Congressional voter in the State of North Carolina into 13 airless, non-competitive electoral boxes unconstitutionally burdens the First Amendment rights of winners and losers alike.

Accordingly, *amici* urge the Court to recognize that the First Amendment bans excessive partisan gerrymandering in settings where it is eminently feasible to substitute "swing" or "contestable" election districts for the steady diet of "landslide" and "safe" districts produced by partisan political leaders in full flight from the inconvenience of competitive elections at the heart of a republican form of government.

1. The Legal Background of Challenges to Excessive Partisan Gerrymandering

This is the sixth time that the constitutionality of political gerrymandering has been before this Court in a plenary proceeding. *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding bi-partisan gerrymandering designed to reflect the partisan make-up of the electorate); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (recognizing that extreme partisan gerrymanders are unconstitutional when they "consistently degrade a voter's...influence on the political process as a whole." (plurality opinion of White, Brennan,

Marshall and Blackmun, JJ);[12] *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (modifying *Davis*; declining to consider 14th Amendment-based challenges to excessive partisan gerrymandering in the absence of an objective baseline of representative fairness from which to measure deviation, but holding open the possibility that a judicially administrable standard may arise under the First Amendment);[13] *LULAC v. Perry*, 548 U.S. 299

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[12] Six members of the *Davis v. Bandemer* Court ruled that 14th Amendment-based claims of excessive partisan gerrymandering pose a justiciable case and controversy. 478 U.S. at 125. The six divided over whether the Indiana gerrymander before the Court violated the Equal Protection rights of Democratic voters. Justices White, Brennan, Marshall and Blackmun held that the evidence before the District Court did not demonstrate a sufficient interference with Democratic voters' ability to play a significant role in the choice of representatives to constitute a denial of the equal protection of the laws. 478 U.S. at 129. Justices Powell and Stewart would have affirmed the District Court's finding of unconstitutionality based on a showing of a purposeful state effort to disadvantage Democratic voters that was carried out in violation of traditional apportionment criteria. 478 U.S. at 176. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, argued that 14th Amendment partisan gerrymandering claims posed non-justiciable political questions. 478 U.S. at 160.

[13] Four members of the *Vieth* Court – Justices Scalia, Chief Justice Rehnquist, and Justices O'Connor and Thomas – flatly rejected the justiciability of partisan gerrymandering claims. 541 U.S. at 305. Four Justices – Justices Stevens, Souter, Ginsburg and Breyer – insisted that 14th Amendment-based partisan gerrymandering claims were justiciable, albeit under three differing standards. 541 U.S. at 326 (Stevens, J); *Id.* at 346 (Souter J, joined by Ginsburg, J; and *Id.* at 365 (Breyer, J.). Justice Kennedy cast the swing vote, agreeing that 14th Amendment-based partisan gerrymandering claims are

(2006) (declining to rule on the justiciability of partisan gerrymandering challenges; rejecting challenge to mid-census reapportionment; granting partial relief under Section 2 of the Voting Rights Act);[14] and *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (unanimously vacating and remanding 14th Amendment equality-based challenge to statewide partisan gerrymander to ascertain whether any named-plaintiff suffered a cognizable injury).[15]

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non-justiciable in the absence of an objective definition of political fairness to act as a baseline against which to measure a given gerrymander, but holding out the prospect of justiciable First Amendment-based challenges that rest on the substantive quality of electoral participation. 541 U.S. at 314.

[14] Justice Kennedy, writing for the *LULAC* Court, explicitly declined to consider whether partisan gerrymandering claims are justiciable, continuing the uncertainty that reigns after *Davis* and *Vieth*. 548 U.S. at 423. Two Justices, Chief Justice Roberts and Justice Alito, ruled that the challengers had failed to provide a judicially-manageable standard, but declined to consider the issue generally. 548 U.S. at 492. Two Justices, Scalia and Thomas, argued that partisan gerrymandering claims are non-justiciable. 548 U.S. at 511. Four Justices, Stevens, Souter, Ginsburg and Breyer continued to argue that partisan gerrymandering claims are justiciable. 548 U.S. at 447, 485-86, and 492.

[15] Two Justices, Thomas and Gorsuch, would have dismissed rather than remand. 138 S.Ct. at 1941. Four Justices, Kagan, Breyer, Ginsburg and Sotomayor, issued a concurring opinion discussing possible justiciable First Amendment challenges. *Id.* at 1939-40. A seventh plenary case, *Benisek v. Lamone*, 138 S.Ct. 1942 (2018), challenging a Democratic gerrymander of a single Maryland Congressional District on First Amendment grounds, was also disposed of on procedural grounds without consideration of the merits. The Court, acting *per curiam*,

Until very recently, challengers relied solely on the 14th Amendment to argue that excessive partisan gerrymandering generates unconstitutionally distorted representational outcomes that intentionally deprive a disfavored group of voters of their fair share of electoral representation.[16] Challengers have struggled unsuccessfully for more than three decades to develop manageable judicial standards acceptable to the Court's majority that would enable judges to determine when politically gerrymandered representation becomes so skewed as to be unconstitutionally unfair.[17] More recently, as in

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unanimously upheld the District court's denial of preliminary injunctive relief without reaching the merits because insufficient time existed to alter the district lines before a forthcoming election. *Id.* at 1945. The Maryland case is once again before the Court on the merits. *Lamone v. Benisek*, No 18-726.

[16] For example, in *Davis v. Bandemer*, the challengers complained that the gerrymander of the Indiana state legislature had enabled the Republican Party to parlay approximately 48% of the statewide vote into 57 of the 100 seats in the lower house; and approximately 47% of the statewide vote into 12 of 25 state senate seats. 478 U.S. at 115. In *Vieth*, one set of plaintiffs challenged only the statewide representational distortion without challenging any particular district. 541 U.S. at 296. One plaintiff complained of an irregularly drawn district but focused solely on the representational distortion caused by the gerrymander. *Id* at 297. In *Gill*, the parties were so focused on statewide representational distortion that they failed to identify any plaintiff with standing to challenge a particular election, requiring a remand to explore the standing issue. 138 S. Ct. at 1933.

[17] In *Davis v. Bandemer*, six members of the Court propounded two standards – the plurality asked whether the gerrymander "consistently degrade[d] a voter's ... influence on the political process as a whole." 478 U.S.

this appeal,[18] challengers have argued that not only does excessive partisan gerrymandering unconstitutionally taint the representational fairness of the ensuing legislature, it violates the First Amendment in three ways by: (1) flouting the First Amendment equality principle; (2) unconstitutionally degrading the quality and quantity of First Amendment activity associated with the intensely gerrymandered elections;[19] and

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at 132. Justices Powell and Stevens asked whether the gerrymander was an intentional effort to diminish the representation of a political rival carried out in violation of traditional districting criteria. *Id.* at 185. In *Vieth*, Justices Souter and Ginsburg applied a modified *Davis* plurality standard, criticizing the lower courts for requiring a showing that a challenger's electoral rights had been all but extinguished. They would have asked whether electoral opportunities had been significantly eroded intentionally. 541 U.S. at 347-50. Justice Stevens re-asserted his *Davis* standard. *Id.* at 333. Justice Breyer asked whether the partisan gerrymander intentionally eroded principles of representative fairness inherent in American democracy. *Id.* at 365. In *Gill*, the challengers relied on a sophisticated mathematical model to determine whether a statewide minority had been "packed" into districts in an intentional effort to "waste" the electoral significance of their votes. 138 S. Ct. at 1923-24.

[18] In this case, the challengers have launched both an equality-based challenge to representational distortion and a First Amendment-based challenge to electoral degradation. The three-judge court below accepted both theories. See *Common Cause v. Rucho*, 318 F. Supp.3d 777, 800-01 (M.D. N. Car. 2018).

[19] A similar decision whether to look forward or backward from a violation of the one-person one-vote principle was made by this Court in the cases following *Baker v. Carr* 369 U.S. 186 (1962). *Baker* and *Reynolds v. Sims*, 377 U.S. 533 (1964) looked backward to the malapportioned election, noting the mathematical

(3) undermining the power of the ballot by shifting the real power to choose the winner of an election to someone other than the eligible voters themselves. *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating shift of power to choose almost certain winner to private hands); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating "blanket" primary giving too much power to non-party members to select nominee.)

2. Extreme Partisan Gerrymandering Violates the First Amendment Equality Principle

The court below recognized that appellants violated the First Amendment equality principle by engaging in viewpoint discrimination and intentionally imposing disparate treatment on similarly situated speakers. 318 F. Supp. 3d at 935. It is no answer for appellants to argue that shifting the legal lens from 14th Amendment equality to First Amendment equality fails to provide a reasonably objective baseline of fairness against which to measure an allegedly unequal gerrymander. Such an argument overlooks a fundamental analytic difference between a 14th Amendment equality challenge, and a challenge grounded in the First Amendment equality principle.

As the Court noted in *Vieth*, a 14th Amendment equality-based challenge to extreme partisan

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disparity in the value of votes cast in a malapportioned setting. In later one-person one-vote cases, the Court unanimously declined to hold that a legislature operating with weighted voting would cure the inequality at the electoral level. See *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

gerrymandering requires a court to construct a subjective baseline of electoral fairness against which to measure an allegedly unconstitutional deviation. While that process is eminently feasible in the one-person one-vote context of *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny, where the mathematical value of one person's vote provides an objective baseline against which to measure the mathematical value of a challenger's vote, constructing an objective baseline of fairness has proven elusive in the context of partisan gerrymandering, where identifying a baseline of "fair representation" often involves a series of subjective judgments. But no such analytic impediment confronts a judge in a First Amendment equality case. Under clearly established First Amendment doctrine, this Court has repeatedly held that the differential treatment by the state of viewpoints or similarly-situated speakers triggers First Amendment strict scrutiny, without the necessity of constructing a baseline grounded in a judge's necessarily subjective view of fairness. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (viewpoint); *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (speaker).[20]

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[20] For additional examples of the enforcement of the First Amendment equality principle, see *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (discrimination between speech about labor and everything else); *Carey v. Brown*, 447 U.S. 455 (1980) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (discrimination between religious and secular speech) *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1983) (same); *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (differential treatment of

In fact, the only baseline required in a First Amendment equality case is a description of the treatment afforded by the state to the favored viewpoint or speaker. That favorable treatment then forms the objective baseline against which to compare the treatment afforded to a disfavored viewpoint or speaker.

Thus, in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), a state University subsidized secular student speech but refused to provide similar support for student speech of a religious character. In deciding whether the First Amendment equality principle had been violated, this Court used as its baseline the University's favorable treatment of secular speech and found that the University was treating speech with a religious viewpoint less favorably, thereby triggering First Amendment strict scrutiny. 515 U.S. at 845-46. Similarly, in *Citizens United v. FEC*, 558 U.S. 310 (2010), in the wake of *Buckley v. Valeo*, 424 U.S. 1 (1976), federal statutes permitted flesh-and-blood individuals to make unlimited independent expenditures seeking to affect the outcome of a federal election but absolutely forbade corporations from expending treasury funds in connection with a campaign for federal office. In assessing the corporation's First Amendment claim, this Court used as its baseline the favored treatment of individuals and ruled that since the statute was treating one set of speakers (corporations), less favorably than

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similarly-situated speakers); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (same); *RAV v. City of St. Paul*, 505 U.S. 377 (1992) (viewpoint discrimination); *Virginia v. Black*, 538 U.S. 343 (2003) (same).

another set of speakers, (individuals), the corporate ban was reviewable under First Amendment strict scrutiny. 558 U.S. at 340 (applying First Amendment strict scrutiny).

In this case, the North Carolina legislature has imposed a massive state-wide gerrymander that intentionally favors Republican Congressional candidates and voters over Democratic candidates and voters by constructing 13 electorates that will, to the maximum extent possible, allow Republican voters to elect the largest number of representatives of their choice, while rendering it difficult or impossible for disfavored Democratic voters to enjoy an equal political opportunity for representation. Applying *Rosenberger* to the viewpoint discrimination inherent in the gerrymander, and *Citizens' United* to the dis-parate treatment of similarly-situated speakers inherent in appellants' intentional decision to favor adherents of one political party over another, the objective judicially manageable baseline in this case is North Carolina's highly favorable treatment of Republican voters, allowing a court readily to determine whether Democratic voters are being treated substantially less favorably.

Once such differential viewpoint or speaker-based treatment is found to exist, classic First Amendment doctrine set forth in *Rosenberger* and *Citizens United* requires North Carolina to demonstrate that its decision to treat Republican and Democratic voters differently is necessary to advance one or more compelling state interests by the least drastic means. 558 U.S. at 340. It is, of course, impossible for North Carolina to meet such a burden of justification. No legitimate – much less compelling – state interest exists that can

justify the state's blatant discrimination against Democratic candidates and voters.

3. Extreme Partisan Gerrymandering Inevitably Degrades the Quantity and Quality of Intensely Protected Electoral Speech

This Court has repeatedly invalidated well-intentioned efforts to improve the democratic process because the reform proposal before the Court would – or even might – depress the quantity and quality of intensely protected electoral speech. E.g., *Miami Herald v. Tornillo*, 418 U.S. 241, 256-57 (1974) ([faced with a duty to print a reply] the "editors might well conclude that the safe course is to avoid controversy." As a result, [the government-enforced] "right of access inescapably damages the vigor and limits the variety of public debate..."); *Buckley v. Valeo*, 424 U.S. 1 (1974) (campaign spending limits would depress electoral speech); *Citizens United v. FEC*, 558 U.S. 310 (2010 (denying corporations the ability to speak during an election campaign would deprive voters of potentially valuable information); *Davis v. FEC*, 554 U.S. 724 (2008) (allowing candidates access to relaxed campaign contribution limits to offset the advantage of significant campaign spending by an extremely wealthy opponent might deter the wealthy candidate from expending money to produce speech); *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011) (dollar-for-dollar match invalid because it would deter fundraising, and thus speech, by the privately-funded candidate); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (invalidating generous cap on total campaign contributions to federal candidates in a single

election cycle because it deterred "full-throated" electoral speech).

In *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721 (2011), Chief Justice Roberts wrote for a five-justice majority in invalidating an Arizona public financing program that provided a publicly-funded candidate with a dollar-for-dollar match of campaign funds raised by a privately-funded opponent. The Chief Justice predicted that the knowledge that each dollar raised privately would result in a dollar-for-dollar match to the candidate's publicly-funded opponent would deter the level of protected fundraising and expenditure by privately funded candidates. 564 U.S. at 745-46. When asked to provide empirical support for the assertion that Arizona's matching plan would, in fact, deter the robust exercise of fundraising and spending by privately-funded candidates, the Chief Justice responded:

> The burden imposed by the matching fund provision is *evident* and *inherent* in the choice that confronts privately funded candidates...we do not need empirical evidence to determine that the law is burdensome. 564 U.S. at 745-46 (emphasis added) (citing *United States v. Davis*, 554 U.S. at 738-40 ("requiring no evidence of a burden whatsoever" caused by differential contribution rules triggered by massive campaign spending by an extremely wealthy candidate).

The burden on robust electoral speech and association imposed by intentionally locking every Congressional voter in North Carolina into carefully rigged elections, where the voters

believe that their speech, association, and campaign contributions almost certainly cannot affect the election's outcome, is far greater than the deterrent impact on electoral speech imposed by the regulations in *Tornillo*, *Davis*, and *Arizona Free Enterprise*.[21] Experience and common sense teach that elections conducted inside a state-designed airless box of apparent inevitability are pale shadows of the real thing. Whenever government has acted to "chill" the "full-throated" exercise of First Amendment freedoms in the context of an election, this Court has condemned the government action as violative of the First Amendment. The "evident," "inherent," and "inescapable" "chilling effect" on protected campaign activity caused by excessive partisan gerrymandering is no different.

The court below recognized that extreme partisan gerrymandering sucks the proverbial

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[21] This Court has held that the reasonable perception of the electorate is an important measure of First Amendment applicability. Thus, in *Buckley*, the Court upheld the constitutionality of limits on the size of campaign contributions based on the "appearance" of corruption inherent in unregulated contributions. 424 U.S. at 26. The lack of such an "appearance" of corruption doomed efforts to restrict independent expenditures by individuals and, eventually, corporations. 424 U.S. at 45. Similarly, the lack of an appearance of corruption (defined narrowly as *quid pro quo* bribery) doomed the generous ceiling on aggregate campaign contributions in a single election cycle. *McCutcheon*, 572 U.S. at 227. The "appearance" of inevitability perceived by the electorate in a landslide (60/40) or a "safe" (55/45) district is far more intense that the diffuse "appearance" of corruption relied on by this Court in *Buckley*, *Citizens United*, and *McCutcheon*.

First Amendment oxygen out of the electoral campaign process, leaving a series of airless, non-competitive electoral boxes inside which campaign speech and association are inescapably depressed. No one – not even the pre-ordained winner – can get terribly excited about competing in a rigged horse race – or campaigning vigorously in a legislative election that appears to have the winner pre-ordained by the state.

In *Buckley*, the Court invoked the metaphor of an automobile to explain why campaign spending should be treated as "pure" speech. Campaign money to a candidate, the Court reasoned, is the equivalent of fuel in the driver's gas tank. 424 U.S. at 19, n. 18. When, however, the driver in *Buckley* is forced by the state to "compete" in a race with an apparently preordained winner, how many people will be interested in buying tickets to watch it, cheering on the drivers, or paying to put gas in the loser's tank? [22]

Fund-raising by both candidates in a rigged election that appears hopeless is inevitably inhibited and skewed.[23] The disfavored candidate

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[22] The chilling effect of perceived inevitability is not unique to the electoral arena. On January 2, 2019, Senate Majority Leader Mitch McConnell stated, "The Senate will not waste its time considering a Democratic bill which cannot pass this chamber and which the President will not sign." https://www.reuters.com/article/us-usa-shutdown-mcconnell/senate-will-not-consider-house-democratic-bills-to-end-shutdown-republican-mcconnell-idUSKCN1OX01I (last visited February 28, 2019).

[23] This Court has repeatedly noted that less campaign money translates into less campaign speech – with a well-informed electorate the loser. *Buckley*, 424 U.S. at 39;

will find it difficult if not impossible to persuade prospective contributors and independent supporters to expend substantial sums on supporting a candidate who is almost certainly doomed to lose. The favored candidate will find it difficult, as well, to persuade donors or independent supporters to spend their money on a sure thing, when the funds could be spent on affecting the outcome in a genuinely contestable race.

The speech and associational activities[24] associated with spirited campaigns for office are also virtually certain to be depressed. Perceived pre-ordained losers find it difficult, if not impossible, to mobilize volunteer support for an apparently doomed candidacy. Sporadic protests and resigned calls for change there may be; but never "full throated speech," with the quality and intensity of electioneering powered by a plausible hope that the election can be won.

Pre-ordained winners suffer, as well. Campaign organizers will find it difficult or impossible to motivate complacent supporters who see no reason to devote substantial time and energy to supporting a candidate who does not appear need their support.

Citizens United, 558 U.S. at 333; *McCutcheon*, 572 U.S. at 197.

[24] The Court has defined the First Amendment's associational right as "that freedom to associate with others for the common advancement of political beliefs and ideas" and has ranked it as "a basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)

Finally, voter participation will plummet.[25] Why bother to vote when the outcome appears to be a foregone conclusion?

It is, of course, no answer to argue that depressing electoral speech or voting in a "landslide" or a "safe" district causes little real harm because speech and voting is highly unlikely to have much impact in a carefully gerrymandered district. In fact, imposing a soporific electoral climate on a political unit risks freezing the intellectual and political *status quo*, not merely in a single election but for the foreseeable future; and not merely in a single district, but in the entire gerrymandered region. A diet of extreme gerrymandering and uncontestable elections makes it difficult, if not impossible, to generate the level of political and intellectual ferment capable of challenging the *status quo*. See Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 Colum. L. Rev. 2187 (2018). Just as incumbents cannot be beaten unless challengers are free to raise enough money to mount a substantial challenge, the intellectual and political *status quo* risks being frozen in place in the absence of a robust free

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[25] North Carolina, a swing state where statewide races for Presidential electors and the governorship enjoy a relatively high voter turnout in excess of 50%, sometimes reaching 60%, experiences extremely low voter turnouts in connection with its highly predictable gerrymandered Congressional elections. In 2018, while the nationwide turnout in the Congressional election was 58%, not a single gerrymandered North Carolina Congressional election reached 50% of the eligible electorate. See *supra* n. 3 for 2018 North Carolina voting results.

market in ideas associated with competitive elections.

Whenever government has acted to "chill" the "full-throated" exercise of First Amendment freedoms in the context of an election, this Court has condemned the government action as violative of the First Amendment. The "evident," "inherent," and "inescapable" "chilling effect" on protected campaign activity caused by excessive partisan gerrymandering is no different.

4. Extreme Partisan Gerrymandering Unconstitutionally Degrades a Voter's First Amendment Right to Play a Significant Role in Choosing the Agent Who Will Speak for the Voter in the Legislature

This Court has recognized that voters are entitled under the Constitution to exercise "an effective voice in the governmental affairs of their country, state or community." *Terry v. Adams*, 345 U.S. 461, 466 (1953) (rejecting the idea that casting a formal vote is the equivalent of exercising a meaningful choice). When, as here, the electorate has been artificially constructed by the state so that the overwhelmingly likely winners and losers are never in serious doubt, voting itself is intentionally degraded from a powerful instrument of individual choice to an after-the-fact acknowledgment of a *fait accomplis*.

The votes cast for a pre-ordained losing candidate are more accurately characterized as expressions of protest than as "effective" exercises

in political power.[26] The pre-ordained winners' votes are downgraded from "an effective voice in the affairs of their country, state or community" into gestures of acquiescence in an electoral choice already made for them by the state.[27]

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court rejected the idea that voting was an exercise of "pure speech." 504 U.S. at 432-33. *Amici* believe that the expansive definition of "pure speech" adopted by the Court in many other electoral settings calls the *Burdick* holding into question. It is, to say the least, anomalous to grant First Amendment protection to virtually every form of electoral activity leading up to the climactic moment of casting an informed ballot, but to withdraw First Amendment protection from the act of speech and association at the core of the casting a ballot.

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[26] Protest votes in rigged elections are, of course, not worthless. As Justice Brandeis taught us in his concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927), they are important as assertions of self-definition and human dignity; but they are far from an exercise of genuine self-government based on informed choice that rests at the core of representative democracy and a republican form of government. See Vincent Blasi, *The First Amendment and the Idea of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm & Mary L. Rev. 653 (1988).

[27] It is no answer to claim that the winning voter may have had an opportunity to exercise choice during the nomination process, which is often riddled with obstacles that include closed primaries in many states, some with durational waiting requirements as long as 11 months; financial barriers; ballot access restrictions; and low turnouts. In any event, a primary is an adjunct to an election, not a substitute for it.

It is, however, unnecessary to overrule *Burdick* to recognize that extreme partisan gerrymandering robs voters of a genuine "choice in the election of those who make the laws under which, as good citizens, they must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). As Justice Black concluded in *Wesberry*: "Other rights, even the most basic, are illusory if the right to vote is undermined." All nine members of the *Burdick* court agreed that the ability to exercise an "effective choice" is at the constitutionally protected core of casting a ballot. 504 U.S. at 430. What divided the Court in *Burdick* was whether Hawaii's refusal to permit voters to cast write-in ballots unconstitutionally eroded that choice.

Writing for six members of the Court, Justice White reasoned that Hawaii's extremely liberal ballot access laws assured voters the ability to exercise a wide and effective choice. 504 U.S at 438-39. Justice Kennedy, joined by Justices Stevens and Blackmun, dissented, arguing that write-in ballots were an important aspect of exercising a voter's free choice. 504 U.S. at 442.

Amici believe that all nine members of the *Burdick* court would have agreed that voting in election districts where the outcomes have been almost certainly pre-ordained by the legislature could not be called an "effective exercise of political power" within the meaning of *Terry v. Adams*, or a "choice in the election of those who make the laws" in the words of Justice Black in *Wesberry*. Accordingly, *amici* urge the Court to hold explicitly what it has often recognized

implicitly[28] – that the freedom to exercise a meaningful choice about who will serve as a voter's representative in the halls of power is not merely protected by the fundamental rights prong of the 14th Amendment's guaranty of equality,[29] but by both the First Amendment and the guaranty of a republican form of government. [30]

In the early years of American democracy, voting was physically an exercise of speech, with voters orally expressing their choice of representative in public, or publicly submitting a ballot vividly decorated to reflect its party or

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[28] See e.g., *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983)

[29] See *Harper v. Virginia Bd of Elections*, 383 U.S. 663 (1966) (invalidating poll taxes); *Kramer v. Union School District*, 395 U.S. 621 (1969) (recognizing equal right to vote in elections affecting prospective voter); *Dunn v. Blumstein*, 405 U.S. 330 (1972 (invalidating durational residence requirements for voting)

[30] *Amici* acknowledge that settings may arise where it is not possible to draw "contestable" or "swing" districts without compromising important neutral principles governing apportionment. It is unnecessary in this case to determine the precise point at which natural sorting makes it unduly disruptive to draw competitive election districts because it is clearly possible to render some or all of North Carolina's Congressional districts genuinely competitive without disturbing traditional apportionment criteria like one person-one vote, compactness and contiguity. When non-competitive elections derive from natural sorting, no constitutional issues are raised because state action is absent. The Constitution is violated only when the state imposes non-competitiveness when competitive elections are eminently feasible.

candidate.[31] In the late 19th century, the "secret ballot" replaced *viva voce* voting in order to protect vulnerable voters from external pressures about how their free choice was to be exercised.[32] But the communicative nature of the vote remained intact – with the communication becoming anonymous and directed to the official charged with declaring the winner. Accordingly *amici* urge the Court to acknowledge the communicative act at the heart of casting a ballot, and to begin the process of developing the appropriate level of First Amendment protection of the right to vote.[33]

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[31] See Donald A. Debats, *How America Voted: By Voice*, and *How the Other Half Voted: The Party Ticket States*, available at sociallogic.iath.virginia.edu (University of Virginia)

[32] For the history of the adoption of the Australian ballot, see L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (Michigan State University Press, 1968).

[33] It is not necessary in this case to determine whether such a communicative act is entitled to the highest level of First Amendment protection available to pure speech, or whether intermediate First Amendment scrutiny available to "speech brigaded with action" is more appropriate. Compare *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning as an act of protest constitutes pure speech entitled to the highest level of free speech protection) with *O'Brien v. United States*, 391 U.S. 367 (1968) (draft card burning constitutes communicative conduct entitled to intermediate First Amendment protection). The extreme example of partisan gerrymandering before the Court in this appeal clearly flunks both strict and intermediate First Amendment scrutiny because it lacks a legitimate state interest, much less a compelling or substantial one.

CONCLUSION

The quality and intensity of a voter's First Amendment participation in the electoral process – listening to the candidates; choosing a preferred candidate; working with others in support of that candidate; and casting a ballot for a candidate of choice – is deeply dependent on the voter's belief that that it is the voters themselves who are empowered to decide who will win an election. Extreme partisan gerrymanders destroy that belief. The decision of the court below should be affirmed.

Dated: New York, New York
March 8, 2019

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* Counsel acknowledges the valuable assistance of Daniel Milechman, a third-year student at Berkeley Law School, in the research, writing, and preparation of this brief *amici curiae*.

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John Sexton is the Benjamin Butler Professor of Law, Dean Emeritus of NYU School of Law, and President Emeritus of New York University. President Sexton worked closely with Professor Dorsen, who served from 1988-2015 as his Counsellor as Dean and University President.

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Gara LaMarche served as Associate Director of the New York Civil Liberties Union and, from 1984-88, as Executive Director of the Texas Civil Liberties Union. He worked closely with Professor Dorsen on democracy-related issues while at the Open Society Institute and as President of Atlantic Philanthropies.

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

SUMMARY OF ARGUMENT

In these cases, the state legislatures of North Carolina and Maryland drew congressional district lines to subordinate voters of a particular political party, dilute their votes, and entrench in power the party controlling the legislature. In North Carolina, the state legislature drew a map that sought to maximize the election of Republican candidates because, as Representative David Lewis explained, "electing Republicans is better than electing Democrats. So I drew this map to foster what I think is better for the country." Rucho J.A. 460. To that end, the mapmakers packed and cracked Democratic voters, seeking to ensure that Republican would wield political power far exceeding their share of votes cast at the polls. In Maryland, the state legislature redrew the 6th Congressional District

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

to flip the district from Republican to Democratic. To achieve this end, the mapmakers shuffled hundreds of thousands of citizens out of or into the 6th District, using sophisticated political data to dilute the votes of Republican voters.

This sort of partisan gerrymandering is "'incompatible with democratic principles'" deeply rooted in the Constitution's text and history. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)). The maps drawn in these cases violate "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Id.* at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)). A state legislature's drawing of lines to "subordinate adherents of one political party," *id.* at 2658, and to burden disfavored voters' "'representational rights,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)), cannot be squared with the First and Fourteenth Amendments. Under our constitutional scheme, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

When our Constitution's Framers wrote our national charter more than two centuries ago, they recognized that "the true principle of a republic is, that the people should choose whom they please to govern them." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 1836) [hereinafter "*Elliot's Debates*"]. The Framers were also deeply suspicious of partisan manipulation of the electoral process. They knew that "those who have power in their hands will not give it

up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." 1 *The Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., 1911) [hereinafter *Records of the Federal Convention*]. Aware of the dangers of faction, they wrote into the Constitution's text and structure protections against partisan gerrymandering and other similar abuses in federal elections. Concerns about partisan efforts to manipulate the rules of our democracy are thus as old as the Constitution itself.

In 1789, the Framers added the First Amendment to the Constitution, ensuring protection of "[t]he special structural role of freedom of speech in a representative democracy." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 25 (1998). The First Amendment serves as a critical safeguard of democratic self-governance, ensuring that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 576. Governmental efforts to subject "a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), cannot be squared with the freedom of speech and association the Constitution guarantees to all. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

The Rucho Appellants argue that the only check on partisan gerrymandering is congressional action under the Elections Clause, *see* Br. of Appellants Rucho, et al. 31-37, but that ignores the changes that

"We the People" have made to the Constitution over time to ensure that states respect the fundamental guarantees of liberty and equality, including in state regulation of the electoral process.

The eighteenth-century Constitution contained few direct limits on the states, but, in the wake of a bloody Civil War fought over slavery, the American people fundamentally altered our federal system, adding to the Constitution universal guarantees of substantive fundamental rights and equal protection of the laws, and, in later amendments, protections for the right of citizens to vote—a right that this Court has recognized is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *McCutcheon*, 572 U.S. at 191 ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). Significantly, these amendments prohibit more than outright denials of the right to vote, because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Efforts by the government to subordinate disfavored persons on account of their political affiliation—such as by diluting their votes—cannot be squared with either the fundamental guarantee of freedom of speech or the Fourteenth Amendment's universal guarantee of the equal protection of the laws. As this Court has many times held, states cannot regulate the electoral process in a manner that runs roughshod over the fundamental protections for speech and equal protection. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 754; *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988); *Anderson v. Celebrezze*, 460 U.S. 780,

786-88, 792-94 (1983); *Bullock v. Carter*, 405 U.S. 134, 141 (1972); *Reynolds*, 377 U.S. at 566-68.

When the framers of the Fourteenth Amendment wrote the equal protection guarantee, they were particularly concerned about Southern states' efforts to deny equal rights to citizens associated with the Republican party, which had supported the Union during the Civil War. "The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). It protects individuals who choose to associate with a political party from state-sponsored discrimination "because of their 'political association,' 'participation in the electoral process,' 'voting history,' or 'expression of political views.'" *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment)).

Thus, both the Constitution's text and history and this Court's cases point to the same conclusion: the Constitution firmly limits the authority of state legislatures to draw lines that systematically subordinate persons associated with one political party and dilute their voting strength, not for any legitimate government purpose, but simply to entrench the governing political party in power. States may not place such unequal burdens on a group of voters' opportunities to elect their representatives simply because of the party with which those voters associate. That is viewpoint discrimination pure and simple. Such gerrymandering perverts our Constitution's democratic principles, changing the relationship between the people and their elected representatives. It "enables politicians to entrench themselves in power against the people's will." *Id.* at 1935.

In our constitutional system, when the government abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. It is precisely in cases, such as this one, where our nation's democracy is on the line that judicial redress is most urgent and necessary. *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) (observing that, in the case of partisan gerrymanders, "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms"); *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring in the judgment) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); *Reynolds*, 377 U.S. at 566 ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection . . . .")

Persons subjected to an abridgement of their First and Fourteenth Amendment rights by an extreme partisan gerrymander should not be denied a remedy simply because redistricting is inevitably a political process. In our constitutional system, legislative majorities cannot use their broad powers to draw district lines to nullify the essential premises of our system of self-government. Because the partisan gerrymanders in these cases subordinate adherents of one political party, burden their representational rights, and dilute and degrade their right to vote, the judgments below should be affirmed.

ARGUMENT

I. At the Framing, the Constitution Established a System of Government in Which the People Choose Their Elected Representatives, Not the Other Way Around.

More than two centuries ago, "We the People . . . ordain[ed] and establish[ed]" the Constitution, *see* U.S. Const. pmbl., creating a system of government organized around the idea that "the true principle of a republic is, that the people should choose whom they please to govern them," 2 *Elliot's Debates* at 257. As the opening words of the first of the Federalist Papers stress, the Constitution was itself an act of popular sovereignty and self-government. *The Federalist No. 1*, at 1 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1999) ("[Y]ou are called upon to deliberate on a new Constitution for the United States of America.").

At a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers designed a new system of government "where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people," 4 *Elliot's Debates* at 331; *see The Federalist No. 14*, *supra*, at 68 (James Madison) ("[E]ven in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular and founded, at the same time, wholly on that principle."). In the republican system of government created by the Framers, "the representatives of the people" could never be "superior to the people themselves." *Id. No. 78*, at 435 (Alexander Hamilton).

Ensuring fair and effective representation for all had deep roots in America's bid for independence from

England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that embodied the principle that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25; Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 170 (1998 ed.) (observing that of all "electoral safeguards for the representational system" none "was as important to Americans as equality of representation"). The Framers appreciated that the "genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *The Federalist No. 37*, *supra*, at 195 (James Madison).

These fundamental republican principles are amply reflected in the Constitution's text and structure. In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *Elliot's Debates* at 21, the Constitution provides that "the House of Representatives shall be composed of Members chosen every second Year by the People of

the several States." U.S. Const. art. I, § 2, cl. 1. Thus, while the Senate was designed to represent the states, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," serving as "the most exact transcript of the whole Society," 1 *Records of the Federal Convention* at 48, 132. To ensure rights of fair and effective representation, the Constitution allocates representatives to the states "according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3, reflecting that "'every individual of the community at large has an equal right to the protection of government,'" *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (quoting 1 *Records of the Federal Convention* at 473).

The Constitution also establishes explicit rules concerning the right to vote in federal elections and to run for Congress, recognizing that "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 *Records of the Federal Convention* at 250. Because the "definition of the right of suffrage is very justly regarded as a fundamental article of republican government," *The Federalist No. 52*, *supra*, at 294 (James Madison), the Framers provided that "[t]he electors are to be the great body of the people of the United States," *id. No. 57*, at 319 (James Madison), and incorporated state suffrage rules to broadly protect the right to vote in federal elections, *id.* ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.").

Along similar lines, the Constitution establishes minimal qualification for candidates for federal office. *Id.* ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."). Indeed, reflecting their concern about partisan manipulation of the electoral process, the Framers recognized that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of (a weaker) faction." 2 *Records of the Federal Convention* at 250.

The Constitution also confers specific powers on the federal government to ensure the integrity of the system of government established by the Constitution. The Guarantee Clause empowers the "United States" to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, protecting the Constitution's system of government from "aristocratic or monarchical innovation," *The Federalist No. 43, supra*, at 242 (James Madison). Even more on point, the Elections Clause of Article I, Section 4 gives Congress the power to override state regulation of the time, place, and manner of federal elections, a reflection of the Framers' "distrust of the States regarding elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 n.21 (1995). As history shows, this grant of power was "a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672; *see Vieth*, 541 U.S. at 275 (discussing the Framers' conclusion that "Congress must be

given the power to check partisan manipulation of the election process by the States").

During the debates over the Elections Clause at the Constitutional Convention, James Madison argued that a limit on state power was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Records of the Federal Convention* at 241. The Elections Clause gave "a controuling power to the Natl. legislature," *id.*, because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices," *id.* at 240. Madison observed that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power," *id.*, noting that there were many ways—including districting—that state legislative majorities might manipulate the democratic process in order to "materially affect the appointments," *id.* at 241.

In debates over the Elections Clause during state ratifying conventions, those urging the Constitution's ratification justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people's right to equal voting power." Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 210 (2010). For example, at the Massachusetts convention, Theophilus Parsons explained that the Elections Clause provided a remedy against state manipulation of the democratic process for partisan ends. "[W]hen faction and party spirit run high," Parsons warned, state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or "introduce [other] such regulations as would render the rights of the people insecure and of little value."

2 *Elliot's Debates* at 27. The Elections Clause, he argued, "provides a remedy," empowering Congress to "restore to the people their equal and sacred rights of election." *Id.*

During these debates, the Constitution's supporters often pointed to the case of South Carolina, where "South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so." *Ariz. State Legislature*, 135 S. Ct. at 2672 (citing Rakove, *supra*, at 223-24); *see* 2 *Elliot's Debates* at 51 ("The representatives, therefore, from [South Carolina], will not be chosen *by the people*, but will be representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?"); 3 *id.* at 367 ("Elections are regulated now unequally in some states, particularly South Carolina . . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.").

In short, from the very beginnings of our Constitution's history, attempts by state majorities to manipulate the electoral process have been viewed with deep suspicion. As a consequence, many provisions of the Constitution were drafted to create a republican system of government that helps "secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 Annals of Cong. 797 (1789) (Joseph Gales ed., 1834).

II. Subsequent Amendments to the Constitution Protect the Right of Individuals To Associate for Political Ends and Guarantee that All Americans Enjoy Equal Protection of the Laws, Regardless of Political Affiliation.

In 1789, the Framers added the First Amendment to the Constitution, protecting "[t]he special structural role of freedom of speech in a representative democracy." Amar, *The Bill of Rights*, *supra*, at 25. As this Court has long recognized, the First Amendment "'remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *McCutcheon*, 572 U.S. at 203 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). This reflects that "the right of electing the members of the government constitutes more particularly the essence of a free and responsible government." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 575; *see Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("[T]he system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern.").

In this respect, the First Amendment reflects our Constitution's promise of popular sovereignty: "[I]n our governments, the supreme, absolute, and

uncontrollable power *remains* in the people." 2 *Elliot's Debates* at 432; *see* Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 569 ("[I]n the United States, . . . [t]he people, not the government, possess the absolute sovereignty."). In other words, "[w]hen it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter.*, 564 U.S. at 754. As Madison put it, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). The First Amendment ensures that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 576.

The First Amendment originally constrained only the federal government, but when the Fourteenth Amendment was added to the Constitution nearly seventy years later, it required states to obey the guarantees of free speech and association secured by the First Amendment. It also guaranteed the equal protection of the laws to all persons, thereby providing protection against the possibility that persons affiliated with a disfavored political party would be subject to unequal treatment under state law. That Amendment, along with the other "constitutional Amendments adopted in the aftermath of the Civil War[,] fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution sweeping new limits on state governments. These limits were designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), to "keep[]

whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

The plain text of the Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," establishes a broad guarantee of equality for all persons, forbidding legislative majorities from discriminating against disfavored persons. *See Yick Wo*, 118 U.S. at 369 ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (the "Equal Protection Clause enforces" a "commitment to the law's neutrality where the rights of persons are at stake").

As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another," *id.* The Fourteenth Amendment "put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic," Speech of Sen. Lyman Trumbull at the Illinois Rail Road Depot, Chicago (Aug. 2, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 6, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation," Speech of Major Gen. Robert C. Schenck at Dayton, Ohio (Aug. 18, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 13.

The Fourteenth Amendment's Framers crafted a broad guarantee of equality for all persons to bring the Constitution back into line with fundamental

principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring in part and concurring in the judgment) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure." (citing 3 *Records of the Federal Convention*, at 212)). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence." Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).

Thus, the Amendment's broad wording was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose broad, universal language specifically intended to secure equal rights for *all*. Although the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Amar, *The Bill of Rights*, *supra*, at 260-61 n.*. Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benj. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867*, at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit

racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination.

The Framers wrote the Amendment's guarantees broadly because, among other things, they were concerned about state efforts in the South to single out for discrimination persons belonging to or associated with the Republican party, which had supported the Union during the Civil War and opposed efforts to reinstitute slavery. The Framers were aware of "the white South's inability to adjust to the end of slavery, the widespread mistreatment of blacks, Unionists, and Northerners, and a pervasive spirit of disloyalty." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 225 (Perennial Classics 2002 ed.); *see McDonald*, 561 U.S. at 779 (plurality opinion) (discussing the "plight of whites in the South who opposed the Black Codes"). In the South, Unionists associated with the Republican party were subject to all manner of discrimination because of their views. Debates in the 39th Congress repeatedly made the point that "[t]he courts are rebel, jurors rebel, Legislatures rebel . . . . They do not disguise their hate for Union men," Cong. Globe, 39th Cong., 1st Sess. 783 (1866), and therefore "the adoption of this Amendment" was "essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them," *id.* at 1093; *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

This sad state of affairs was documented in painstaking detail in the report of the Joint Committee on

Reconstruction, "which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment," *McDonald*, 561 U.S. at 772, and "extensively catalogued the abuses of civil rights in the former slave States," *id.* at 827 (Thomas, J., concurring). The Committee, which took the "testimony of a great number of witnesses," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), learned of a deep-seated hostility to both the newly freed slaves and their Republican allies. The witnesses the Committee spoke with confirmed that, in the South, "[t]here is . . . a feeling of great bitterness towards the [R]epublican party" and that people "look upon them with the greatest hatred, the greatest ill-will imaginable for one class of men to feel towards another." *Report of the Joint Committee*, pt. II, at 66, 208. As a result, the Committee concluded that, without federal protection, "Union men, whether of northern or southern origin, would be obliged to abandon their homes" because of animus "totally averse to the toleration of any class of people friend[ly] to the Union, be they white or black." *Id.* at xvii; *id.* at xvii-xviii ("Southern men who adhered to the Union are bitterly hated and relentlessly persecuted."). Numerous witnesses confirmed that civil rights protections could not be enjoyed because a "loyal man" could not "get his rights in the courts" due to "prejudice," *id.* pt. II, at 97, that newly formed governments "would legislate against them in every way," *id.* pt. I, at 106, and that it was unlikely that persons "would be allowed to express openly their Union sentiments without the protection of the United States troops," *id.* pt. III, at 101. Should a Republican Unionist run for office "[h]e would have no chance at all"; "[t]hey would break up their polls and destroy their ballots." *Id.* pt. IV, at 81.

To prevent these sorts of past abuses as well as new ones that might arise in the future, the Fourteenth Amendment established equality under the law as a constitutional mandate, forbidding state majorities from using the democratic process to subject disfavored persons—whether by reason of their race, their political views, or some other form of animus—to discriminatory treatment and the loss of their fundamental rights. This sweeping guarantee of equality applies to Appellees in this case, who seek to enjoy the "right to participate in electing our political leaders," *McCutcheon*, 572 U.S. at 191, on an equal basis with all other voters in their state. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567.

There is no "redistricting" exception to these fundamental Fourteenth Amendment principles. The text of the Fourteenth Amendment's guarantee of equality "speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Moreover, the right to vote is a fundamental right, "preservative of all rights." *Yick Wo*, 118 U.S. at 370. Indeed, no right is protected by more parts of the Constitution. U.S. Const. amend. XIV, § 2; *id.* amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1; *see Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) ("The Constitution uses the words 'right to vote' in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments."). A districting plan that, in essence, "declar[es] that in general it shall be more difficult for one group of citizens"—defined by their political views—"to seek aid from the government" through the political process is "itself a denial of equal protection of the laws in the most literal

sense." *Romer*, 517 U.S. at 633; *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation' . . . we would surely conclude the Constitution had been violated.").

III. Partisan Gerrymandering that Has the Purpose and Effect of Subordinating Adherents of a Political Party and Severely Limiting the Effectiveness of Their Votes Violates the First and Fourteenth Amendments.

Three lines of this Court's precedents strongly support the proposition that extreme partisan gerrymanders that subordinate adherents of a political party and severely limit the effectiveness of their votes violate the First and Fourteenth Amendments. As these cases make clear, when a state uses "partisan classifications" in a manner that "burdens rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), and violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around,'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted), judicial relief is warranted, *see Reynolds*, 377 U.S. at 566 ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). A plan that so degrades the rights of persons belonging to or associated with a disfavored party cannot be squared with "[t]he concept of 'we the people' under the Constitution," which "visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

First, this Court's one-person, one-vote cases have held that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, . . . the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds*, 377 U.S. at 565-66. *Reynolds* held unconstitutional a state legislative districting scheme that gave disproportionate political representation to persons living in rural areas, concluding that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment." *Id.* at 566; *see Bd. of Estimate v. Morris*, 489 U.S. 688, 693-94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (*Reynolds*' rule is "designed to prevent debasement of voting power and diminution of access to elected representatives.").

Reynolds stressed equal protection principles as well as republican principles deeply rooted in the text and structure of the Constitution. "As long as ours is a representative government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. Any other result would "sanction minority control of state legislative bodies" and prevent legislatures from being "collectively responsive to the popular will." *Id.* at 565. A system that gave persons more political power based on where they lived burdened voters' representational rights, denying certain citizens "an

equally effective voice in the election of members of his state legislature." *Id.*

Second, this Court's cases have also vindicated the rights of racial minorities to participate equally in the political process by preventing at-large and multimember districting schemes from "being used invidiously to cancel out or minimize the voting strength of racial groups." *White v. Regester*, 412 U.S. 755, 765 (1973); *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (striking down redrawing of boundaries designed to "despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights"). Drawing on *Reynolds*, this Court's cases have affirmed that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), and that plaintiffs may establish an unconstitutional burden on their representational rights by demonstrating that racial minorities "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," *White*, 412 U.S. at 766; *see Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). These cases, thus, quite explicitly protect "rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), by ensuring "that each

citizen ha[s] an equally effective voice in the election of members of his state legislature," *Reynolds*, 377 U.S. at 565.

Likewise, this Court's cases construing the results test of Section 2 of the Voting Rights Act, a statute that enforces constitutional protections, have held that states may not "dilut[e] minority voting power" by the "manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-29 (2006) (finding that redrawing of lines to reduce percentage of Latino voting age population "prevented the immediate success of the emergent Latino majority" and resulted in "a denial of opportunity in the real sense of that term"). Manipulation of district lines—whether through packing or cracking voters—can burden voters' representational rights by severely limiting the effectiveness of their votes. *See Gill*, 138 S. Ct. at 1930-31. "When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map." *Id.* at 1936 (Kagan, J., concurring). That is exactly what the evidence shows happened in these cases. *See* Br. of Appellees League of Women Voters of North Carolina, et al. ("LWV Br.") 9-14; Br. of Appellees Common Cause, et al. ("CC Br.") 8-12; Br. of Appellees Benisek, et al. ("Benisek Br.") 8-11.

Third, and finally, this Court's First Amendment cases have repeatedly struck down efforts to subordinate persons belonging to or associated with a political party disfavored by the state. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. at 356, and the "right to associate with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see Cal. Democratic Party*, 530 U.S. at 574 (recognizing that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986))). Subordinating adherents of a disfavored political party "based on disapproval of the[ir] ideas or perspectives" is "the essence of viewpoint discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment); LWV Br. 51; CC Br. 53-55; Benisek Br. 24-29.

As this Court's precedents make clear, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), because "the system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern," *Elrod*, 427 U.S. at 372. The First Amendment does not permit the state to subject to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some state-selected orthodoxy," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990), in order to "tip[] the electoral process in favor of the

incumbent party," *Elrod*, 427 U.S. at 356; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate .... The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

"[G]overnment discrimination based on the viewpoint of one's speech or one's political affiliations" is simply antithetical to the First Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (refusing to permit government to "coerce support" simply because of "dislike of the individual's political association"); *Bd. of Educ., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.").

The First Amendment analysis that applies in these cases and in others involving state regulation of the electoral process "concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). This Court's cases insist on a "pragmatic or functional assessment that accords some latitude to the States," *id.*; *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while ensuring "the right of individuals to associate for the advancement of political beliefs, and the right of

qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Under these established First Amendment principles, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. That reflects that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams*, 393 U.S. at 32. Because "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, efforts by a state to subordinate adherents of a disfavored party and severely limit the effectiveness of their votes cannot be squared with the fundamental limits enshrined in the First Amendment. The First Amendment denies the government the authority to entrench one party in power. In the electoral arena—where First Amendment protection is at its apex—"the people lose when the government is the one deciding which ideas should prevail." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018). The First Amendment prevents the government from "favor[ing] some participants in th[e democratic] process over others." *McCutcheon*, 572 U.S. at 227; *Davis v. FEC*, 554 U.S. 724, 742 (2008) ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."); LWV Br. 38-39.

It is, of course, true that "[p]olitics and political considerations are inseparable from districting and apportionment" and that "districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S. at 753. But a state does not have carte blanche to draw district lines free from

constitutional constraints. *See id.* at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); *Gomillion*, 364 U.S. at 345 (refusing to "sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions"); *cf. Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained."). The fact that the government makes political choices in districting does not carry with it a license to subordinate a group of voters and dilute their right to vote because of their political affiliation.

In sum, republican principles embedded in the Constitution's text and structure, fundamental First Amendment principles that safeguard freedom of political association, and equal protection principles that ensure equal rights under the law for all persons, regardless of their political convictions—principles deeply rooted in the Constitution's text and history and this Court's precedents—do not permit the government to use its power over the districting process to give disproportionate political power to a group of citizens based on their political association and views. This "ingrained structural inequality," *Evenwel*, 136 S. Ct. at 1123—like the malapportionment invalidated in *Reynolds* and the cases that followed it—singles out a group of citizens and dilutes and debases their right to vote in a manner manifestly inconsistent with constitutional guarantees and the system of fair and effective representation our Constitution establishes. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567. The fact that an individual belongs to one political party or another "is not a legitimate reason for . . .

diluting the efficacy of his vote." *Id.*; *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

In light of these fundamental constitutional principles, "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *Gaffney*, 412 U.S. at 752 ("It would be idle . . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). The fact that a state legislature drew district lines with political considerations in mind is the beginning, not the end, of the analysis. "The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). In other words, there must be a showing that "partisan classifications burden[] rights of fair and effective representation." *Id.* at 312. This requires a demonstration that a partisan gerrymander has the purpose and effect of subordinating adherents of a political party and severely limiting the effectiveness of their votes, conferring legislative power far in excess of votes cast at the polls. It requires showing that the partisan gerrymander unjustifiably obstructs the basic workings of representative government, "subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* at 314. These inquiries provide judicially manageable standards for separating ordinary political line drawing from unconstitutional efforts to degrade and dilute a group of voters' opportunities to

elect representatives on account of their political affiliation.

Under these standards, the extreme gerrymanders in these cases, which turn our Constitution's system of representative government on its head, cannot be squared with the First and Fourteenth Amendments. A state cannot enact into law the view that "electing Republicans is better than electing Democrats," Rucho J.A. 460, or that electing Democrats is better than electing Republicans. A state cannot use its considerable power to draw lines to nullify the fundamental principles at the core of our Constitution's system of government.

IV. The Constitution Requires Redress by the Courts When States Subordinate Adherents of a Political Party Based on Viewpoint in Violation of the First and Fourteenth Amendments.

Judicial relief is warranted here. "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 313 (2014)). Although this case, like many others, is undeniably sensitive and demands careful judgment, "this is what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Both at the Founding and following the Civil War, our Constitution's Framers insisted that constitutional limitations "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without

this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78, supra*, at 434 (Alexander Hamilton); 3 *Elliot's Debates* at 554 ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). The Framers created the Article III judiciary to "guard the Constitution and the rights of individuals from . . . designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *The Federalist No. 78, supra*, at 437 (Alexander Hamilton); *id. No. 10*, at 49 (James Madison) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

Like their counterparts at the Founding, the Framers of the Fourteenth Amendment recognized that judicial review was essential to ensure that the Amendment's constitutional protections "cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). The Framers understood that the "object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority." *Id.* "[T]he greatest safeguard of liberty and of private rights," they recognized, is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary." Cong. Globe, 41st Cong., 2d Sess. 94 (1869).

As the Constitution's text and history reflect, "[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

by the courts." *Obergefell*, 135 S. Ct. at 2605-06 (quoting *Barnette*, 319 U.S. at 638). This Court "cannot . . . ask another Branch to share [its] responsibility" to engage in judicial review of challenged state action. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

Thus, it is of no moment that the Elections Clause gives Congress the power to prescribe a remedy for partisan gerrymandering in congressional redistricting. This Court cannot delegate to Congress its constitutional role to "say what the law is" and enforce the Constitution's status as "the fundamental and paramount law of the nation." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That would permit the fundamental limits imposed by the First and Fourteenth Amendments to be "passed as pleasure." *Id.* at 178. Indeed, this Court has repeatedly refused to "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), simply because of the possibility that Congress could act under the Elections Clause. The authority granted by the Elections Clause "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian*, 479 U.S. at 217; LWV Br. 40-44; CC Br. 35-37; Benisek Br. 28. Whether or not Congress imposes regulations of its own, the Fourteenth Amendment requires states to respect First Amendment freedoms and obliges courts to intervene if they do not.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICI CURIAE* DEMOCRACY NORTH CAROLINA AND THE PEOPLE'S ALLIANCE FUND IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

This *amici curiae* brief in support of Appellees is filed on behalf of Democracy North Carolina ("Democracy NC") and The People's Alliance Fund, which are nonpartisan, nonprofit corporations incorporated in North Carolina and organized under Section 501(c)(3) of the Internal Revenue Code. Collectively, Democracy NC and You Can Vote, which is a program of The People's Alliance Fund (together, "*Amici*") have registered tens-of-thousands of North Carolinians to vote and have engaged with hundreds-of-thousands of North Carolinians to help them exercise their right to vote.

Amici's mission and work to organize, educate, and assist voters and potential voters across the State gives *Amici* a substantial interest in this case, as well as a unique perspective on the harms of the 2016 Congressional Redistricting Plan ("2016 Plan"), which was properly invalidated by the District Court below. The partisan gerrymander of North Carolina's congressional districts has engineered noncompetitive elections, created unresponsive legislators, and diluted the votes of North Carolinians. Through their substantial contact with potential North Carolina voters, *Amici* have directly experienced the detrimental impacts of partisan gerrymandering on North Caro-

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[1] Counsel for all parties have filed blanket consents to the filing of *amici curiae* briefs. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

linians' civic engagement, trust in democratic institutions, and political participation. This case presents this Court with an opportunity to confirm that the Constitution provides a remedy for these harms.

A. Democracy North Carolina

Democracy NC engages in nonpartisan research, organizing, public education, and advocacy in order to increase voter participation and realize pro-democracy reforms, which it believes are mutually necessary goals and prerequisites to the empowerment of historically excluded communities in the political process. For more than 25 years, Democracy NC and its predecessor organization have promoted reforms to make the election system more accessible to underrepresented voters, while also sponsoring educational programs to expand public involvement in the political process.

Democracy NC researches and reports on the administration of elections, the role of money in politics, voter participation, and good government; advocates for policies to make voting more accessible, such as early voting; participates in court cases that seek to maintain voting rights, eliminate corruption in the voting process, and promote transparency; and authors materials and sponsors events to train community members in organizing and advocacy, and the registration and turn-out of voters.

Democracy NC has six offices across the State with staff members who conduct dozens of trainings and educational forums each year about the election process. Democracy NC distributes hundreds-of-

thousands of brochures, voter guides, and other materials to encourage public involvement in elections during the more than 300 events it holds each year. Democracy NC has also filed legal actions against Democratic and Republican elected officials, candidates, parties, and political committees whose actions undermine the public's faith in fair elections.

Democracy NC trains groups of 100–200 volunteers in every county in the State who engage and support North Carolina residents in pro-democracy initiatives. In 2018, Democracy NC registered more than 4,000 North Carolinians to vote and educated and assisted hundreds-of-thousands of North Carolinians to help them exercise their right to vote. Among other things, Democracy NC's voter information website, "NCvoter.org," was viewed over 765,000 times in the run-up to the 2018 elections.

Through its original research, policy advocacy, grassroots organizing, civic engagement, and leadership training, Democracy NC seeks to achieve a government that is truly of, by, and for the people.

B. The People's Alliance Fund You Can Vote Program

The People's Alliance Fund is a nonprofit organization that supports progressive education, research, and service activities in North Carolina communities. You Can Vote was launched in 2014 as a program of the People's Alliance Fund to educate voters on photo identification requirements mandated by North Carolina's 2013 legislation. Since then, You Can Vote has grown to have a broader mission: You Can Vote is a

nonpartisan program that trains and mobilizes volunteers to educate, register, and empower all North Carolina citizens to vote.

You Can Vote works to accomplish its mission by educating voters on topics such as early and absentee voting, residency and photo identification requirements, and on the offices on the ballot. You Can Vote's volunteers also register voters and assist voters in updating their registrations.

Because its volunteers are well-trained and nonpartisan, You Can Vote has partnerships with over 150 community organizations in the State that allow its volunteers to talk with voters in their facilities. These include schools, colleges, hospitals, community centers, courthouses, health clinics, and churches of multiple denominations.

Since its launch, You Can Vote has registered 27,000 voters in North Carolina, including more than 8,000 in 2018 alone. You Can Vote has also held over 350,000 one-on-one conversations with potential voters across the State—including 150,000 in 2018—to educate and prepare North Carolinians to exercise their right to vote.

SUMMARY OF ARGUMENT

Amici are devoted to helping North Carolinians exercise their right to participate in government, including by voting to elect representatives of their choosing who are responsive to the voters in their districts. Collectively, *Amici*'s staff and volunteers have registered more than 30,000 North Carolinians to

vote and spoken with hundreds-of-thousands of potential voters to educate them on voting requirements and urge them to go to the polls. Through these efforts, *Amici* have witnessed the harms wrought by partisan gerrymandering on the people of North Carolina.

In the 2016 Plan, the State legislature intentionally drew the district lines to engineer elections where the outcome would be all-but predetermined. As found by the District Court, the North Carolina General Assembly has ensured that each district is either a "safe" Republican district with little chance of electing a Democrat or a "packed" Democratic district where Republican voters have no real chance to elect a member of their party.

Because elections are noncompetitive, potential voters rightly believe the system has been rigged against them to minimize the impact of their votes. As found by the District Court, both the intent and effect of the General Assembly's districting was to "dilute the votes of voters who favored non-Republican candidates." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 814 (M.D.N.C. 2018). Further, because North Carolina's districts are, by design, safely Democratic or Republican, voters rightly believe that their representatives are not responsive to members of the opposite party or to independents because cross-party support is not necessary for any given legislator to secure reelection.

Amici have also witnessed district lines that have divided neighborhoods and other natural communities of interest into separate districts, weakening the

collective voice of the voters in those communities. For instance, the line between District 6 and District 13 divides the city of Greensboro, and specifically the campus of North Carolina A&T State University—the largest historically black university in the country. The 2016 Plan thereby dilutes and diminishes the voice and voting power of the citizens of Greensboro and the students of North Carolina A&T.

Amici engage daily with the citizens of North Carolina, who strongly support district lines that are drawn in a nonpartisan manner and are not calculated to favor voters from one party or another. The General Assembly, however, is itself a product of partisan gerrymandering that entrenches the party that draws the district lines and of elections that by design are not competitive. The legislature therefore perpetuates the practice despite popular opposition.

"'[P]artisan gerrymanders . . . [are incompatible] with democratic principles.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004)) (brackets in original). The District Court correctly held that "the drawing of [North Carolina's] legislative district lines to subordinate adherents of one political party and entrench a rival party in power . . . strikes at the heart of [] foundational constitutional principle[s]" and voting rights. *Rucho*, 318 F. Supp. 3d at 800. For these reasons, this Court should affirm.

ARGUMENT

I. *AMICI*'S EFFORTS TO MOBILIZE VOTER PARTICIPATION AND ENGAGEMENT ARE HINDERED BY PARTISAN GERRYMANDERING

Amici's mission and work to organize, educate, and assist voters and potential voters across the State give *Amici* unique, on-the-ground insight into the attitudes and experiences of North Carolinians, and, as a result, into the detrimental impacts of the unconstitutional conduct at issue in this case.

As the District Court found, the North Carolina General Assembly intentionally drew the district lines in the 2016 Plan to "ensure Republican candidates would prevail in the vast majority of the State's congressional districts and would continue to do so in future elections." *Rucho*, 318 F. Supp. 3d at 801. Specifically, in creating the State's congressional districts, the legislature drew the district lines to create "safe Republican" majorities in nine districts and to pack the Democratic votes into three districts. *Id.* at 810.[2] Congressional elections are thus designed to be noncompetitive, congressional representatives are incentivized to be nonresponsive, and natural communities of interest are divided by district lines. All of

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[2] The District Court also found a safe Republican majority was created in a tenth district (District 5), but unlike for the other "safe" Republican districts, held that Plaintiffs had not shown the district was drawn intentionally to increase Republican voting strength. *Id.* at 909.

these effects undermine *Amici*'s pro-democracy and pro-voter mission.

A. *Amici*'s Substantial Efforts Towards Voter Registration And Engagement

Democracy NC works to achieve increased civic participation and pro-democracy reforms. It strives to promote greater voter participation, remove barriers to voting, and safeguard against corruption. Democracy NC's extensive engagement with North Carolina citizens is integral to fulfillment of this mission.

Democracy NC generates extensive nonpartisan research and impartial data on voting procedures, laws, and candidates, which its volunteers and staff distribute to North Carolina voters during the more than 300 Democracy NC events each year. In addition, Democracy NC organizers identify and train groups of 100–200 volunteers in each county who mobilize around particular pro-democracy issues by coordinating public information sessions, organizing rallies, and engaging voters through phone calls and door-to-door canvassing. Democracy NC staff and volunteers also register and mobilize voters.

In 2018, Democracy NC registered more than 4,000 North Carolinians to vote, reached out to more than 221,000 voters via phone and text messaging, and distributed more than 1.5 million voter guides and other literature. The organization also maintains "NCvoter.org," a website with information on voting procedures and registration which

was viewed over 765,000 times in the run-up to the 2018 elections.

Similarly, You Can Vote works to register, educate, and empower North Carolinians to vote. To accomplish this mission, You Can Vote relies on trained volunteers who engage with voters in partner agency locations and in public settings where they can talk to large numbers of eligible voters. You Can Vote trains its volunteers to have meaningful conversations with individual voters to elicit and answer voters' questions about elections and voting. You Can Vote emphasizes outreach to voters who have been underrepresented at the polls and who may face barriers to voting, including low-income voters, minority voters, young voters, seniors, people with disabilities, and formerly incarcerated individuals who have completed their sentences.

You Can Vote volunteers help voters complete or update their voter registrations. Volunteers also educate voters about assigned precincts, locations for early voting, and voting deadlines and procedures, including whether any documents will be required at the polls. Throughout these conversations, You Can Vote volunteers remain nonpartisan and do not engage in speech about candidates, political parties, or issues.

Since its launch in 2014, You Can Vote volunteers have held over 3,000 voter drives or events and have had over 350,000 one-on-one conversations with eligible voters. In 2018 alone, You Can Vote trained 1,979 volunteers, held 1,500 voter education drives or

events, and engaged in approximately 150,000 one-on-one conversations with North Carolina voters.

Since 2014, You Can Vote has helped over 27,000 voters complete their registrations, registering over 8,000 voters in 2018 alone. Further, voters registered by You Can Vote turn out to vote at a rate higher than the State as a whole, exceeding the statewide average in 2018 by 10%.

B. Partisan Gerrymandering Discourages Voter Participation

During the course of *Amici*'s registration and mobilization efforts, they have had conversations with hundreds-of-thousands of voters and potential voters across the State. Many have expressed a belief that the outcome of the congressional elections in their districts are "predetermined" because the district lines have been drawn to favor one party or the other. As a result, countless citizens with whom *Amici* have interacted believe their votes do not matter and the votes of those in their communities do not matter. Many potential voters tell *Amici* that because they believe that their votes do not matter, they are not going to vote.

Kate Fellman, You Can Vote founder and Program Director, reports that voters "feel that the elections are predetermined" and that, as a result, the "the level of mistrust in the community regarding voting is staggering." *Amici*'s staff and volunteers working in the community to register and mobilize voters frequently hear responses such as "Why should I

vote? It doesn't make any difference" and "Our votes never count."

Plaintiffs in this case report similar apathy among North Carolinians. "Multiple Plaintiffs testified that in 'the most recent election, a lot of people did not come out to vote'—despite Plaintiffs' concerted get-out-the-vote efforts—'[b]ecause they felt their vote didn't count.'" *See Rucho*, 318 F. Supp. 3d at 931; *see also id.* (quoting Plaintiff Peck's testimony that "I can't tell you how many people told me this election, Republicans as well as Democrats, 'This system is rigged. My vote doesn't count.' It was really hard to try to galvanize people to participate."); *id.* at 822 (quoting Plaintiff Taft's testimony that his "vote really is meaningless because . . . there is no way a candidate who is a Democrat can win in that district"); *id.* at 823 (quoting Plaintiff Freeman's testimony that in his district "there is no remote chance of any Democrat winning, so my vote is just a total waste").

Amici have found that the perception that the system is "rigged" against the voters is particularly strong in minority communities, which have been subject to repeated efforts by the State to pack their votes into noncompetitive districts through racial gerrymandering. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (discussing history of racial gerrymandering in North Carolina). Val Applewhite, a Democracy NC Field Organizer with particular focus on minority communities, for instance, reports that citizens have a "loss of faith in government" as a result of the State's repeated efforts to dilute their votes.

Young people also frequently express particularly strong feelings of disillusionment and disengagement from politics and voting, resulting in part from gerrymandering. Young Democrats in districts where the Democratic vote has been cracked have noted that they have not had a Democratic representative during their lifetimes and expressed the belief that they are unlikely to ever have a representative from their party. The same would be true for a young Republican living in a district where Democratic voters have been packed. Margaret Clemen, for instance, a retired teacher and You Can Vote volunteer, reports frequently hearing from young people that "they are not going to vote because their votes will not make any difference."

Importantly, not only is there a *perception* among North Carolinians that their votes have no impact, the statistical evidence before the Court shows that partisan gerrymandering has had the effect of minimizing the impact of North Carolinians' votes. Because Democratic Plaintiffs were sorted into either cracked districts, where the Democratic candidate had no realistic chance of winning, or into packed districts, where the Democratic candidate was favored by a large margin, Plaintiffs' votes carried less weight than they would have had the districting been nonpartisan. *Rucho*, 318 F. Supp. 3d at 819; *see also id.* at 884 (finding that while State-wide votes were relatively evenly split between Republicans and Democrats, in the three districts packed with Democratic votes, the Democratic candidate received 67.95% of the vote and in the ten other districts, the Republican candidate received 60.27% of the vote); *see also, e.g.*, *id.* at 820–21 (finding that Plaintiff Hall's vote would

have had greater impact in 99.85% of hypothetical alternative districts in which Hall could have been placed); *id.* at 821–23 (finding that Plaintiff Berger's vote would have had greater impact in more than 99% of hypothetical alternative districts).

If allowed to stand, the State's deliberate dilution of North Carolinians' votes is highly likely to persist into the future. The District Court found that the margin of victory in every district "exceed[s] the thresholds at which political science experts, including Legislative Defendants' expert [ ], consider a seat to be 'safe'—*i.e.*, highly unlikely to change parties in subsequent elections." *Id.* at 885. In other words, the noncompetitive elections will continue to be noncompetitive. Regardless of the particular candidates on the ballot, the districts packed with Democratic voters will continue to elect Democrats while the districts where the Democratic vote has been cracked will continue to elect Republicans. *See also* LAURA ROYDEN, MICHAEL LI, AND YURIJ RUDENSKY, BRENNAN CENTER FOR JUSTICE, EXTREME GERRYMANDERING & THE 2018 MIDTERM 25 (Mar. 23, 2018), *available at* https://www.brennancenter.org/publication/extreme-gerrymandering-2018-midterm ("[I]n order for more than two Republican seats to be at risk [in North Carolina], an electoral wave unlike anything North Carolina has seen in recent history would be required.").

In short, when potential voters tell *Amici* that the system is "rigged" against them, they are correct. The districts in North Carolina have been intentionally drawn to diminish citizens' voting power. This partisan gerrymandering discourages citizens from voting

and undermines *Amici*'s mission of increasing voter participation.

C. Partisan Gerrymandering Disincentivizes Legislators From Responding To Their Electorate

North Carolinians have also expressed to *Amici* that representatives in districts that have been designed by the State to be "safe" are not responsive to voter concerns. This is because a representative who does not believe his seat is at risk in the general election has less incentive to engage with and be responsive to voters of the opposite party or independents than if that representative believed bipartisan support would be necessary to win election. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 470–71 (2006) (*LULAC*) (Stevens, J., dissenting in part) ("Members of Congress elected from . . . safe districts need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district."); *Rucho*, 318 F. Supp. 3d at 893 ("We find that the 2016 Plan has the effect of entrenching Republican candidates in power, even in the face of significant shifts in voter support in favor of non-Republican candidates, and thereby likely making Republican elected representatives less responsive to the interests of non-Republican members of their constituency.").

The testimony in the record is illustrative of this problem. Evidence offered by the League of Women Voters ("League") is that "candidates were often not 'motivated' to participate 'in voter forums, debates, [or] voter guides, because the outcome is so skewed in

favor or in disfavor of one [candidate] or the other.'" *Rucho*, 318 F. Supp. 3d at 831. Plaintiff Fox testified that because her congressman is "in a safe seat," he has "less need[] to engage with the people that he represents" and does not "have to be as responsive to . . . citizen activists." Fox Dep. 29:24–30:2, 30:16–21, ECF No. 101-4, Mar. 22, 2017.

Moreover, because a representative in a "safe" district need not appeal across party lines, he or she is likely to take more polarized positions and use more polarized rhetoric antagonistic to the opposite party. *See, e.g.*, *LULAC*, 548 U.S. at 471, n.10 (2006) (Stevens, J., dissenting in part) (citing literature explaining that "safe seats produce more polarized representatives"); *see also* Kari VanDerVeen, *Examining The Role Of Gerrymandering In Campaign Discourse*, ST. OLAF COLLEGE NEWS (Sep. 17, 2018), https://wp.stolaf.edu/news/researchers-explore-the-role-of-partisan-gerrymandering-in-campaign-discourse (discussing recent research finding campaign rhetoric on congressional candidates' websites to be more extreme when the district's party breakdown was not reflective of the state as a whole).

This movement towards partisanship is concerning for *Amici*, who often hear from citizens that they are turned off from voting by the partisanship displayed by both parties. District lines that encourage partisanship and discourage representatives from appealing across party lines are detrimental to voter engagement.

D. Partisan Gerrymandering Divides Natural Communities, Diminishing Voters' Voice And Influence

The 2016 Plan also undermines voter participation by dividing communities of interest. One of the principal objectives in drawing district lines should be to maintain natural geographic communities within the same district. *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997). People living within a particular town or other geographic community tend to share particular interests as a result of, for instance, common social or economic factors that affect their community. Where district lines are drawn to place a community within a single district, community members can unite to elect or to petition the support of a particular representative. *See Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 750 (1964) (Stewart, J. dissenting) ("[Legislators] represent people . . . with identifiable needs and interests . . . which can often be related to the geographical areas in which these people live. The very fact of geographic districting . . . carries with it an acceptance of the idea of legislative representation of regional needs and interests.").

Conversely, where a district line is drawn to divide a community into multiple districts that include other regions not part of that community, the collective power of the community to elect or petition a representative is weakened and there is less incentive for a representative to be responsive to that particular community. The ability of community members to influence policy is therefore diminished when the com-

munity is improperly divided among disparate districts. *See* Nicholas Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1390–1393 (2012).

Despite the interest of North Carolinians in maintaining geographic communities within single districts, congressional district lines were intentionally drawn to divide geographic communities so as to increase partisan advantage. For instance, the cities of Greensboro, Fayetteville, and Asheville, and numerous counties, were intentionally divided into multiple districts in order to diminish the collective voice of those cities' and counties' citizens. *Rucho*, 318 F. Supp. 3d at 883; *see id.* at 902–22 (discussing examples where the 2016 Plan "divides municipalities and communities of interest along partisan lines").

In Greensboro, the line between Districts 6 and 13 was drawn to divide the city and was specifically drawn through the middle of the campus of North Carolina A&T State University.[3] Students in nine dormitories vote in one district while students in six dormitories vote in another.[4] North Carolina A&T is the largest historically black university in the country

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[3] *See* Ella Nilsen, *North Carolina's Extreme Gerrymandering Could Save The House Republican Majority*, VOX (May 8, 2018, 11:00 AM), https://www.vox.com/policy-and-politics/2018/5/8/17271766/north-carolina-gerrymandering-2018-midterms-partisan-redistricting.

[4] *See* Spectrum News Staff, *NC A&T Students March Against Voting Hurdles*, SPECTRUM NEWS (Oct. 29, 2018, 11:27 AM), https://spectrumlocalnews.com/nc/triad/news/2018/10/29/nca-t-students-march-against-voting-hurdles.

with 10,000 students,[5] and a natural community of interest. By dividing the community between districts, the voice and voting power of the citizens of Greensboro, and in particular North Carolina A&T students, are diluted. As one student noted, if united in the same district, North Carolina A&T students could "have the power to sway [an] election" but "dividing that in half" with each half in a majority-Republican district, "dilutes the vote."[6]

The City of Fayetteville and surrounding Cumberland County—which include large clusters of historically Democratic districts—have been cracked by the line between Districts 8 and 9. Districts 8 and 9 are "serpentine" districts, each spanning eight counties, and "join[ing] sections of the state that have little in common." *Rucho*, 318 F. Supp. 3d at 913–16. While historically, congressional districts that included portions of Cumberland County were "reasonably competitive," *id.* at 824, the 2016 Plan ensured Districts 8 and 9 would be "safe Republican" districts. *Id.* at 913–15. As a result, the Districts' representatives are disincentivized from spending time in Cumberland and Asheville. Ms. Applewhite, the Democracy NC Field Organizer—a former three-term member of Fayetteville's City Council and Air Force veteran—reports that the representatives for Districts 8 and 9 do not spend time interacting with Fayetteville and Cumberland citizens, and particularly the City's minority and military communities. In the words of Ms.

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[5] *Id.*

[6] *Id.*

Applewhite, "it feels like the people of Fayetteville and Cumberland have no representation."

To take another example, Asheville is the largest city in western North Carolina and has a long history of voting Democratic.[7] The surrounding Buncombe County has vibrant health care and manufacturing sectors and one of the lowest unemployment rates in the State.[8] Asheville-Buncombe voters have a community of interests different from those of voters in surrounding rural counties. *See, e.g.*, Sarver Dep. 9–33:4, ECF No. 101-23, April 10, 2017 (testimony of Plaintiff Sarver, an Asheville resident, that Asheville has distinct economic, cultural, and political interests).

Historically, Buncombe County (and Asheville) has been within one district in which elections were competitive. *Rucho*, 318 F. Supp. 3d at 825. Yet, the 2016 Plan splits Buncombe County and Asheville between two "safe" Republican districts, *id.*, where the preferred candidate of most people in Asheville and Buncombe County has no real chance at election. *Id.* at 897. As Plaintiff Sarver testified, "because Asheville is divided into two Congressional Districts the

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[7] Mark Barrett, *Districts Or Not, Asheville A Liberal City*, CITIZEN TIMES (July 8, 2016, 12:26 PM), https://www.citizen-times.com/story/news/politics/elections/2016/07/08/districts-not-asheville-liberal-city/86859454/.

[8] Kim Dinan, *Area Economy Continues Growth, Low Unemployment*, MOUNTAIN XPRESS (July 6, 2018), https://mountainx.com/news/area-economy-continues-growth-low-unemployment/.

political voice is diluted." Sarver Dep. 25:12–14, ECF No. 101-12, April 10, 2017; *see also id.* at 25:21–25 ("[I]f Asheville was in one Congressional District I feel like there would be a lot more accountability for [representatives] to show up to a town hall or to respond to constituents . . . ."). Asheville's mayor explains that the people of Asheville believe "their voice has been eradicated by gerrymandering."[9]

Moreover, as in Greensboro, the district line through Asheville was intentionally drawn through a university campus (the University of North Carolina Asheville),[10] diluting the voice of that campus community.

In addition to diluting communities' voices through cracking, the District Court also found that the 2016 Plan "divides municipality and communities of interest" by packing. For instance, the line between Districts 2 and 4 divides Wake County in order to pack historically Democratic voters into District 4 (along with concentrations of Democratic voters in Raleigh, Durham and Chapel Hill) while placing the

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[9] Joel Burgess, *Asheville Gerrymandering Focus Of New HBO/'Vice' Segment, Other National Media*, CITIZEN TIMES (Sept. 21, 2017, 7:44 AM), https://www.citizen-times.com/story/news/local/2017/09/21/asheville-gerrymandering-focus-new-hbo-vice-segment-other-national-media/689845001/.

[10] WLOS Staff, *District Line Puts Floor-Mates At UNC Asheville In Different Precincts*, WLOS (Nov. 3, 2016), https://wlos.com/news/local/district-lines-run-through-2-unc-asheville-dorms.

county's historically Republican precincts into District 2 to create a safe Republican district. *Rucho*, 318 F. Supp. 3d at 822, 904–906; *see also* Fox Dep. 20:10–14, ECF No. 101-4, Mar. 22, 2017 (Plaintiff Fox explaining that in Wake County, "all of the Democrats are smooshed together so that they're going to win with a huge surplus of votes because everybody's been packed into one heavily Democratic district.").

The division of communities is antithetical to the mission of *Amici*, which aim to assist North Carolinians in exercising their collective voice and in electing representatives responsive to the concerns of their constituents.

II. NORTH CAROLINIANS HAVE NO REASONABLE PROSPECTS OF ENDING PARTISAN GERRYMANDERING LEGISLATIVELY

A. North Carolinians Oppose Partisan Gerrymandering And Have Petitioned The State Legislature To Draw District Lines Impartially

In *Amici*'s experience, the substantial majority of North Carolinians oppose partisan gerrymandering. Recent polling suggests nearly 60% of registered voters support laws that would require congressional

maps be drawn in a nonpartisan fashion.[11] This support cuts across party lines.[12]

Amici have organized public education efforts around this opposition to partisan gerrymandering. Both Democracy NC and You Can Vote participated in the 2017 Fair Maps campaign which had the goal of mobilizing support for a process for drawing district maps that is fair, open to the public, and nonpartisan.

As part of the Fair Maps campaign, hundreds of *Amici*'s volunteers participated in phone banks, went door-to-door, and set up booths at community events. Over a nine-month period in 2017, Democracy NC collected nearly 23,000 petition signatures in support of nonpartisan districting. The majority of the signatures came from North Carolinians with no previous connection to Democracy NC, but who were nonetheless motivated to take action because of the harms caused by partisan gerrymandering. *Amici* also collected nearly 2,500 postcards addressed to individual North Carolina representatives calling on them to support an independent, nonpartisan districting process. Still more postcards were mailed directly by citizens to their representatives. Other citizens contacted their representatives by phone and email to urge their support for nonpartisan districting. Citi-

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[11] *See* Public Policy Polling, *Democrats Have Edge, Energy in North Carolina For 2018*, 1 (Jan. 23, 2018), https://www.publicpolicypolling.com/wp-content/uploads/2018/01/PPP_Release_NC_12318.pdf.

[12] *Id.* at 1, 7.

zens also expressed their opposition to partisan gerrymandering in-person to their representatives. On March 1, 2017, Democracy NC co-hosted the "Citizens Lobby Day to End Gerrymandering" at the North Carolina Legislative Building in Raleigh. Nearly 400 citizens attended, coming from across the State.

Through this work, *Amici* found overwhelming popular opposition to partisan gerrymandering. For instance, of the 1,290 people who You Can Vote volunteers spoke to during their door-to-door efforts, 1,239—*i.e.*, 96%—completed a postcard to their representative in support of nonpartisan districting. North Carolinians support political districts that are not drawn to diminish the power of their votes.

B. Because The North Carolina Legislature Is A Product Of Partisan Gerrymandering, It Has Refused To Act

Despite the efforts of *Amici* and tens-of-thousands of North Carolinians, the North Carolina General Assembly has refused to take action to end partisan gerrymandering. During the 2017-2018 Session, bills were introduced in both the North Carolina House and Senate that would require congressional districts be drawn in a nonpartisan manner that does not intentionally dilute the strength of votes based on party

affiliation.[13] Neither bill has been passed out of committee for a vote.[14]

The refusal of the State legislature to end partisan gerrymandering is not surprising because the State legislators are themselves products of partisan gerrymandering. Similar to the U.S. congressional districts at issue in this case, the State House and Senate district lines were intentionally drawn to pack and crack the Democratic votes, thereby making elections noncompetitive and entrenching incumbents and the party which drew the lines. *See* Defendants-Appellees' Brief on Remand at 56, *Dickson v. Rucho*, 2015 WL 4456364 (N.C. 2015) (State's brief acknowledging that district lines "were drawn to maintain Republican majorities in the General Assembly and increase the number of Republican leaning congressional seats.").[15] The "chief architect" of the State legislative districts was the same Thomas Hofeller who drew the U.S. congressional district lines at issue here. *Covington v. North Carolina*, 316 F.R.D. 117, 126 (M.D.N.C. 2016) (internal quotations omitted), *aff'd*, 137 S. Ct. 2211, (2017).

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[13] H.B. 674, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); S.B. 702, 2017 Gen. Assemb., Reg. Sess. (N.C. 2018).

[14] H.B. 674, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); S.B. 702, 2017 Gen. Assemb., Reg. Sess. (N.C. 2018).

[15] The State legislative districts were also a product of unconstitutional racial gerrymandering. *Covington v. North Carolina*, 316 F.R.D. 117, 130 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

Tellingly, in the 2016 State House of Representatives general election, nearly half of the seats—57 of 120—were not contested.[16] Nearly 30% of the State Senate seats—15 of 50—were uncontested.[17] Through partisan districting, the North Carolina legislature has thereby entrenched both itself and the State's U.S. congressional representatives and diluted the votes of North Carolinians who overwhelmingly support nonpartisan districts.

The District Court therefore correctly found that the 2016 Plan violates "'the core principle of [our] republican government . . . that the voters should choose their representatives, not the other way around.'" *Rucho*, 318 F. Supp. 3d at 801 (quoting *Arizona State Legislature*, 135 S. Ct. at 2677 (2015)). As

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[16] *See* House Principal Clerk's Office, *Miscellaneous Data Sheet, General Election for 2017 House of Representatives*, North Carolina General Assembly (Nov. 10, 2016), https://www.ncleg.gov/DocumentSites/HouseDocuments/Election%20Documents/2017%20NC%20House%20General%20Election%20Data%20Sheet.pdf.

[17] *See* Office of the Senate Principal Clerk, *Unofficial General Election Data For The North Carolina Senate 2017 General Assembly 2016 General Election – November 8, 2016*, North Carolina General Assembly (Aug. 2, 2016), https://www.ncleg.gov/DocumentSites/SenateDocuments/2017%20Election%20Documents/Senate%202016%20General%20Election%20Data.pdf; *see also* Will Doran, *Common Cause Video Says Half Of All NC Legislative Races Are Uncontested Due To Gerrymandering*, POLITIFACT NORTH CAROLINA (Aug. 9, 2016, 7:46 PM), https://www.politifact.com/north-carolina/statements/2016/aug/09/common-cause/common-cause-video-says-half-all-nc-legislative-ra/.

such, the 2016 Plan violates the constitutional rights of North Carolinians.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF *AMICI CURIAE* PROFESSORS CHRISTOPHER ELMENDORF, JOSEPH FISHKIN, BERTRALL ROSS, DOUGLAS SPENCER, AND FRANITA TOLSON IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Professors Christopher S. Elmendorf, Joseph Fishkin, Bertrall Ross, Douglas Spencer, and Franita Tolson are legal scholars whose research and writing focus on redistricting and other aspects of election law.

Professor Christopher Elmendorf currently serves as the Martin Luther King, Jr., Professor of Law at the University of California, Davis, School of Law. He has published numerous articles on these topics in, among other law reviews, the University of Chicago Law Review, the Columbia Law Review, and the Yale Law Journal. He received his J.D. from Yale Law School.

Professor Joseph Fishkin is the Marrs McLean Professor in Law at The University of Texas at Austin. His research on electoral politics and voting rights has been published in the Columbia Law Review, the Supreme Court Review, and the Yale Law Journal, among others. He received his J.D. from Yale Law School and a D. Phil. in Politics from Oxford University.

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that the position they take in this brief has not been approved or financed by Appellants, Appellees, or their counsel. Neither Appellants, nor Appellees, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

As required by Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief. Evidence of written consent of all parties has been filed with the Clerk.

Professor Bertrall Ross is the Chancellor's Professor of Law at U.C. Berkeley School of Law. His work on election law, constitutional law, and statutory interpretation has been published in the Columbia Law Review, NYU Law Review, University of Chicago Law Review, and California Law Review among others. He received his J.D. from Yale Law School, and a M.P.A. from Princeton University Woodrow Wilson School of Public and International Affairs.

Professor Douglas Spencer is Professor of Law and Public Policy at the University of Connecticut, and for the 2018–2019 academic year, he is Visiting Professor at the University of Chicago. His research on minority voting rights and election law has been published in the California Law Review, the Columbia Law Review, and the Election Law Journal among others. He holds a Ph.D. in Jurisprudence and Social Policy from the University of California, Berkeley.

Professor Franita Tolson is a Professor of Law at University of Southern California Gould School of Law. Professor Tolson's writings on partisan gerrymandering and other topics have been published in leading law reviews including, the *Boston University Law Review*, the *Vanderbilt Law Review*, the *Alabama Law Review*, the *Notre Dame Law Review*, and the *University of Pennsylvania Law Review Online*. She received her J.D. from the University of Chicago Law School.

Amici curiae submit this brief to rebut arguments made by Appellants and their *amici*

regarding the nature of the vote dilution "injury" discussed in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Appellants argue that this case suffers from "the same basic flaws" as *Gill*, Appellants Br. at 25, because, like *Gill*, it concerns "'group political interests' and 'generalized partisan preferences' that this Court has no 'responsib[ility]' to 'vindicate.'" *Id.* at 24 (alteration in original). Appellants further argue that the court below erroneously assumed that the baseline against which effect is to be measured is the "overall partisan makeup of the State," *id.* at 43, whereas in Appellant's view a dilution injury per *Gill* is an injury to individuals in a particular legislative district, *id.* at 26, not to a statewide group of voters tied together by their partisan preferences. *Id.* at 25.

Similarly, *amicus curiae* in support of Appellants, the National Republican Redistricting Trust ("NRRT"), argues that although the Constitution "provides rights for definite individuals," Brief of *Amicus Curiae* The National Republican Redistricting Trust in Support of Appellants at 29, Feb. 11, 2019 ("NRRT Amicus Br."), there is no individual right to be free from partisan gerrymandering and that what plaintiffs really are seeking is a "group right to proportional representation" for political parties, *id.* at 2.

These arguments confuse the personal "injury in fact" that plaintiff-voters must show to establish standing in a dilution case with the merits-stage showing of harm to structural democratic values of responsiveness or majority rule that plaintiffs must make to prevail. Appellants and the NRRT seek to turn *Gill*, a case solely about standing, into a case

about the merits of partisan gerrymandering claims in general.

As shown below, these arguments are at odds with this Court's precedents. In vote dilution cases, the "injury" necessary to establish standing is not the same as the "injury" necessary to establish liability. This distinction, which Appellants and the NRRT ignore, is not an anomaly, but rather a requirement that exists whenever plaintiffs seek to enforce structural constitutional values.

SUMMARY OF THE ARGUMENT

The Constitution protects structural values of democratic accountability and responsiveness; it also separates powers among the branches of the federal government to protect a broadly shared interest in liberty. However, not everyone who shares these interests can sue to protect them; a plaintiff must have standing. Whether a plaintiff has standing is analytically distinct from the merits of his claim. Thus, given the breadth of structural interests, the injury necessary for standing will typically be narrower and often different in kind from the constitutional harm to which plaintiff objects.

Vote dilution cases are consistent with the above-described principles. As a review of the genealogy of the Court's vote dilution cases demonstrates, these cases vindicate important structural values of representation and democratic responsiveness. However, as in other areas of constitutional law, not everyone who shares an interest in these structural values can sue to

vindicate them. Rather, only a plaintiff who lives in a challenged district has standing. Yet the type of injury which must be shown to establish standing is different from the structural harm—a harm to democratic responsiveness—which must be shown to prevail on the merits. Thus, there is no merit to the argument that *Gill*'s holding about standing necessitates a district-specific analysis of dilution at the liability stage. On the contrary, in a partisan vote dilution challenge to a state's map of congressional districts—just as in a racial vote dilution challenge to such a map—the liability-stage inquiry into dilutive effect must consider representational opportunities statewide.

ARGUMENT

I. FEDERAL LAW OFTEN PROTECTS STRUCTURAL VALUES, BUT NOT EVERYONE WHO CARES ABOUT THEM HAS STANDING TO SUE WHEN THEY ARE VIOLATED

Many provisions of the Constitution exist to protect structural values, such as accountability and democratic responsiveness, as well as the broadly shared interest in liberty. Yet these common structural values do not confer the right to sue upon all Americans.

For example, the vesting of "[a]ll legislative powers" in a bicameral Congress, *see* U.S. Const. Art. I, § 1, together with the carefully wrought presentment procedure for its exercise, guarantees that citizenry's liberties will not be abridged without

a considered legislative decision or the legislature's clear delegation of rulemaking authority to a politically accountable executive. *INS v. Chadha*, 462 U.S. 919, 944–51 (1983).[2] Similarly, accountability for the execution of the laws is protected by the Vesting and Take Care Clauses of Article II, which ensure that "[t]he buck stops with the President." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("The Framers established a single President by design" because it "furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch"), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010). And the democratic responsiveness of Congress is guaranteed by Article I, Section 2, which provides that the House of Representatives shall be "chosen 'by the People of the several States.'" *See Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (quoting U.S. Const. Art. I, § 2).

Yet a citizen's generalized interest in liberty, accountability, or responsiveness does not confer standing to challenge a separation of powers violation

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[2] *See also Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("[S]tructural protections against abuse of power are critical to preserving liberty."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) ("[T]he Constitution diffuses power the better to secure liberty . . . .").

in federal court. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (standing "may not be predicated upon an interest . . . held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share").[3] To have standing, a plaintiff must plead and prove, among other things, an "injury in fact." *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). This injury "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (plaintiff must have "a personal stake in the outcome of the controversy") (citation omitted).[4]

This "injury in fact" need not be the same as, or even similar in kind to, the type of interest which the constitutional provision at issue was meant to protect. Indeed, this Court has emphasized that the existence of a cause of action and the existence of standing are "distinct concepts" and that "whether a plaintiff

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[3] *Accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy.").

[4] *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881–82 (1983) ("[P]laintiff's alleged injury [must] be a particularized one, which sets him apart from the citizenry at large.").

states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute." *Bond v. United States*, 564 U.S. 211, 219 (2011) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998)).[5] Accordingly, the Court has rejected efforts to find standing based on the merits of a plaintiff's case. *See Schlesinger*, 418 U.S. at 225 (criticizing lower court for finding standing based on a "premature evaluation of the merits of [plaintiffs'] complaint") (footnote omitted); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (rejecting test for standing based on whether plaintiff had a "legal interest" that had been harmed, on the grounds that such a test "goes to the merits"). And, in cases where the structural value is a broad one, the inquiry into injury on the merits will typically be much broader than the inquiry into injury for standing purposes.

Myers v. United States, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), illustrate the distinction between the values at stake in the merits inquiry and the injury necessary to show standing in separation of powers cases. In each of those cases, this Court decided foundational questions about the separation of powers not at the behest of ordinary citizens asserting their interest in liberty or accountability, but rather at the behest of an individual government employee asserting his personal interest in back pay following an allegedly wrongful termination. Surely this

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[5] *Accord Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("[S]tanding 'in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal . . . .'") (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

interest was nowhere near the Framers' minds when they undertook to allocate powers among the three branches of the federal government.

II. VOTE DILUTION HARMS THE STRUCTURAL VALUE OF DEMOCRATIC RESPONSIVENESS, WHICH IMPACTS ALL MEMBERS OF A POLITICALLY ALLIED GROUP OF CITIZENS, YET NOT ALL CITIZENS HAVE STANDING TO SUE

Vote dilution cases follow the same pattern as the constitutional cases discussed above. Like those cases, vote dilution cases protect important structural values—here, representation and responsiveness. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623–26 (1982) (citing plaintiffs' lack of representation and defendants' lack of responsiveness); *White v. Regester*, 412 U.S. 755, 765–69 (1973) (same). However, not all citizens with an interest in these values can sue to protect them. Only a person who lives in an improperly drawn district has standing because only such a voter has suffered the requisite injury in fact. *See* § II.B, *infra*.

A. The Genealogy of This Court's Vote Dilution Jurisprudence Makes Clear that Vote Dilution Harms the Structural Value of Democratic Responsiveness

This Court first addressed vote dilution in the context of elections for a single officeholder. *See United States v. Saylor*, 322 U.S. 385 (1944). In the

single-office setting, a practice is dilutive if it interferes with the majoritarian outcome. Subsequently the Court extended the concept of vote dilution to address the composition of legislative bodies. In legislative-body cases—such as the instant case—a practice is dilutive if it impinges on majority rule or renders the body inadequately representative of, or responsive to, a group of citizens with common political interests, an inquiry that requires assessment of the legislative body or districting map as a whole. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) ("*LULAC*") (courts should look "statewide" in determining whether members of a racial or ethnic minority group have achieved a roughly proportional percentage of legislative seats); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (comparing voting power of citizens in different parts of the state).[6]

1. Office-Specific Dilution Cases

In office-specific dilution cases, dilution occurs when some votes count for more than other votes in determining the winner.

For example, in *Saylor*, this Court acknowledged that ballot box stuffing could "dilut[e] and destroy[] [legitimate votes] by fictitious ballots fraudulently cast and counted." 322 U.S. at 386; *see*

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[6] Racial gerrymandering cases, while also decided under the Equal Protection Clause, do not focus on responsiveness. Nonetheless, even in those cases this Court has held that plaintiffs can "present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Ala. Legislative Black Caucus v. Ala.*, 135 S. Ct. 1257, 1265 (2015).

also id. at 392 (Douglas, J., dissenting) ("[H]e who bribes voters and purchases their votes corrupts the electoral process and dilutes my vote as much as he who stuffs the [b]allot box.").

Gray v. Sanders, 372 U.S. 368 (1963) recognized that office-specific dilution may occur not only through fraud, by also as the result of *de jure* rules for aggregating votes. *Gray* found Georgia's "county unit" system for aggregating the votes cast in primary elections for statewide office unconstitutional, on the ground that the system diluted the votes cast by residents of more populous counties. Under the county-unit system, the candidate who won the most counties prevailed in the election, rather than the candidate who won the most votes. The county-unit system thus gave outsized influence to residents of lightly populated counties.

It is clear that the value at stake in *Saylor* and *Gray* was majority rule. The class of citizens whose votes were diluted consisted of those who, while eligible to vote for the office in question, had to surmount a higher hurdle than other eligible citizens before their candidate could win. Since *Saylor* and *Gray*, this Court has occasionally alluded to the office-specific form of vote dilution, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."), but the main stem of dilution

jurisprudence has concerned representation in multi-member legislative bodies, which we discuss next.[7]

2. Legislative-Body Dilution Cases

In legislative-body dilution cases, dilution occurs when an actually- or potentially-allied group of voters has had its opportunity to win seats "minimized or canceled out."

Reynolds v. Sims, 377 U.S. 533 (1964), famously extended *Gray* by holding that just as dilution occurs when residents of densely populated areas are disadvantaged by the vote-counting rules for a particular office, so too does dilution *at the level of the legislative body* occur when those same residents are disadvantaged by malapportioned legislative districts. *Compare Gray*, 372 U.S. at 379 ("How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"), *with Reynolds*, 377 U.S. at 562 ("[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.").

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[7] Appellants' argument that vote dilution cannot occur "[i]f each vote is counted and counted equally," Appellants Br. at 28, mistakenly conflates the office-specific and legislative-body dilution precedents.

In *Reynolds*, as in *Gray*, majority rule was the fundamental constitutional value at stake, and dilution was conceptualized as an interference with majority rule. The only difference was scale: single office (*Gray*), versus legislative body as a whole (*Reynolds*). *See Reynolds*, 377 U.S. at 565 ("[T]o sanction *minority control* of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.") (emphasis added); *id.* at 545 (noting that under the challenged map, "only 25.1% of the State's tot[al] population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives"); *see also* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103 (2000) (agreeing with the *Reynolds* Court that the constitutional injury in the malapportionment cases was an injury to majority rule, but arguing that the case should have been decided on a Republican Form of Government rather than an Equal Protection theory).

Implicit in *Reynolds* and *Gray* was the idea that a legislative body is inadequately responsive to the preferences of its constituents if the will of the majority was thwarted. The responsiveness norm was extended in *Fortson v. Dorsey*, 379 U.S. 433 (1965), decided just a year after *Reynolds*. In *Fortson*, this Court recognized that legislative-body dilution may also occur if the rules for translating votes into seats are structured so as to render the body *inadequately responsive* to a distinct political faction

within the citizenry, even if there is no infringement of majority rule. *Id.* at 439 ("It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."). *Fortson* is thus the fount of this Court's racial and the partisan vote dilution jurisprudence. In either type of dilution case—racial or partisan—the inquiry into effects properly considers the entire map of legislative districts, not just a single district in isolation from the rest.[8]

a. Racial Vote Dilution Cases

Racial vote dilution occurs when members of (1) a politically cohesive racial group suffer from (2) a legally insufficient opportunity to wield voting strength, i.e., to secure representation in, or responsiveness from, the legislative body in question.

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[8] This is not to say that the district court erred in the present case by "proceed[ing] on a district-by-district basis." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C 2018). In doing so, the district court followed *Gill's* instruction to evaluate whether particular districts had been gerrymandered, *id.* at 821–27, in the sense of being purposefully drawn for partisan advantage in ways that depart from traditional neutral criteria. By requiring district-specific evidence of gerrymandering, *Gill* usefully limits the reach of any remedy in a partisan vote dilution case, focusing the redrawing of the map on specific districts. But *Gill's* requirement for some district-specific evidence does not vitiate the court's responsibility, at the liability stage of a partisan gerrymandering case, to assess representation or responsiveness under the map as a whole. The district court properly did so in this case. *See id.* at 868.

When such dilution occurs, *all* members of the politically cohesive racial group suffer it, not just those who may reside in a particular (actual or potential) single-member district. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663 (2001). This simple idea ties together nearly 50 years of case law, including cases from the 1970s and early 1980s which were decided on an equal protection theory and more recent cases applying the "results test" of Section 2 of the Voting Rights Act. However, as this section of the brief will explain, while the concept of racial vote dilution as a jurisdiction-wide injury has been present throughout this Court's jurisprudence, it was somewhat tacit in the early cases, owing largely to the fact that the parties had failed to foreground the matter. *Cf. Johnson v. De Grandy*, 512 U.S. 997, 1014–15 (1994) (analyzing dilution at geographic scale agreed to by the parties in the court below). Not until *LULAC*, 548 U.S. 399 (2006), did this Court confront a properly presented argument over the appropriate geographic scale. *LULAC* confirms the dilution inquiry should be jurisdiction-wide.

This Court's initial racial vote dilution cases were decided under an equal protection theory, and while they eschewed any right of minority voters to be proportionally represented in legislative bodies, they placed great weight on the *responsiveness* of the legislative body (or intermediary party organizations) to the minority community. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 148–55 (1971) (acknowledging trial court's findings about the "distinctive substantive-law interests" of the black community, but holding that no unconstitutional dilution had

occurred because black voters were integrated into and represented through the Democratic Party coalition); *White*, 412 U.S. at 766–67 (finding unconstitutional dilution of black vote where, *inter alia*, few blacks had been elected and white-dominated slating organization "did not need the support of the Negro community to win elections [and] did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community"); *id.* at 768–69 (finding unconstitutional dilution of Latino vote where, *inter alia*, Latinos had only rarely been elected in a multi-member district and the legislative delegation was "insufficiently responsive to Mexican-American interests"); *Rogers*, 458 U.S. at 623–26 (finding unconstitutional dilution where county officials were "unresponsive and insensitive to the needs of the black community," and blacks had been "prevented" from "effectively participating in Democratic Party affairs and in primary elections").

Since legislatures serve the people primarily by enacting legislation, and since bills require a majority vote of the legislative body to pass, the emphasis on responsiveness in the early dilution cases cuts strongly in favor of a jurisdiction-wide dilution inquiry. The evidence in these cases went well beyond the circumstances of voters in one actual or potential single-member district. Some of the cases concerned multimember state legislative districts, and the evidence in those cases spoke to the circumstances of voters in the multimember districts, as well as official discrimination (or its absence) statewide. *See Whitcomb*, 403 U.S. at 131–32 (comparing conditions in poor black neighborhoods with conditions

elsewhere in the multimember district); *White*, 412 U.S. at 765–67 (discussing history of official discrimination against blacks in Texas); *id.* at 768 (observing that Mexican-Americans in county served by multimember district and elsewhere in Texas had long suffered discrimination). Other cases concerned at-large elections for local legislative bodies—city councils and county commissions—and here again the evidence was jurisdiction-wide. *See City of Mobile v. Bolden*, 446 U.S. 55, 71–74 (1980) (plurality opinion) (noting local officials' lack of responsiveness, but holding that plaintiffs had failed to prove intentional discrimination); *Rogers*, 458 U.S. at 623–27 (discussing, *inter alia*, lack of responsiveness from county officials, and history of discrimination).

In 1980, this Court erected an additional requirement for equal-protection vote dilution cases, namely that plaintiffs prove the dilution was purposeful. *See City of Mobile*, 446 U.S. 55. Congress responded by amending Section 2 of the Voting Rights Act to eliminate the intent requirement and return to the *White v. Regester* framework. *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 404–417 (2012) (contrasting static and dynamic glosses on Congress's codification of *White*); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 Wash & Lee L. Rev. 1347 (1983), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2674&context=wlulr (recounting history of the 1982 amendments). Since 1982, this Court's racial vote dilution cases have all been

decided under Section 2 of the Voting Rights Act, rather than the 14th Amendment.

The Senate Report accompanying Section 2 of the Voting Rights Act itemized factors that courts should evaluate in determining whether plaintiffs had proved vote dilution. S. Rep. No. 97-417, at 28–29 (1982). These factors, drawn from *White* and other cases decided before *City of Mobile*, do not restrict a court's evaluation to a challenged district. Rather, they expressly direct courts to examine conditions in "the State or political subdivision" whose legislative body is at issue in the case. *See Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986) (citing Senate Report factors, including "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; [and] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group"). Indeed, in *Gingles*, this Court's first case interpreting the 1982 amendments, the Court expressly relied on these factors and, accordingly, examined both statewide evidence and evidence specific to the multimember districts that the plaintiffs sought to replace. *Id.* at 38–40 (describing, *inter alia*, history of discrimination in the state, and "the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts").

Gingles is best known today for establishing the three-factor threshold showing that racial vote dilution plaintiffs must make (potential remedial

district, minority cohesion, and white bloc voting). *Id.* at 50–51. But equally important was the concurring opinion of Justice O'Connor (joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist), which lucidly explained the essential conceptual questions that any theory of racial vote dilution must answer: what is the proper measure of minority "voting strength," and what is the correct benchmark for an undiluted districting plan, i.e., how much voting strength *should* the minority community wield? *See Id.* at 84–99 (O'Connor J., concurring in the judgment). Though expressing concern that the plurality opinion's gloss on Section 2 of the Voting Rights Act could lead to proportional representation, Justice O'Connor acknowledged that "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." 478 U.S. at 84.

Notably, the hypothetical with which Justice O'Connor illustrated her points strongly supports a jurisdiction-wide dilution inquiry, one which accounts for the voting strength of *all* minority citizens who are governed by the legislative body at issue, wherever they may live. Justice O'Connor posited "a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black" and vote as a bloc. *Id.* at 85. She then discussed various districting scenarios, weighing the number of seats the black community would control under each scenario, the security of those seats, and the likelihood that councilmembers elected from other seats would be electorally responsive to black

interests. *Id.* at 85–89. It is clear from this discussion that she understood dilution, in a legislative-body case, as a phenomenon to be assessed at the level of the legislative body as a whole (in this example, the town council). In other words, the court must assess the legislative body's representation or responsiveness vis-à-vis *all* members of the racial-political group in the polity, not just those in a given district, and compare this with representation / responsiveness afforded to the majority group.

This Court employed a similar hypothetical in *De Grandy*, 512 U.S. at 1016–17, indicating that the Court (like Justice O'Connor in *Gingles*) understood that racial vote dilution must generally be measured at the level of the legislative body as a whole because the concept of racial vote dilution concerns the political strength of *all* minority voters in the polity.[9]

LULAC made explicit that the geographic scope of the dilution inquiry must be statewide if a statewide map of districts is at issue. In *LULAC*, a case about congressional districts, the state defendants urged a regional approach, whereas

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[9] It is true that when the *De Grandy* Court turned from hypotheticals to the evidence in the record, the Court assessed "rough proportionality"—its benchmark for the absence of dilution—in the general area of one county, rather than looking statewide, even though the case was about state legislative districts (not a county commission). *See* 512 U.S. at 1014–15, 1023. But the Court did so only because "the plaintiffs [had] . . . passed up the opportunity to frame their dilution claim in statewide terms." *Id.* at 1022.

plaintiffs argued for a statewide inquiry.[10] With the question thus framed, this Court announced, "the answer . . . is to look at proportionality statewide." 548 U.S. at 437. Any smaller scale would be "arbitrary," and would run against the Senate Report factors, which (as discussed above) point toward a jurisdiction-wide inquiry. *Id.* at 437–38.

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Although some language in recent cases might be thought to evidence a narrower, district-specific theory of racial vote dilution, that language is best understood not as propounding such a theory, but rather as recognizing (1) that Section 2 of the Voting Rights Act affords certain protections that go *beyond* the right to a racially undiluted vote; and/or (2) that to have standing to bring a dilution case under Section 2, plaintiffs must suffer an "injury in fact" which is more personal and individuated than the dilution injury suffered by a racial or political group.

Regarding the first point, it has long been recognized that Section 2's "results test" offers protection against certain non-dilution injuries. *See Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia,

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[10] No one argued for a nationwide inquiry. A nationwide dilution inquiry would have a certain logic in cases about congressional districting, *see* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, but because Article I specifies that Members of Congress are to be chosen by the "People of the *several* States" (emphasis added), under rules and subject to voter qualification determined by each state, it makes more sense to assess congressional representation at the scale of individual states.

J., dissenting) ("If . . . a county . . . made it more difficult for blacks to register than whites, . . . § 2 would [] be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate."). The existence of these additional protections, which can be invoked by individual minority voters or small clusters of voters, has occasionally obscured the jurisdiction-wide nature of the vote dilution inquiry.

For example, in *De Grandy*, the Court declined to recognize "rough proportionality" (its benchmark for the absence of dilution) as a safe harbor, because, among other things, that would allow the "rights of some minority voters under § 2 [to] be traded off against the rights of other members of the same minority class." *See* 512 U.S. at 1019. This passage implies a conception of Section 2 of the Voting Rights Act that includes an equal-treatment requirement. The state may not arbitrarily privilege some minority voters at the expense of others. But though Section 2 arguably disallows this, it is not on account of dilution. So long as the minority group as a whole wields the same political strength pre- and post-"tradeoff of rights," there has been no dilution. *Cf. LULAC*, 548 U.S. at 511 (Roberts, J., concurring in part) ("[I]t is [not] our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority . . . .").

The majority opinion in *LULAC* has also seeded some confusion, for after noting the departure from statewide proportionality in that case might be "deemed insubstantial," Justice Kennedy wrote that "that consideration would not overcome *the other*

evidence of vote dilution for Latinos in District 23." 548 U.S. at 438 (emphasis added). Taken at face value, this statement implies that vote dilution is a district-specific rather than statewide matter—contradicting most everything this Court has said about dilution in legislative-body cases since *Reynolds*, as well as most everything that Justice Kennedy himself had said to that point of his *LULAC* opinion. As Chief Justice Roberts sagely remarked in dissent, "Whatever the majority believes it is fighting with its holding, *it is not vote dilution on the basis of race or ethnicity.*" *Id.* at 511 (emphasis added). The Chief Justice was absolutely right. If *LULAC*'s holding is correct, it is because Texas had empowered some minority voters at the expense of others for no legitimate reason,[11] thus violating Section 2's equal-treatment norm, not because the "Latinos in District 23" constituted a distinct "protected class" which could suffer "dilution" irrespective of the voting strength that Latinos exercised elsewhere in the state.

Justice Kennedy's plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), also contains some language suggestive of a district-specific theory of racial vote dilution. *See id.* at 19 ("[I]t is a *special wrong* when a minority group . . . could constitute a compact voting majority [of a single member district]

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[11] *See* 548 U.S. at 440–41 (explaining that "the reason for taking Latinos out of District 23 . . . was to protect Congressman Bonilla from a constituency that was increasingly voting against him," and distinguishing such bad incumbency protection from legitimate efforts to "keep the constituency intact so the officeholder is accountable for promises made or broken").

but, despite racially polarized bloc voting, that group is not put into a district [where it is a numerical majority].") (emphasis added). But *Bartlett*'s holding—namely, that plaintiffs must show that they *could* be drawn into a compact, numerically majority-minority district—is better understood as a standing-like limitation on the category of voters who may sue.

That the "special wrong" needed for standing in a Section 2 dilution case is not the same as the dilution which must be shown at the liability stage becomes clear in Part III.C of Justice Kennedy's *Bartlett* opinion. There, Justice Kennedy indicates that the representation or responsiveness secured by clusters of black voters who may not comprise a majority of a compact single-member district is *absolutely* relevant to the liability-stage inquiry in a dilution case: "[C]rossover voting patterns and [] effective crossover districts[, i.e., districts in which a numerical racial minority joins forces with some whites to elect mutually satisfactory candidates,]. . . . [C]an be evidence [] of diminished bloc voting under the third *Gingles* factor *or of equal political opportunity under the § 2 totality-of-the-circumstances analysis.*" 556 U.S. at 24 (emphasis added). The italicized phrase is critical. It indicates that a crossover district should count in the voting-strength (rough proportionality) calculus, even if the minority voters in that district would not have had standing to bring a dilution claim if the state had lumped them into a district with hostile whites. This apparent oddity is a byproduct of the fact that the "special," district-specific injury needed for standing in a Section 2 dilution case is not the same as the jurisdiction-wide injury under Section 2 of the Voting

Rights Act that must be shown to prevail on the merits of a racial vote dilution case.

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In short, the genealogy of the racial vote dilution cases shows that they protect the structural values of representation and responsiveness. Consideration of whether dilution has occurred and whether these values have been abridged requires an examination of representation/responsiveness vis-à-vis all members of the politically cohesive racial group in the jurisdiction, not just those in the particular area where the plaintiffs live.

b. Partisan Vote Dilution Cases

Like the racial vote dilution cases, this Court's rather more limited partisan dilution jurisprudence is rooted in *Fortson v. Dorsey*'s statement that an electoral system could be unconstitutional if it "operate[s] to minimize or cancel out the voting strength of racial *or political* elements of the voting population." 379 U.S. at 439 (emphasis added).

The focus of the partisan vote dilution inquiry "is essentially the same" as that of its racial sibling. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion).[12] The question in both types of

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[12] Unsurprisingly given their common point of origin, this Court's partisan vote dilution precedents borrow heavily from the racial vote dilution cases. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735 (1973) (relying on *Whitcomb* and *White*); *Bandemer*,

cases is whether a politically cohesive and distinctive set of voters—defined by party identity and interests in the partisan dilution cases, and racial identity and racially distinctive political interests in the racial dilution cases—has a fair opportunity to wield "voting strength" vis-à-vis the legislative body in question. It follows that in partisan dilution cases, courts should gauge dilution by assessing the "voting strength" of *all* of a party's supporters who may participate in elections for the representative body at issue—not just those who reside in a particular district.

Consistent with a jurisdiction-wide analysis, Justice White's opinion in *Bandemer* described the inquiry in the partisan case *Gaffney* as follows:

> Just as clearly, in *Gaffney v. Cummings*, where the districts also passed muster under the *Reynolds* formula, the claim was that the legislature had manipulated district lines to afford political groups in various districts an enhanced opportunity to elect legislators of their choice. Although advising caution, we said that "we *must* . . . respond to [the] claims . . . that even if acceptable populationwise [sic], the . . . plan was invidiously discriminatory

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478 U.S. at 131–33 (relying on racial precedents to hold that partisan vote dilution claimants, like racial vote dilution claimants, must show a degradation of their ability to influence the political process as a whole).

> because a 'political fairness principle' was followed . . . ."

478 U.S. at 124–25 (underlining emphasis added) (alterations in original) (quoting *Gaffney*, 412 U.S. at 751–52). Thus, the Court recognized that the inquiry runs beyond single districts and is motivated by the structural issue of political fairness.

To be sure, a supplemental, district-specific inquiry may be needed to establish that the plaintiff has standing, or to determine whether certain supporters of a political party were intentionally gerrymandered. But this is separate from the inquiry into dilutive effects. In a legislative-body dilution case, be it racial or partisan, the effects inquiry must focus on representation in, or responsiveness from, the legislative body as a whole.

B. Notwithstanding the Breadth of the Structural Harms Caused by Vote Dilution, Standing in Vote Dilution Cases is District-Specific

Like cases in other areas, vote dilution cases reflect the distinction between the values sought to be protected and the category of individuals who can sue to vindicate those values. Thus, even though, as shown above, the inquiry into whether vote dilution has occurred is statewide (in cases about statewide maps of legislative districts), if the plaintiff does not live in a gerrymandered district, he does not have standing.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that voters in urban counties had standing to sue for the alleged malapportionment of the Tennessee's General Assembly, in which rural districts tended to be much less populous than urban ones. The plaintiffs alleged that their votes were being "debase[d]," *id.* at 188, in violation of the Equal Protection Clause, "vis-a-vis voters in irrationally favored counties," *id.* at 207–08. Given these allegations, the Court held that the plaintiffs had "alleged such a personal stake in the outcome of the controversy," *id.* at 204, as to give them standing.[13]

In so holding, the Court was careful to distinguish between the merits of the plaintiffs' case and the question of standing. The Court expressly stated that "[i]t would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." *Id.* at 208.

Baker's analysis of standing was reaffirmed in in *Wesberry v. Sanders*, 376 U.S. 1 (1964), which involved allegations that disparities among the populations of Georgia's congressional districts resulted in the "debasing [of] the weight of [plaintiffs'] votes." *Id.* at 4. "The reasons which led to these

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[13] *Compare Lance v. Coffman*, 549 U.S. 437, 441–42 (2007) (plaintiffs lacked standing where their sole complaint was that provision of Colorado Constitution prohibiting redistricting more than once a decade violated United States Constitution; "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

conclusions in *Baker* [regarding standing, jurisdiction, and justiciability] are equally persuasive here." *Id.* at 6.

Consistent with its decisions in malapportionment cases, the Court held in *United States v. Hays*, 515 U.S. 737 (1995), that plaintiffs who challenged a congressional district as an unconstitutional racial gerrymander, on the grounds that it assigned voters to a newly-drawn black-majority district on the basis of race, had to live in the challenged district in order to have standing. Only plaintiffs who lived in the challenged district, the Court held, had suffered the personalized injury in fact necessary to confer standing. *Id.* at 745. By contrast, a plaintiff who lives outside such a district "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve," which would not suffice to create standing. *Id.*[14]

Given the decisions in *Baker* and *Hays*, it came as no surprise that, in *Gill*, this Court held that plaintiffs alleging vote dilution on partisan grounds lacked standing because they had failed to prove that they lived in an improperly drawn district. In that case, the plaintiffs, voters who supported Democratic candidates, alleged that Wisconsin's legislative districting plan diluted their voting power by

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[14] *See also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016) (members of Congress did not have standing to challenge three-judge court's decision holding that one district was an unconstitutional racial gerrymander these members of Congress neither lived in nor were running for election in that district).

"cracking" large, cohesive groups of Democratic voters into multiple districts in which they were a minority and, where Democratic voter concentrations were too large to "crack," "packing" them into a small number of overwhelmingly Democratic districts. 138 S. Ct. at 1923–24. The Court observed, however, that only one of the named plaintiffs had testified at trial and that he had conceded that the district in which he lived would have a Democratic majority under any of the competing districting plans offered by the parties. *Id.* at 1924–25.

On these facts, the Court held that the plaintiffs had failed to prove standing, because they had not proved the requisite personal injury in fact. *Id.* at 1929–33. *Gill's* treatment of the standing issue is thus consistent with this Court's prior vote dilution cases.

Appellants and the NRRT seek to make much of the statement in *Gill* that "a person's right to vote is 'individual and personal in nature,'" and accordingly that "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Id.* at 1929–30 (citations omitted); *see* Appellants' Br. at 24 (discussing the concept generally and quoting *Gill*, 138 S. Ct. at 1930); NRRT Amicus Br. at 2, 29 (focusing on *Gill's* discussion of individual rights). But these statements concern standing—whether the *Gill* plaintiffs were in the category of people who can sue to vindicate the structural right to responsiveness that underlies the vote dilution cases. Because the Court has consistently treated the issue of standing as separate from the merits, *Gill's* remarks about the nature of

the named plaintiffs' injuries say nothing about the nature of the liability-stage inquiry in a partisan dilution case.

CONCLUSION

For all the reasons stated above, *amici curiae* Professors Christopher Elmendorf, Joseph Fishkin, Bertrall Ross, Douglas Spencer, and Franita Tolson respectfully submit that the lower court correctly analyzed standing on a district-level basis, and dilution on a statewide basis.

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No. 18-422, 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF AMICI CURIAE FIRST AMENDMENT AND ELECTION LAW SCHOLARS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are eleven nationally recognized scholars and teachers of the First Amendment and Election Law. All of them have substantial expertise on the subjects of redistricting and the First Amendment. Each has authored multiple scholarly articles and books on constitutional law and the democratic process. Their scholarship and experience lead them to conclude, for the reasons explained below, that the First Amendment right of freedom of association should be understood to require strict scrutiny of redistricting plans that discriminate based on political-party affiliation—partisan gerrymanders—and that both North Carolina's and Maryland's plans are unconstitutional. A full list of amici, including brief summaries of their credentials and relevant scholarship, appears in the Appendix.

SUMMARY OF ARGUMENT

Amici urge affirmance of the lower courts' decisions that extreme partisan gerrymanders may violate the First Amendment right of association of both individuals and parties, though we propose a legal standard different from that adopted by either of those courts. The First Amendment right to freedom of association protects both an individual's ability to exercise political influence by joining with like-minded others, and the right of expressive associations, including political parties, to be free from discrimination based on the political viewpoint of the group.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae.

There is no more important way in which citizens seek to advance their political beliefs than by associating with political parties. As this Court has long recognized, party-based discrimination is anathema to the First Amendment because it infringes on individual liberty and distorts the electoral process. *See Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (recognizing that discrimination based on political party violates the First Amendment right of association because it inhibits "the individual's ability to act according to his beliefs and to associate" and "tips the electoral process in favor of the incumbent party").

Under this Court's precedents, the right to freedom of association does more than just safeguard the right to *join* a political party or other group of like-minded people. It also prohibits state regulations that *discriminatorily burden a political group's ability to influence the electoral process*. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1986); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Redistricting laws that discriminatorily burden one political party at the expense of another—partisan gerrymandering—effect this type of injury and warrant strict scrutiny. Unless they are narrowly tailored to a compelling state interest, such laws must be struck down.

Recognizing that partisan gerrymandering implicates associational rights is fully consistent with this Court's precedents. The Court has long recognized the relationship between expressive association and voting, applying the same standard to association claims under the First Amendment and right-to-vote claims under the Fourteenth Amendment. *See Anderson*, 460 U.S. at 788-90; *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

Recognition of an association-based partisan gerrymandering claim would not categorically foreclose any consideration of party affiliation in redistricting. But, where party affiliation is used to draw district lines in a manner that discriminates against a political party and its adherents by placing them at a significant disadvantage relative to their statewide voting strength, that would be a severe burden that triggers strict scrutiny. *See id.* at 434. Even then, the state could defend its plan by showing that it is narrowly tailored to further a compelling interest such as ensuring compactness or preserving political subdivisions.

There is ample guidance in First Amendment case law to define when a redistricting plan imposes a discriminatory burden on association that is of such a magnitude to warrant heightened scrutiny. Here, there can be no doubt that North Carolina's plan severely burdens the associational rights of the minority party and its adherents. The packing and cracking of Democratic voters makes it more difficult for their preferred candidates to win congressional elections and impedes citizens' ability to join with like-minded others outside the electoral process – for example, by recruiting candidates, raising money, and otherwise organizing for collective political expression. There is no compelling justification for the discriminatory burden that North Carolina's plan imposes on the non-dominant party and its adherents. While the Maryland case is closer, that plan imposes a substantial burden on the disfavored party and its supporters, in this case Republicans, by entrenching a 7-1 split in favor of the Democratic Party. The evidence of record demonstrates harm to association both inside and outside the electoral process that cannot be justified by Maryland's proffered interests.

The importance and urgency of this Court's adopting a legal standard by which to assess partisan gerrymandering cannot be overstated. As Justice Kagan has recently emphasized, "[p]artisan gerrymandering jeopardizes '[t]he ordered working of our Republic, and of the democratic process.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (opinion of Kagan, J.); quoting *Vieth v. Jubelirer*, 541. U.S. 267 at 316 (opinion of Kennedy, J.). The dominant party's incentive and ability to entrench itself in power are stronger than ever, given the increase in partisan polarization[2] and the hardening of partisan attitudes.[3] Enhanced technological tools are now available that enable the dominant political party in any state to draw district lines so that it not only maximizes its immediate electoral gains but also—by drawing enough "safe" seats for itself—ensures that its electoral advantage will persist for years. *See Gill*, 138 S. Ct. at 1941:

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[2] *See, e.g.*, Alan I. Abramowitz, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015); Sean M. Theriault, PARTY POLARIZATION IN CONGRESS (2008); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273, 276-81 (2011); Pew Research Ctr., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf.

[3] Michael S. Lewis-Beck, et al., THE AMERICAN VOTER REVISITED, 127 (2011); Larry Bartels, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35 (2000); Warren E. Miller & J. Merrill Shanks, THE NEW AMERICAN VOTER 146-50 (1996); Nicole E. Mellow, *Voting Behavior: Continuity and Confusion in the Electorate*, in THE ELECTIONS OF 2016, 87, 90-92 (Michael Nelson, ed., 2017).

> Technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements. . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides.

Moreover, because partisanship has increased and stiffened, it is even more likely now than before that the effects of such partisan gerrymandering will persist. Such substantial and durable party-based discrimination in redistricting fundamentally undermines our democracy.

ARGUMENT

A. The Right of Association Protects an Individual's Ability to Enhance Her Political Influence by Associating with Others

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Central to the right of association is "the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The right to expressive association afforded to civic groups, including political parties, arises in part from the individual interest in gathering with others and lending

one's voice to a larger cause. But that is not the only basis for this right. As this Court has recognized, the right of association also limits the state's ability to discriminate against groups that espouse a rival point of view. This Court has thus recognized that the right of association extends to rules regulating the electoral process itself and has applied a balancing test under which rules that impose "severe" burdens trigger strict scrutiny.

Freedom of association is closely linked to the First Amendment's prohibition on content and viewpoint discrimination. This Court has held that, "[a]bove all else, the First Amendment 'means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). This principle applies with special force where political speech is concerned, to ensure that the dominant political group may not stifle or diminish the collective voice of its opponents. *See* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 Election L.J. 288, 291-93 (2014). This is in keeping with the long line of precedent holding that government discrimination against disfavored viewpoints or speakers contravenes the First Amendment. *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 340-41 (2010) (citing cases).

Consistent with the viewpoint-neutrality principle, the Court's earliest decisions protecting expressive association have restricted government efforts to discourage or punish individuals for joining groups with disfavored viewpoints. The first example is *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), in which the Court found that a discovery request by the

State of Alabama seeking the identities of NAACP members triggered strict scrutiny. The Court explained that the request, if granted, was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. The associational interest in *Patterson* thus went beyond the right of individuals simply to join the organization; it also included the right of those with a disfavored viewpoint not to be burdened in ways that interfered with achievement of their shared "political goals." *Id.*

So too, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court applied strict scrutiny to a Virginia statute that impeded free expression in the pursuit of associational viewpoints, in that case by inhibiting the NAACP's solicitation of plaintiffs in civil-rights litigation. Such litigation, the Court explained, was "a form of political expression" and particularly "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community." *Id.* at 429. The Virginia statute threatened to undermine the NAACP's ability to exercise political power to further its members' viewpoints: there "inhere[d] in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.* at 434. It cut off a key "avenue open to a minority to petition for redress of grievances" and thereby to exert political power in furtherance of its viewpoints. *Id.* at 430.

This Court's patronage cases similarly recognize that the right of association protects both the individual interest in associating with like-minded others and the collective interest in "the free functioning of the

electoral process." *Elrod*, 427 U.S. at 356. In *Elrod*, the Court held unconstitutional the practice of firing people from certain government jobs because of their party affiliation. After describing the harm to the individual liberty interest arising from this practice, the *Elrod* plurality explained that patronage "tips the electoral process in favor of the incumbent party" by allowing it to "starve [the] political opposition." *Id.* *See also id.* at 371 n.6 ("Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.") (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). Later patronage cases go even further than *Elrod* in limiting government consideration of party affiliation. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The principle underlying these decisions is viewpoint-neutrality, especially when it comes to government actions that might affect the electoral process. *See* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 Cap. U. L. Rev. 1, 45-47 (2007).

The First Amendment right of association thus implicates both the systemic interest in a fair political process and the individual interest in furthering one's beliefs, both of which underlie the patronage cases. *Elrod* and its progeny also illustrate the centrality of *political parties* to the right of association—and the corresponding harms arising from the dominant party's discrimination against a non-dominant party to entrench itself in power.

These same principles have guided the Court's consideration of state laws directly regulating the electoral process. The Court first held voting itself to be a form of expressive association in *Williams v. Rhodes*,

393 U.S. 23 (1968), striking down an Ohio ballot-access law that disadvantaged new political parties while giving "the two old established parties a decided advantage." *Id.* at 31. Later, in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court struck down an Illinois law providing that a voter could not vote in a party primary if, in the prior 23 months, the voter had cast a ballot in the primary of another political party. The Court held that the law burdened the plaintiff's right of association because it impaired her ability to "associate effectively with the party of her choice." *Id.* at 58. The problem with the statute was not that it rendered the plaintiff unable to associate with the party of her choice: she plainly could, just not in the particular context of the party's primary elections. *Id.* Rather, the fatal problem was that the statute "constituted a 'substantial restraint' and a 'significant interference'" on a "basic function" and "prime objective" of associating with others in the exercise of political power, namely choosing a party's candidates by participating in primary elections. *Id.* *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (recognizing that ordinance limiting contributions and expenditures in ballot measure campaigns impermissibly "hobble[d] the collective expressions of a group," limiting its power to advocate effectively for the political views of its members).

These cases recognize that associational interests are implicated when people lend their individual voices to a broader chorus to advance their shared political viewpoint, both inside and outside the electoral process. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied this principle to discrimination based on *which* chorus of voices one chooses to join.

Plaintiffs in *Anderson* challenged an Ohio statute that required independent candidates seeking a place on the ballot to declare their candidacies before the established political parties had chosen their candidates. *Id.* at 782-83, 799. The Court concluded that this law "burden[ed] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.* at 788. It explained that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94. In short, the Ohio statute placed a "particular burden on an identifiable segment of Ohio's independent-minded voters," hindering the ability of such voters to band together and influence the political process. *Id.* at 792.

Like previous associational-rights cases, *Anderson* was concerned with the discrimination the law imposed on a group of voters' attempting to further their political beliefs through the electoral process. The statute "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," restrictions that "threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794; *see also id.* at 788 n. 8 ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and denied and equal opportunity to win votes") (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

Under *Anderson*, courts should weigh the "character and magnitude" of the injury to associational and voting rights against the state's asserted interests. 460 U.S. at 789. While "reasonable, nondiscriminatory" restrictions may generally be justified by the state's "important regulatory interests," the Court held, a stronger state justification is required if the law discriminates against an identifiable political group. *Id.*

The Court later clarified that strict scrutiny applies only to "severe" restrictions, as opposed to "'reasonable, nondiscriminatory'" ones. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). Since *Anderson* and *Burdick*, the Court has continued to emphasize that advancement of one's beliefs *through a political party* is central to freedom of association. *See* Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. L. Rev. 763, 777, 785 (2016).

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), for instance, the Republican Party challenged a Connecticut statute prohibiting independent voters from participating in its primary. The Republican Party argued that the statute "impermissibly burden[ed] the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success." *Id.* at 214. The Court agreed, concluding that the statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 216. *See also California Democratic Party v. Jones*, 530 U.S. 567 (2000) (recognizing associational rights of major parties); *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 581 (1989) (same).

Of course, not all burdens on political party association violate the First Amendment. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458 (2008) (upholding blanket primary that did not severely restrict party's associational rights); *Clingman v. Beaver*, 544 U.S. 581, 589 (2005) (upholding law prohibiting members of one party from voting in another party's primary because law did not impose a severe burden). But, where the state severely restricts the associational right of a political party and its adherents by imposing *discriminatory* burdens, strict scrutiny applies.

The Court's freedom-of-association cases thus do more than simply protect individuals' ability to associate with like-minded others. They are also concerned with the ability to advance the group's shared viewpoints by *translating that association into political power through the ballot*. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1249 (2003) ("[I]n protecting political association, the First Amendment protects more than private association. [It] also extends to election laws that burden the individual's right to make free choices and to associate politically through the vote."). Most importantly for these cases, they limit a dominant political party's power to discriminate against a rival group and its supporters by diminishing their collective voice in the electoral process.

B. The Right of Association Forbids Districting that Discriminatorily Burdens Political Association Based on Party Affiliation

As the preceding section demonstrates, this Court's right-of-association cases establish that laws discriminating on the basis on party affiliation trigger strict

scrutiny under the First Amendment. This principle is grounded in both the individual liberty interest in affiliating with others to advance one's beliefs and the collective interest in preventing the dominant political group from impairing the free functioning of the electoral process. In assessing election laws alleged to violate the right of association, this Court has articulated a balancing standard, under which "severe" restrictions are subject to strict scrutiny while "reasonable, nondiscriminatory" ones receive more deferential review.

This Court should apply this established standard to partisan gerrymandering. As Justice Kennedy has recognized, redistricting laws are comparable to other laws that discriminatorily restrict political-party association, including those that accomplish this objective through regulation of the electoral process. *See Vieth*, at 314-16 (citing *Elrod*, *California Democratic Party*, *Eu*, and *Anderson*). Redistricting laws plainly affect opportunities for association: the boundaries of a district define which voters may associate with one another for purposes of advancing their viewpoints by voting for candidates within that district. A districting scheme that discriminates against a particular association of like-minded individuals—and especially a political party, which is the primary means through which individuals organize to advance their political beliefs at the ballot box—will impede the efficacy of that group's efforts to achieve its political aims.

It is well-established that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see also id.* (recognizing the "First Amendment

interest of not burdening or penalizing citizens because of . . . their association with a political party").

In the context of redistricting, as in other associational-rights cases, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights." *Id.* at 315. Under this Court's freedom-of-association case law, a districting plan that imposes discriminatory burdens on people with a particular viewpoint—for instance, the independent-minded voters in *Anderson* or the supporters of the minority political party in these cases—runs afoul of the First Amendment, because such a plan violates the associational rights of citizens seeking to join their voices with others sharing their viewpoint. Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159, 2191-97 (2018). As Justice Kagan stated in her concurring opinion in *Gill*, "[m]embers of the 'disfavored party' in the State. . . deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." 138 S. Ct. at 1938 (citation omitted). *See also* Tabatha Abu El-Haj, *Networking the Party*, 118 Columbia L. Rev. 1225, 1286 (2018) (association inquiry should focus on "the party's ability to mobilize broad and representative political participation").

Applying the Court's freedom-of-association jurisprudence to redistricting is fully consistent with the basic principles that have long guided redistricting decisions under the Equal Protection Clause. The Court has applied the same legal standard to both associa-

tion and voting claims for over three decades. *See Anderson*, 460 U.S. at 787-89 & n.7 (recognizing that ballot-access law implicated "overlapping" associational and voting rights and applying same standard to both); *Burdick*, 504 U.S. at 433-34 (applying same standard to both voting and association claims). There is no tension between the Court's freedom-of-association case law and the Court's observation that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Political gerrymandering does not infringe on associational rights merely by virtue of its consideration of political party affiliation. Instead, political gerrymandering infringes on associational rights when it discriminatorily burdens the proponents of a particular viewpoint, through effects both inside and outside the electoral process.

In *Gaffney*, the Court upheld a redistricting plan that plainly protected associational rights: a statewide plan drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas." *Id.* at 752; *see also id.* ("We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts."). Such a plan, which sought to ensure that the elected representatives roughly mirrored the electorate, cannot be said to place an undue burden on either party. To the contrary, the *Gaffney* plan considered political viewpoint to *avoid* infringement on associational rights. By contrast, a plan that discriminates against one political party and in favor of the other should trigger strict scrutiny under the First Amendment.

As this Court's decisions make clear, state action need not completely "deprive [plaintiffs] of all opportunities to associate with the political party of their choice" in order to warrant First Amendment scrutiny. *Kusper*, 414 U.S. at 58. Instead, the Court looks to whether the action "constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association." *Id.* (quoting *Patterson*, 357 U.S. at 462 and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)). A "significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest" but rather must be narrowly tailored to serve a compelling state interest. *Id.*; *see also Button*, 371 U.S. at 438 ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

Similarly, this Court's voting and associational rights cases call for "[a] court considering a challenge to a state election law" to assess "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789). When First Amendment rights are "subjected to 'severe' restrictions" by state election laws, the laws will survive only if they are "'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally

sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

A state election law, therefore, will not trigger heightened scrutiny on freedom-of-association grounds unless it imposes a sufficiently large and lasting burden on association. As this Court's decisions make clear, a restriction on association is "severe" and warrants strict scrutiny where it is not "reasonable [and] nondiscriminatory." Thus, in both *Kusper* and *Anderson*, the Court applied strict scrutiny where the challenged laws imposed discriminatory burdens on independent-minded voters and candidates. *See Anderson*, 460 U.S. at 793 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."); *Kusper*, 414 U.S. at 58 (strict scrutiny applied where state law forbade voters from participating in one party's primary within 23 months after voting in another party's primary).

In the context of redistricting, then, there must be a significant *discriminatory* effect on a political party and its adherents for the restriction to be deemed "severe." The mere fact that a redistricting plan yields districts that tend to result in one party's having an electoral advantage over another does not alone demonstrate discrimination or compel strict scrutiny. *Cf. Burdick*, 504 U.S. at 433. A redistricting plan that achieves a "rough approximation" in representation of those parties "large enough to elect legislators from discernible geographic areas" would not trigger strict

scrutiny. *Gaffney*, 412 U.S. at 752. In those circumstances, the character and magnitude of any burden would not justify a finding that associational rights had been severely restricted. *See Burdick*, 504 U.S. at 434 ("[W[hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson* , 460 U.S. at 788).

But, where redistricting discriminates against a political party and its members by placing them at a significant disadvantage relative to their statewide voting strength, strict scrutiny is warranted. *Cf. Gaffney*, 412 U.S. at 754 ("[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."). That would include cases in which a state plan undertakes "to minimize or eliminate the political strength of any group or party." *Cf. id.* (holding that state plan may not be invalidated where "it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough proportional representation in the legislative halls of the State").

The constitutional standard amici advocate is different from that employed by either of the courts below. The lower courts adopted slightly different three-part tests, looking to the state's intent to burden the disfavored party and its supporters, the actual effects on association, and causation. *Lamone v. Benisek*, 348 F. Supp. 3d 493, 515 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 929 (M.D. N.C. 2018).

Amici instead propose application of the familiar *Anderson-Burdick* standard that has been applied in other cases involving voting and association, considering the "character and magnitude" of the burden on the disfavored party and its supporters. If the burden is sufficiently large and lasting to be severe, then strict scrutiny applies. If not, the state's important regulatory interest may justify the burden. This provides an appropriately nuanced standard that considers whether the burdens on associational rights are justified by the state's interests.

There are multiple ways to measure the burden that a particular plan imposes on the electoral opportunities of a political party and its supporters. One of them is the "efficiency gap," which the district court defined as "votes cast for a candidate in excess of what the candidate needed to win a given district, which increase as more voters supporting the candidate are 'packed' into the district, *or* votes cast for a losing candidate in a given district, which increase on an aggregate basis, when a party's supporters are 'cracked'". *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 658 (M.D. N.C 2018). Other metrics of the statewide impact on a party include the mean-median difference[4] and seats-to-votes curve.[5] These and other metrics are more extensively addressed in Plaintiffs-Appellees' briefs and other amicus briefs being filed in support of their position.

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[4] *See* Laura Royden & Michael Li, *Extreme Maps* (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf., at 4

[5] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987).

Amici do not propose that this Court endorse any one of these proposed metrics as the gold standard, but all of them may provide evidence of the statewide effects of a redistricting plan on the nondominant party and its adherents. So too will actual election results under a redistricting plan where one party is consistently able to garner a share of legislative seats significantly larger than its share of votes *and* the other party a share of seats significantly smaller than its share of votes. Evidence of legislative intent to create or entrench a partisan imbalance likewise will suggest First Amendment harm—for instance if there are statements by legislators urging a plan that that would prevent the opposing party from gaining a majority of seats, even when it receives a majority of votes. When all these indicators point in the same direction, they may show a severe burden on that party, especially when combined with evidence of effects outside the electoral process.

Even if a redistricting plan imposes a significant discriminatory burden on one political party, it could still survive if it is narrowly tailored to serve a compelling government interest. Such a plan could not, of course, be justified by any purported interest in favoring the dominant political party over a less popular one. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). But a districting plan might survive if its disparate impact on one political party were justifiable in light of traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions. *See Bush v. Vera*, 517 U.S. 952, 959-960 (1996) (identifying

traditional redistricting principles). This might be the case where, for example, a party's members are arrayed geographically such that a districting plan reflecting the party's statewide voting strength would require non-compact and unusually shaped districts. If a minority party's members were widely dispersed across a state, a statewide districting plan that yielded a proportion of legislative seats lower than the proportion of the party's supporters might be justifiable. The same would be true if a party's members were densely concentrated in several pockets of the state where it possesses super-majorities. Under such circumstances, the state's interest in consistency and contiguity of districts might justify the burden on associational rights.

The standard we advocate does not guarantee any particular quantum of political power. Rather, it protects against significant discriminatory burdens on association, in service of the central First Amendment interest in avoiding viewpoint discrimination. A party may face inherent disadvantages by virtue of geography. A state with only a few congressional districts may adopt a plan that favors one party because such a plan is necessary to avoid non-compact districts or splits of political subdivisions. But a state may not adopt a plan that discriminatorily burdens adherents of a particular viewpoint, such that their avenues to political power are effectively blocked while the dominant party is entrenched.

Nor would our proposed standard foreclose any consideration of political party in drawing lines. Rather, consistent with established voting and association precedent, it would prohibit only those plans that impose a *severe* burden on an identifiable political group that is not narrowly tailored to further a compelling

interest. In this context, that means a plan that discriminates significantly based on political-party affiliation and cannot be justified based on traditional redistricting principles. To make this judgment does not require that the courts assess the substance of individuals' or groups' political viewpoints. Instead, it requires attention to disparities between voting strength and representational strength, informed by attention to traditional districting principles, an area in which this Court has extensive experience. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

C. North Carolina's Redistricting Plan Violates Plaintiffs' Associational Rights

Viewed under the established freedom-of-association standard, the North Carolina case is not close. The state's 2016 Plan imposes substantial and lasting discriminatory burdens on the associational rights of individuals who support one political party, and these burdens are not narrowly tailored to a compelling government interest. Accordingly, the district court's judgment should be affirmed.

This Court's jurisprudence calls for assessment of the "character and magnitude" of the burden on voting and associational rights. The discriminatory burden on associational rights here is severe. The 2016 Plan dramatically enhances the voting strength of Republican voters in North Carolina's congressional districts, to the detriment of Democratic voters. For instance, in 2016, Republican candidates won 76.9% of the state's Congressional delegation with only 53.22% of the statewide vote. *Rucho*, 279 F. Supp. 3d at 657. Moreover, as the district court found, the "empirical evidence reveals that the 2016 Plan 'bears more heavily on [supporters of candidates of one party] than another'". *Id.* at 642, *quoting Washington v. Davis*, 426

U.S. 229, 242 (1976). And the district court also found that Plaintiffs' empirical evidence further showed that "the 2016 Plan's pro-Republican bias is not attributable to a legitimate redistricting objective, but instead reflects an intentional effort to subordinate the interests of non-Republican voters." *Rucho*, 279 F. Supp. 3d at 644-45.

The empirical evidence shows that the North Carolina plan's negative effects on the nondominant party were severe. Using the results of the 2016 election, conducted under the 2016 Plan, one of Appellees' experts "calculated an efficiency gap favoring Republican candidates of 19.4 percent," *Rucho*, 279 F. Supp. 3d at 659. Partly by virtue of this disparity in "wasted" votes, Republicans were able to amass an extensive majority of North Carolina's congressional delegation in 2016, even though they had fewer voters statewide than Democrats. Appellees' expert also showed that the plan would likely have an *average* 8% efficiency gap in favor of the dominant party throughout the life of the plan. *Id.* at 660. The plan thus weakens the ability of Democratic voters to associate with each other through the electoral process, compared to their Republican counterparts.

This is the definition of a severe and invidious associational burden: individuals belonging to a group defined by belief or viewpoint are unable, as a result of discriminatory legislation, to associate with one another in a manner that would otherwise enhance their political power. There is overwhelming evidence that these effects were intended. As the district court found, there is no dispute that "the General Assembly intended for the 2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-

Republican candidates. Nor could they. The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data'. . .to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts." *Rucho*, 279 F. Supp. 3d at 597.

The undisputed evidence of record also demonstrates that the 2016 Plan diminished expressive association *outside* the electoral process. *Id.* at 679. The district court found that the 2016 Plan has had various "chilling effects on speech and association—[including] difficulty convincing voters to participate in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials. . . ." *Id.* at 680. For example, the 2016 Plan has made it very difficult for non-Republicans to get out the vote. Multiple Plaintiffs testified that in "the most recent election, a lot of people did not come out to vote" despite concerted get-out-the vote efforts – "[b]ecause they felt their vote didn't count.'" *Id.*, *citing* Deposition of Elizabeth Evans, ECF 101-7, at 16:4-9. The 2016 Plan similarly chilled the speech and associational rights of voters affiliated with the North Carolina Democratic Party. Because Democratic candidates were unlikely to prevail in districts drawn by the General Assembly to elect Republicans, it "ma[d]e[] it extremely difficult' for the North Carolina Democratic Party "to raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts. . . . For the same reasons, the party had difficulty recruiting strong candidates." *Rucho*, 279 F. Supp. 3d at 680 (al-

terations in original), *citing* Deposition of North Carolina Democratic Party by George Goodwin ["Goodwin Dep."], ECF 110-07, at 98: 1-5; 41:20-42:20; 60:23—61:16; *also citing, e.g.*, Deposition of John Quinn, ECF 101-22, at 39:1-3 "[Extreme gerrymandering] makes it harder for me [as a local organizer] to raise money; it makes it harder for me to recruit candidates, makes it harder to just mobilize a campaign."); Deposition of Melzer Morgan, ECF 101-16, at 23 ("[P]eople. . .say [sic] no sense in us giving money to that candidate because [he or she] is unlikely to prevail, notwithstanding the merit of their positions.") *See also* Goodwin Dep., at 44:18-25 ("it makes it extremely difficult to recruit candidates . . . who are of like mind with fellow Democrats whenever the districts are drawn such that the voting history makes it impossible for a Democrat to even come close in those races."); *Id.*, at 56:16-57:10 (discussing the "domino effect" of partisan gerrymandering: "it also makes it difficult. . . to raise funds, to get a message out for those candidates who have policies that support the Democratic platform . . .").

In this case, the discriminatory burden is not narrowly tailored to a compelling government interest. For example, as the district court found, the political geography of North Carolina "does not explain the 2016 Plan's pro-Republican discriminatory effects. . ." 279 F. Supp. 3d at 669. "In sum, we find that the North Carolina] General Assembly drew and enacted the 2016 Plan with intent to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation. . . .[and] that a variety of evidence demonstrates that the 2016 Plan achieved the General Assembly's discriminatory partisan objective. *Id.* at 672. Put another way, the discriminatory burden on associational rights of non-Republican candidates and voters was

not the necessary byproduct of other governmental interests, but rather the purpose and primary consequence of the Act.

D. Maryland's Redistricting Plan Violates Plaintiffs' Associational Rights.

Although the Maryland redistricting plan presents a closer case, the evidence presented is sufficient to affirm the district court's conclusion that it violates the associational rights of the Republican Party and citizens who wish to associate with it. As the district court properly recognized, the 2011 congressional plan was "specifically intended . . . to achieve a 7 to 1 Democratic majority" in the state's delegation. *Lamone*, 348 F. Supp. 3d at 502. The dominant party achieved this objective principally through the redrawing of the Sixth Congressional District. Over 700,000 voters were moved to redraw this district, which retained only one-half of its previous population. *Id.* at 499. The Cook Political Report concluded that this district went from "R+13" to "D+2", the largest swing of any district in the country. *Id.* at 508.

The Maryland record does not contain the same empirical documentation of statewide injury to the non-dominant party's electoral opportunities that is present in the North Carolina case. It does, however, contain evidence of harm to the associational rights of the Republican Party and its members outside the electoral process. Plaintiff Sharon Strine, for example, testified to the effects of the redrawn Sixth District on her efforts to engage Republican voters. Working on behalf of the Sixth District's Republican candidate in 2014, she spoke to thousands of people and reported on the difficulties in motivating people to engage politically. *Id.* at 508 (quoting Strine's statement that people feel "disenfranchised," believing that "it's not

worth voting anymore" because of the redrawn district). The record evidence also documents that Republican voters' participation palpably declined – for example, going down from 48% of registered voters in 2010 to 35% in 2014 in Garrett County, from 43% to 27% in Allegany County, and from 37% to 25% in Washington County. *Id.* Republican fundraising also declined in these counties, all of which were in the Sixth District both before and after the 2011 redistricting. The Republican Central Committees in these counties received 6.5% less in the 2014 cycle than in the previous midterm election cycle. *Id.* at 509. In 2012, those committees experienced a 12% drop compared to the prior election cycle. *Id.* at 509.

The Maryland record thus demonstrates a tangible effect on the associational rights of the Republican Party and its supporters, both inside and outside the electoral process itself. Without empirical evidence of the magnitude of the impact on Republicans statewide – for example, metrics like the efficiency gap, mean-median difference, or seats-to-vote curve – this evidence may not be sufficient to characterize the burden as "severe." But under the *Anderson-Burdick* standard, lesser burdens on association must still be justified by the state's important regulatory interests. And in the Maryland case, the state has utterly failed to justify its redrawing of the Sixth District. As the district court explained, the geographic features of the region cannot explain the dramatic changes that the legislature adopted. *Id.* at 520. To the contrary, all the evidence of record points to one explanation only for the way in which Democrats redrew that district: to maintain a 7-1 Democratic advantage throughout the life of the plan. Because the state has failed to demonstrate an important interest or even a rational basis

for the redrawn Sixth District, this Court should affirm the district court's judgment.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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March 8, 2019

APPENDIX

APPENDIX OF AMICI CURIAE*

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No. 18-422

In The
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,

v.

COMMON CAUSE, ET AL.,
Appellees.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF FIRST AMENDMENT CLINIC AT DUKE LAW IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The First Amendment Clinic at Duke Law (the "Clinic") has a public mission to protect and advance the freedoms of speech, press, assembly, and petition. Staffed with law faculty with First Amendment expertise and state-certified student attorneys, the Clinic represents clients with First Amendment claims and provides public commentary and legal analysis on First Amendment issues. The Clinic also participates as *amicus* in cases, such as this one, involving First Amendment issues that bear directly on its mission.

As a program of Duke Law School, the Clinic has a special connection to North Carolina. Therefore, in addition to the Clinic's general interest in protecting First Amendment values, it has a specific interest in ensuring that North Carolina elections are conducted in a constitutional manner. The Clinic's *amicus* brief frames the partisan gerrymandering at issue in this case within the larger context of North Carolina's political history. In doing so, it shows that the object of the 2016 redistricting plan is one that has distorted North Carolina elections as far back as the Reconstruction Era.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the clerk.

SUMMARY OF ARGUMENT

Preserving the vitality of democratic governance is central to the meaning and purpose of the First Amendment. This fact has been recognized since the founding era, and is reflected in this Court's First Amendment jurisprudence. This Court has recognized that political speech and association lie at the core of the First Amendment, and the First Amendment accords the exercise of those freedoms through political parties "special protection."

Severe partisan gerrymandering hollows out these fundamental freedoms by placing disfavored political parties at an enduring electoral disadvantage. As a result, the speech and associational rights of persons affiliated with those parties are deprived of the very political force that justifies their position in the hierarchy of First Amendment values. Severe partisan gerrymandering, therefore, is like any other legislation that abridges core First Amendment freedoms on the basis of political viewpoint: it disadvantages those it targets because of their expressed political beliefs.

North Carolina's political history demonstrates the threat that partisan gerrymandering poses to democratic governance and First Amendment freedoms. As early as the Reconstruction Era, political parties in North Carolina have used various means to entrench political power and create a de facto one-party state. Throughout the twentieth century, the Democratic Party used racial and partisan gerrymandering to preserve the dominance it had obtained through the disfranchisement of

African Americans and other devices. Since 2010, North Carolina's Republican Party has followed the example of its Democratic predecessors and has used gerrymandering to entrench its newfound power. The 2016 redistricting plan is the GOP's latest effort to achieve this impermissible goal.

Because the purpose and effect of severe partisan gerrymandering is to discriminate against a class of voters on the basis of their political viewpoint, the Court should subject such gerrymandering to strict scrutiny. The 2016 redistricting plan necessarily fails such scrutiny because there is no legitimate governmental interest in drawing district lines to weaken the political influence of a particular class of voters.

ARGUMENT

I. PRESERVING THE VITALITY OF DEMOCRATIC GOVERNANCE IS CENTRAL TO THE MEANING AND PURPOSE OF THE FIRST AMENDMENT.

a. The Key Role Of The First Amendment In Safeguarding Democratic Governance By Protecting Political Speech And Association Has Been Recognized Since The Founding Era.

As this Court has observed, "the great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment." *New York Times*

Co. v. Sullivan, 376 U.S. 254, 273 (1964). The Act made it a federal crime to defame "the government of the United States, or either house of the Congress . . . or the President . . . with intent to . . . bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." *Id.* at 274 (quoting Sedition Act of 1798, 1 Stat. 596). Critics, among them the First Amendment's original draftsman, James Madison, rejected the Act both as a clear violation of the Amendment and as a blatantly partisan attempt by the Federalist majority in Congress to entrench itself and Federalist President John Adams in office. *See* Peter Zavodnyik, *The Age of Strict Construction: A History of the Growth of Federal Power, 1789-1861* 70–76 (2007) (describing the combination of constitutional and partisan-political objections to the Sedition Act).

Madison's argument that the existence of effective means for criticizing those in power is essential to democratic governance was not itself a newly minted partisan objection. In a 1794 speech in Congress, for example, he insisted that "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Sullivan*, 376 U.S. at 275 (quoting 4 *Annals of Cong.* 934 (1794)). But the Sedition Act crisis impelled Madison to draw out explicitly the links between the First Amendment and American republicanism. In the "Report of 1800" that Madison drafted and the Virginia legislature adopted in defense of the legislature's earlier denunciation of the Act, Madison asserted that "the right of electing the

members of the government . . . [is] the essence of a free and responsible government," and immediately noted that "[t]he value and efficacy of this right, depends" on the freedom of the voters to "examin[e] and discuss[] . . . the candidates." The Sedition Act contradicted the republican premises of the Constitution by providing "those who administer the government" protection against criticism: "Nor can there be a doubt . . . that a government thus intrenched . . . will easily evade the responsibility, which is essential to a faithful discharge of its duty." The Report of 1800, 17 *The Papers of James Madison* 344 (R.A. Rutland ed. 1991). By deterring criticism of the legislative majority that enacted it, the Sedition Act afforded "those in power . . . an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it." *Id.* at 345.

"Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Sullivan*, 376 U.S. at 276; *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I had conceived that the United States through many years had shown its repentance for the Sedition Act . . . ."). By the close of the founding era, there was a broad consensus that Madison's attack on the Act's constitutionality was correct. *See Sullivan*, 376 U.S. at 276 (quoting an 1836 Senate report stating that the Act's "invalidity was a matter 'which no one now doubts'"). Other leading founders, including Chief Justice Marshall, shared Madison's belief that free government depends on the ability of the people effectively to control their government through the electoral process. *See*

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (the legislators' "identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from [power's] abuse. They are the restraints on which the people must often rely solely, in all representative governments."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (reasoning that "the confidence that" a legislative power "will not be abused" can exist only where those affected by the power are "all represented" in the legislature).

Severe partisan gerrymandering differs from the 1798 Sedition Act in that it does not impose a criminal penalty on those critical of the legislative majority. But such gerrymandering has an almost equally devastating effect on "the value and efficacy" of the rights to criticize the majority, to associate with others to do so, and to oust from office those in power if a majority of voters agree. Like the Sedition Act, partisan gerrymandering confers on its perpetrators "an undue advantage" in retaining power, and diminishes sharply "the influence which their constituents possess at elections," by undermining the practical force of political speech and association by those opposed to the legislative majority, even when they constitute a majority of the voters.

b. Political Expression And Association Are At The Core Of First Amendment Protections: The First Amendment Most Strongly Protects Speech That Is Integral To A Healthful Democracy.

The role of the First Amendment in safeguarding democratic governance is also reflected in this Court's First Amendment jurisprudence. Specifically, in determining the strength of First Amendment protections, this Court has distinguished between categories of speech, types of restrictions, and—to a limited extent—the nature of the regulated speakers. These distinctions demonstrate that the First Amendment most strongly protects speech that is integral to a healthful democracy.

This Court has afforded different protections to different types of speech. Political speech receives greater protection than commercial speech, *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), just as speech in the public interest receives greater protection than speech that is of purely private interest, *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Still other categories of speech are "of such slight social value" that they do not even fall within the First Amendment's scope. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court has justified these distinctions on the ground that "not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,'" *Connick v.*

Myers, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), because "it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). By contrast, "speech on purely private matters does not implicate the same constitutional concerns." *Snyder*, 562 U.S. at 452. Its restriction does not threaten "the free and robust debate of public issues" nor "interfere[] with a meaningful dialogue of ideas." *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760). Likewise, commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik*, 436 U.S. at 456.

Similarly, this Court has distinguished between three types of speech restrictions: restrictions on particular viewpoints, restrictions on particular subjects, and restrictions imposed for reasons unrelated to content. Viewpoint-based restrictions, this Court has acknowledged, are an "egregious form of content discrimination" and are presumptively unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995). Content-based restrictions, likewise, are subject to a presumption of unconstitutionality, surviving "only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (citations omitted). Content-neutral restrictions, by contrast, receive a more lenient form of scrutiny. *Id.* at 2232 (citation omitted).

Finally, this Court has recognized that the First Amendment accords "special protection" to the

associational freedoms of political parties. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). In particular, political parties are guaranteed "the freedom to join together in furtherance of common political beliefs" and to "identify the people who constitute the association." *Id.* at 574 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). Acknowledging the fundamental importance of this right, this Court has said that "[r]epresentative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574.

This Court's First Amendment jurisprudence therefore shows that the very speech restrictions that are most hostile to democratic governance are also those that are most offensive to the First Amendment. Indeed, speech protections are measured in reference to "the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder*, 562 U.S. at 452 (quoting *Sullivan*, 376 U.S. at 270). Speech must receive the highest level of protection when its restriction threatens "the free and robust debate of public issues" which our nation and Constitution are profoundly committed to protecting. *See id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760).

c. Partisan Gerrymandering Injures First Amendment Freedoms By Placing Political Parties At An Enduring Electoral Disadvantage.

Severe partisan gerrymandering is particularly offensive to the First Amendment

because it constitutes a *viewpoint-based* burden on the *political* expression of *political* parties. Severe partisan gerrymandering undermines certain political parties' associational rights by placing them at an "enduring electoral disadvantage." *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring). The Constitution can only fully secure the freedom of speech of political parties through protection of their members' freedom of association, since the parties must often "speak through their candidates" in order to "advance a shared political belief." *See Cal. Democratic Party*, 530 U.S. at 587 (Kennedy, J., concurring). Political parties that are victims of severe partisan gerrymandering are "deprived of their natural political strength," rendering them unable to translate voter support into political representation. *Gill*, 138 S. Ct. at 1938. The natural consequence is that the party's ability to recruit candidates, register voters, attract volunteers, and generate support declines. *See id.* In effect, the party's associational freedoms are hollowed out, formally untouched but deprived of much of their value. Severe partisan gerrymandering is therefore like any other legislation that abridges First Amendment freedoms on the basis of political viewpoint: it disadvantages those it targets because of their expressed political beliefs.

II. NORTH CAROLINA'S POLITICAL HISTORY DEMONSTRATES THE THREAT THAT PARTISAN GERRYMANDERING POSES TO DEMOCRATIC GOVERNANCE AND FIRST AMENDMENT FREEDOMS.

Democratic governance rests on the ability of the people to remove from power elected officials and

political groups that have lost the confidence of a majority of the voters. As this Court observed long ago, it is the legislators' "identity with the people, and the influence which their constituents possess at elections . . . on which the people must often rely solely, in all representative governments" to guard against the abuse of governmental power. *Gibbons*, 22 U.S. at 197. Severe partisan gerrymandering poses a direct threat to the processes of democratic governance because it undermines the power of voters over their government. The history of North Carolina illustrates the danger that a legislative majority will use partisan gerrymandering among other anti-democratic measures to entrench itself in power and create, for practical purposes, a one-party state. In the Reconstruction and Post-Reconstruction eras, the Democratic Party used gerrymandering (both partisan and racial), intimidation, voting barriers, and stigmatization to prevent Republicans and Populists from influencing elections. *See infra* Part II.a–c. These practices were not successfully challenged at the time, but in hindsight it is clear that they constituted a massive violation of the First Amendment rights of African Americans, poor whites, and members of opposition parties throughout the era. The Democratic Party then sought, with success, to entrench its ill-gotten power through racial and partisan gerrymandering through much of the 20th century. *See infra* Part II.d. In 2010, the GOP gained control of both the North Carolina Senate and House of Representatives, and following the example of its Democratic predecessors, began gerrymandering to entrench its power. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018). The 2016

redistricting plan is the GOP's latest effort to achieve this impermissible goal.

a. The Reconstruction and Post-Reconstruction Eras

In 1868, Republicans prevailed in the North Carolina legislature under the state's new constitution, which guaranteed voting rights to black men. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's Redemption Revisited 1870-1905 and 2011-2013*, 33 LAW & INEQ. 53, 71, 78 (2015). Across North Carolina, the Republican Party consisted of blacks and whites that organized together to elect candidates seeking to "act for the good of the people, not the elite." *Id.* at 79. In response to the Republican Party's electoral success in 1868, the elites in the Democratic Party utilized appeals to white supremacy to diminish the Republican Party's power. *Id.* at 80–81.

In 1870, in the wake of the Reconstruction Amendments, the Democratic Party gained control of the North Carolina legislature and immediately began efforts to nullify the Fifteenth Amendment's grant of universal male suffrage. *See* Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* 3–4 (1981). In 1872, the Democrat-controlled General Assembly redrew congressional districts in an effort to neutralize Republican votes. *Id.* To this end, the General Assembly created a district that became known as the "black second": a district composed of ten counties with particularly dense African American populations. *Id.* at 4. Altogether more than one-fifth of North Carolina's

African American population lived in the "black second." *Id.* Having packed North Carolina's predominately African American counties into a single congressional district, the Democrats increased their chances of obtaining victories in the state's several other districts. *Id.*

Having diminished the *statewide* political influence of North Carolina's largely Republican and African American counties, the Democratic Party next sought to deprive those counties of their *local* political influence as well. *See* Curtis, *supra*, at 82–83. To this end, the Democrats passed legislation "essentially abolish[ing] elected county government" by vesting in the state legislature the power to appoint local officials. *Id.* at 82. Of course, the counties that suffered most as a result of this legislation were counties with predominately African American populations, *see id.*, like those that comprised the "black second," which, after the General Assembly's redistricting, had quickly become a "Republican and black stronghold." Anderson, *supra*, at 4–5.

In 1889, the General Assembly also revised North Carolina election law to require voters to prove their "age, occupation, place of birth and place of residency." J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 48 (1974). These requirements disproportionately barred African American men from voting, since those born into slavery often did not know their birth dates and black residences often lacked street names and house numbers. *Id.* The election-law revisions also

"increased the power of the overwhelmingly Democratic election officials and county canvassers." Anderson, *supra*, at 166. This gave corrupt election administrators opportunities to manipulate votes in favor of Democrats and coerce African Americans not to vote for opposition parties. Kousser, *supra*, at 16.

These measures had a devastating effect on the Republican Party. By 1890, Republican representation in the General Assembly was half what it had been before the suffrage restrictions of 1889. Anderson, *supra*, at 185. And the election of 1890 produced Democrat congressional victories in every district but the "black second." *Id.* As one commentator put it, "[t]he rich and inconsistent polity of the 1880s was being transformed . . . into a rational, consistent, and barren one-party system." *Id.*

b. The Republican-Populist Upheaval

Despite the success of the Democratic Party's initial spate of suffrage-restricting legislation, Democratic control "continued to face threats from various independent movements, as well as from Republicans." Curtis, *supra*, at 83. In the early 1890s, both black and white working class voters united under the banner of Republicanism and Populism. *See id.* at 84–85. As this Republican-Populist fusion gained momentum, the still Democrat-dominated General Assembly attempted to undercut it by once again gerrymandering congressional district lines. *See* Anderson, *supra*, at 186. The General Assembly's goal in drawing the lines, as admitted by one senator, was to "make compact districts, and also to make them all Democratic." *Id.*

The Democratic Party's redistricting, however, was unsuccessful at stopping the fusionist insurgency, and by 1894, the Republican-Populist fusion won control of the General Assembly. *See* Curtis, *supra*, at 84. Over the next few years, the fusion legislature abolished the suffrage restrictions of the previous decades, restoring county control over local elections and limiting the power of election officials to interfere with voting. *Id.* With these barriers abolished, voter turnout in predominately African American counties increased "from 18,543 in 1892 to 33,900 in 1896." *Id.* at 85.

The "full participation and honest counting" of elections allowed for a second fusion success in the 1896 election. Anderson, *supra*, at 239. North Carolina emerged with a "Republican governor, a Populist-dominated congressional delegation, a mixed state administration, [and] a fusion legislature." *Id.* at 239. However, the Republican-Populist alliance had a fundamental infirmity: It was united by an aversion to Democratic elitism and not by a commitment to African American suffrage. *See id.* at 194, 240–41. Consequently, the alliance was easily dismantled by white-supremacist propaganda and Ku Klux Klan violence. *See id.* at 240–41. The Democrats used racist rhetoric intended to stir white fusionists' fears of imminent African American dominance. *Id.* Combined with the reality of an increased number of African Americans in public positions, this rhetoric effectively "demoralize[d] white Republicans and neutralize[d] the Populists." *Id.* In this way, the social and political purchase that African Americans had gained as a result of fusion

success became the Democrats' most effective tool for rending the alliance.

c. Disfranchisement And Democratic Party Dominance

In 1898, the Democratic Party won back the General Assembly and began an enterprise of disfranchisement to ensure that its power would stick. *See* Curtis, *supra*, at 85–86. With the Democratic Party at the helm, North Carolina erected several barriers to prevent blacks and poor whites from influencing future elections. *See id.* The new Democratic majority repealed the fusionist legislature's election reform laws, effectively reinstating the barriers of the 1870s and 1880s. *Id.* at 86. The Democrats then enacted legislation that further restricted suffrage. *Id.* Under the new legislation, county election boards were appointed by a state election board which was in turn appointed by the Democratic state legislature. *Id.* At the same time, the legislation "granted virtually unlimited discretionary power" to local election registrars controlled by the state board. *Id.* at 87 (quoting Michael Perman, *Struggle for Mastery: Disenfranchisement in the South, 1888-1908* 167 (2001)). Election ballots were made indistinguishable "by color or party emblem" so that illiterate voters—disproportionately African American men—could not cast accurate votes. *Id.* The legislation also introduced a multi-box voting system whereby each category of contested office had different voting boxes which were distinguishable only by text. *See* Kousser, *supra*, at 50. A vote dropped in the wrong box was thrown out. *Id.* Finally, pursuant to the new voter

registration requirements, a voter had to indicate whether he was required to pay a poll tax. Curtis, *supra*, at 86. A voter who was required to pay a poll tax but indicated that he was not could be indicted by a grand jury. *Id.* at 87.

Having effectively deterred or rendered ineffectual a large portion of Republican votes, the Democratic Party moved to enact a disfranchising amendment to the North Carolina Constitution. *Id.* The amendment conditioned voter registration on the ability to "read and write section[s] of the Constitution," and conditioned voting itself on the payment of a poll tax. *Id.* (quoting N.C. Const. art. VI, § 4, *amended by* 1899 N.C. Sess. Laws. 341–42). However, the amendment also featured a "grandfather clause" exempting from the literacy requirement those who were legally entitled, or whose ancestors were legally entitled, to vote before Reconstruction. *Id.* at 87. The amendment's obvious aim was to disfranchise illiterate voters, disproportionately African American, and poor people—both African American and white—who could not afford to pay the poll tax. *See* Kousser, *supra*, at 65–72. With the help of the new suffrage-restricting legislation, and with significant "[f]orce and fraud," the amendment passed with 128,285 votes against and 182,217 votes in favor. Curtis, *supra*, at 88.

The most significant threat to the enduring dominance of the Democratic Party was the possibility that "robust, interracial political coalitions" would make a resurgence. *See id.* at 88. Conscious of this risk, the legislature created the

white Democratic primary to unite Democrats, Kousser, *supra*, at 73, and "suppress political diversity among white men," Anderson, *supra*, at 274. The theory of the white primary was that, by meeting as an all-white body to decide party nominations, ideological tensions within the party could be resolved and defections to opposition parties in the general elections could thus be prevented. *See* Kousser, *supra*, at 73–74. The white democratic primary proved extremely effective, leading one commentator to call it "[o]ne of the chief reasons for the South's failure to develop a two-party system. *Id.* at 72.

Ultimately, the Democrats succeeded in branding the Republican Party as the "Negro party," *see id.*, and minimizing the effectiveness of the votes of those who were not deterred by the stigma. By the early twentieth century, disfranchisement had effectively instituted a one-party system in North Carolina. Before disfranchisement, partisan competition and election participation was robust—an estimated 83% of North Carolina's black population voted in the 1880 presidential election, with 67% of them voting Republican. *Id.* at 15. Elections continued to be both bipartisan and biracial into the 1890s. The vast majority of whites and blacks voted in the 1896 gubernatorial election, with 40% of voting whites and 67% percent of voting blacks voting for opposition parties. *Id.* at 42. After the disfranchising amendment, however, statewide participation in elections plummeted. Between the 1896 and 1904 presidential elections, black voter turnout in North Carolina decreased by almost 100%, white turnout by 23%, and overall turnout for opposition parties by 53%. *Id.* at 241. By 1908, nearly

half of North Carolinians failed to vote in the gubernatorial election. *Id.* at 226.

North Carolina's Post-Reconstruction era demonstrates that the consequence of one-party rule is to diminish voter participation across the political spectrum. When one party interferes with democratic governance with the object of entrenching political power, elections and civic engagement lose their significance as a means of effecting political change. Even the party in power must face the reality that elections in such a system are mere pretense. A genuine democracy therefore depends on the possibility of meaningful elections, which depends in turn on the freedom from artificial partisan entrenchment.

d. Gerrymandering In The Twentieth And Twenty-First Centuries: A Bipartisan Means of Entrenchment

North Carolina's Democratic Party managed to preserve its power from any meaningful challenge for much of the twentieth century. *See Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) ("Before the 1970's, North Carolina was essentially a one-party state, with Democrats controlling the state government in all respects."). The party preserved its power in part through racial and partisan gerrymandering. *See* Douglas M. Orr Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 S.E. Geogr. 39, 43 (1969) ("During the first half of the twentieth century there was a steady drift toward unrepresentative, gerrymandered congressional districts in all parts of the state."). The

state's politics began to change "in the 1970's, as voters elected the first Republican governor and the first Republican United States Senator in this century. Republican successes continued in the 1980's," *Pope*, 809 F. Supp. at 394, and the Democratic legislative majority responded with gerrymandering intended to mitigate the rising Republican threat, *see id.* at 397 (noting that "North Carolina's governor does not possess the power to veto legislation, placing the redistricting power wholly in the hands of the invariably Democrat-dominated state legislature.").

In 1982, the General Assembly enacted a redistricting plan "for the election of members of the [state] Senate and House of Representatives." *Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). Under the plan, the state's urban counties were composed of multimember districts, which resulted in a twenty-percent population disparity between legislative districts. Robert N. Hunter Jr., *Racial Gerrymandering and the Voting Rights Act in North Carolina*, 9 Campbell L. Rev. 255, 270 (1987). The plan provoked separate challenges from both black and Republican voters; the challenges were eventually consolidated. *Gingles*, 590 F. Supp. at 351 n.4. The black voters alleged that the plan "impermissibly dilute[d] the voting strength of the state's registered black voters by submerging black voting minorities in multi-member" districts, and "fractur[ed] . . . a concentration of black voters sufficient in number and contiguity to constitute a voting majority . . . with the [intended] consequence" of preventing "an effective voting majority of black

citizens" in the fractured districts. *Id.* at 349–50. The Republican voters complained that the General Assembly's redistricting plan was "partisanly designed to submerge" not only black voters but "Republican voters as well." Hunter, *supra*, at 270–71. The Court ultimately agreed with the black voters, holding that the redistricting plan violated Section 2 of the Voting Rights Act. *Gingles*, 590 F. Supp. at 350. Because the Republican voters sought the same relief, the Court did not reach their claim. *See id.*

During the 1990s, gerrymandering disputes in North Carolina were primarily a by-product of the preclearance procedures of section 5 of the Voting Rights Act. In 1990, North Carolina gained a 12th seat in the U.S. House of Representatives as a result of the 1990 census. *Shaw v. Reno*, 509 U.S. 630, 633 (1993). The General Assembly presented a reapportionment plan to the U.S. Department of Justice that featured one majority-black congressional district. *Id.* The Justice Department objected to the plan under section 5, and the legislature then submitted a revised plan with a second majority-black district. *Id.* Some districts in the revised 1992 plan had a "dramatically irregular shape," *id.* at 633, and the plan was challenged both by white North Carolina voters who alleged that the plan was "an unconstitutional *racial* gerrymander," *id.* at 636, and by the Republican Party and individual voters who alleged that the plan was an unconstitutional partisan gerrymander, *Pope*, 809 F. Supp. at 394. This Court summarily rejected the GOP challenge, *id.*, but ultimately struck down the 1992 reapportionment plan as an unconstitutional racial

gerrymander, *Shaw v. Hunt*, 517 U.S. 899, 902 (1996). The Court subsequently upheld a 1997 revised plan against a racial-gerrymandering challenge. *Easley v. Cromartie*, 121 S. Ct. 1452, 1456 (2001).

In 2000, North Carolina gained another seat in Congress as a result of the census and the General Assembly enacted a new redistricting plan which was in effect from 2001 to 2010. *Rucho*, 318 F. Supp. 3d at 802. "Unlike the 1992 Plan, the 2001 Plan did not generate significant federal litigation," and "[i]n all but one of these elections, the party receiving more statewide votes for their candidates for the House of Representatives also won a majority of the seats." *Id.* at 802–03.

In 2010, the Republican Party gained a majority in both the North Carolina Senate and House of Representatives, and quickly established committees dedicated to redistricting. *See id.* The Republican-controlled General Assembly redrew congressional districts in 2011 with the goal of "minimiz[ing] the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 803 (quoting Dep. of Thomas B. Hofeller 127:19–22, Jan. 24, 2017, ECF Nos. 101-34, 110-1). After producing its intended effect in two consecutive congressional elections, *id.* at 804, the 2011 Plan was struck down as an unconstitutional racial gerrymander, *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016). The 2016 Plan, which followed, is the subject of the present litigation.

The 2016 Plan, with its deliberate and severe partisan gerrymandering, is the latest iteration in a long and unfortunate part of North Carolina history.[2] That history demonstrates the harm done to democratic governance when a temporary legislative majority entrenches itself in power: the ability of the people to control their government through voting is sharply diminished when the legislature can negate the choices of the majority of the voters through manipulating electoral districts. The temptation to abuse legislative power in this manner is bipartisan, and the *Democratic* Party's successful use of gerrymandering and other partisan devices, for over a century, to lock in place its political dominance illustrates the consequences of ignoring the current *Republican* legislative majority's parallel efforts. Partisan gerrymandering, whichever party wields it, is fundamentally anti-democratic, and the harm it causes is even greater now because of new technology that enables the creation of more precise and effective gerrymandering schemes based on past election data. *See id.* at 803–04. As Justice Kagan has noted, "technology makes today's gerrymandering

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[2] The post-2010 legislative majority has followed its Democrat predecessors in attempting to disadvantage voters of opposing views through other means as well as gerrymandering. In 2016, North Carolina's General Assembly enacted an election law "that restricted voting and registration in five different ways," each of which "target[ted] African Americans with almost surgical precision." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Noting that African Americans in North Carolina tend not to vote Republican, and that the legislature, before enacting the law, "requested data on the use, by race, of a number of voting practices," the Fourth Circuit concluded that the law was passed "with racially discriminatory intent in violation of the Equal Protection Clause . . . and § 2 of the Voting Rights Act." *Id.* at 219.

altogether different from the crude linedrawing of the past," enabling "pinpoint precision in designing districts" and allowing "mapmakers [to] capture every last bit of partisan advantage, while still meeting traditional districting requirements." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring).

North Carolina's historical experience also shows the harm that severe partisan gerrymandering inflicts on the speech and associational rights of voters. Over time, a successful effort by a legislative majority to armor itself against the results of truly democratic elections weakens the opposing party and lowers the level of participation by voters of all views. First Amendment freedoms need not be formally abridged if their practical effect can be neutralized. This reality, that partisan gerrymandering which gives rise to an enduring electoral advantage strikes at the core of democratic governance, demonstrates the stark incompatibility of severe partisan gerrymandering with the First Amendment.

III. THE FIRST AMENDMENT REQUIRES STRICT SCRUTINY IN CASES OF SEVERE POLITICAL GERRYMANDERING.

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990) (internal quotation marks and citation omitted). Partisan gerrymandering that has the "purpose and effect of imposing burdens on a disfavored party and its voters" selects those it disfavors on the basis of the political beliefs and associations they have manifested. *Vieth*, 541 U.S. at

315 (Kennedy, J., concurring). This Court has "applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First Amendment." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011) (emphasis in original). It would clearly be inconsistent with First Amendment principle and precedent to exempt from searching review viewpoint discriminatory legislation aimed at the core First Amendment activities of political speech and association.

The gerrymander at issue in this case is both impermissible in purpose and severe in effect. The record shows that appellants relied on political data to draw congressional district lines with the goal of "ensur[ing] [that] Republican candidates would prevail in the vast majority of the State's congressional districts." *Rucho*, 318 F. Supp. 3d at 801. The record further shows that the gerrymander had its intended effect, resulting in Republican victories in 10 of the 13 congressional districts drawn by the 2016 Plan, despite the fact that Republicans carried only a slight majority of the statewide vote. *Id.* at 811. This electoral disadvantage significantly reduces the ability of voters opposed to the legislative majority to effectively exercise their associational rights. *See Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (burdens on associational rights include "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)"). Indeed, the appellees have testified to their "decreased ability to mobilize their party's

base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." *Rucho*, 318 F. Supp. 3d at 829. Furthermore, as a general matter, the impact of partisan gerrymandering on political parties is well documented. *See* Nicholas O. Stephanopoulos & Christopher Warshaw, The Impact of Partisan Gerrymandering on Political Parties 13–20 (Feb. 7, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330695.

This Court has consistently refused to uphold viewpoint-based restrictions on political speech and association unless those restrictions are narrowly tailored to serve a compelling governmental interest. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–29. Because the purpose and effect of severe partisan gerrymandering are to discriminate against a class of voters on the basis of their political viewpoint, the Court should subject such gerrymandering to strict scrutiny. *See Vieth*, 541 U.S. at 324 (Stevens, J. dissenting) ("[D]iscriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny."). As the court below noted, "[n]either the Supreme Court nor any lower court has recognized any [governmental] interest furthered by . . . 'the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.'" *Rucho*, 318 F. Supp. 3d at 848 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)); *accord Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in

order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."). The 2016 Plan therefore fails strict scrutiny. Given its severity and its viewpoint discriminatory purpose, however, the 2016 Plan is unconstitutional under any doctrinal framework.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,
Appellants,

v.

COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,
Appellants,

v.

O. JOHN BENISEK, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Maryland

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INTEREST OF AMICUS CURIAE[1]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, access to information, and government transparency. The Abrams Institute has an interest in defending robust constitutional protections for the freedoms of speech and press as critical safeguards of our democratic system.

SUMMARY OF THE ARGUMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." So this Court observed in the first line of Chief Justice Roberts's First Amendment plurality opinion in *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191 (2014). It followed that statement by offering five examples of constitutionally protected participation, one of which was voting itself. *Id.* That example was hardly controversial. Voting, after all, is the ultimate form of "speech by citizens on matters of public concern," *Lane v. Franks*, 573 U.S. 228, 235 (2014), and the principal mechanism by which citizens "expressly advocate the election or defeat of a candidate." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320 (2010).

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

Voting thus lies at the heart of First Amendment protection.

Partisan gerrymandering, the practice at issue in these cases, is fundamentally inconsistent with First Amendment principles. These cases arise out of legislation that shapes election districts in a manner designed to predetermine which political party prevails in certain elections. The legislation does this by sorting citizens on the basis of their past expressed political views and targeting those with disfavored views for disfavored treatment. This is nothing less than quintessential, insidious viewpoint discrimination.

Fortunately, settled First Amendment doctrine provides clear, workable standards for rooting out partisan gerrymanders. First Amendment scrutiny is entirely compatible with state legislatures' constitutional authority to regulate the mechanics of voting, and would not preclude consideration of myriad, long-approved districting factors, such as compactness, political subdivisions, contiguity, and communities of interest. Moreover, well-established First Amendment principles provide courts with a manageable and familiar framework for reviewing partisan gerrymandering claims. Nor does the history of this practice, persistently condemned as unconstitutional from the outset, insulate it from First Amendment scrutiny. For the First Amendment does not, in any manner, countenance discrimination against voters on the basis of their viewpoints, and that is precisely what partisan gerrymandering does and is precisely what the First Amendment forbids.

ARGUMENT

I. Partisan Gerrymandering Violates The First Amendment's Protection Of Freedom Of Speech

The First Amendment stands against all "attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). States are prohibited from regulating speech or expressive conduct "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). States engage in just such prohibited conduct when they establish partisan gerrymanders.

A. Voting Is Core Political Speech

Voting lies at the heart of First Amendment protection. It is the ultimate means "of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is the expression of a citizen's views on government, and the principal way of ensuring "that government remains responsive to the will of the people." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The First Amendment protects picketing, petition-signing, protesting, political expenditures, and even the wearing of arm bands precisely because such activities facilitate speech directed at "the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Voting likewise serves the First Amendment's guarantee "that the individual citizen can effectively participate in and contribute to

our republican system of self-government," as much as any other form of protected political speech. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). As such, the First Amendment necessarily protects the casting of a ballot, for it is the ultimate form of political advocacy and the mechanism by which government is held accountable to the people.

This Court has previously observed that voting constitutes the expression of political views that merit First Amendment protection. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (noting that voters "express their views in the voting booth"); *see also Doe v. Reed*, 561 U.S. 186, 195 (2010) (holding that signing a petition "expresses [a] political view" and "the expression of a political view implicates a First Amendment right"); *id.* at 224 (Scalia, J., concurring) (acknowledging "the existence of a First Amendment interest in voting"). A citizen's vote is an "inherently expressive act" because it is the exercise of a "personal right" to express a view on the preferred outcome of an election. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011); *see also id.* at 133 (Alito, J., concurring) ("Voting has an expressive component in and of itself."). [2] Because the First Amendment safeguards this most basic right to participate in the election of our leaders, it necessarily protects participation through voting at least to the same extent it protects participation by running for office, advocating for a candidate, and contributing to a

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[2] A citizen's vote thus differs from a legislator's vote, which "is the commitment of his apportioned share of the legislature's power," as opposed to the commitment of "a personal right" to the democratic election of a candidate. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011).

campaign. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality opinion).

Additionally, voting falls well within the ambit of the First Amendment as protected expressive conduct. *See Texas v. Johnson*, 491 U.S. 397, 403 (1989). [3] The act of voting is quintessentially expressive—it seeks "to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Votes communicate a clear message to multiple audiences, from candidates to officeholders to ballot counters, all of whom readily understand both the literal meaning of a written or spoken vote and the wider political message that vote conveys.[4] Thus, whether viewed as pure speech or expressive conduct, voting is fully protected by the First Amendment.[5]

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[3] *See also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 487 (2016) ("Voting . . . plainly express[es] a point of view and represent[s] a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.").

[4] Nowhere is this more apparent than in the speech-based rhetoric with which politicians and the media characterize election results as 'voters sending a message,' 'voters saying they want change,' 'voters telling us they're frustrated,' and so forth.

[5] Of course, the First Amendment would guard against viewpoint discrimination in the act of drawing legislative districts even if voting were not fully protected speech or expressive conduct. *See Carrigan*, 564 U.S. at 125 ("We have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First

The history of voting in the United States confirms that it has always been archetypal political speech. In early America, voting was conducted by voice vote, termed *viva voce*, or by a public show of hands. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). The *viva voce* method "was not a private affair, but an open, public decision, witnessed by all." *Id.* Election judges would call the name of an individual voter and ask, "for whom do you vote?"—to which the voter would reply "by proclaiming the name of his favorite" candidate. *Doe*, 561 U.S. at 224 (Scalia, J., concurring). Several states held fast to the "oral expression" method of voting up through the Civil War, while others variously replaced the practice of *viva voce* voting with paper ballots. *Id.* at 226.

The switch to paper did not dampen the essential speech element of voting. To the contrary, political parties "used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance," making the votes a public form of political communication at the polling place. *Id.*; *see also Burson*, 504 U.S. at 200-01. At the end of the nineteenth century, states adopted the Australian secret ballot in a direct effort to protect voters' political speech at the polls from being suppressed or distorted through coercion and intimidation. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (noting that the First Amendment protects anonymous political speech in order "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant

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Amendment.") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992)).

society"). A vote—whether delivered orally or in writing, publicly or anonymously—has always functioned as a form of political speech advocating for the election or defeat of a candidate.

That a vote has a specific legal effect does not alter its status as protected political speech. This Court has confirmed that the "legal effect" of an "expressive activity" does not "deprive[] that activity of its expressive component, taking it outside the scope of the First Amendment." *Doe*, 561 U.S. at 195; *see also id.* at 231 (Thomas, J., dissenting) (underscoring the majority's recognition that expressive activity does not fall "'outside the scope of the First Amendment' merely because 'it has legal effect in the electoral process'"). If the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *McCutcheon*, 572 U.S. at 191, it surely follows that a vote—which translates political advocacy into political representation—receives the highest First Amendment protection. If anything, the legal effect of a vote elevates its status to the apex of protected speech.

B. Partisan Gerrymandering Is Viewpoint Discrimination

It is axiomatic that "the government offends the First Amendment when it imposes . . . burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. Partisan gerrymanders do just that. Partisan gerrymandering assigns voters to districts on the basis of their political views with the aim of devaluing the votes of disfavored speakers and enhancing the political impact of preferred speech—goals this Court has

emphatically found impermissible in the context of political speech. *See, e.g.*, *Citizens United*, 558 U.S. at 341; *McCutcheon*, 572 U.S. at 191 ("[T]he political participation of some" may not be restricted "in order to enhance the relative influence of others.").

States engaging in partisan gerrymandering accord their citizens differential treatment based on whether their viewpoints are favored or disfavored by those in power. Past expression—namely, voting history—is used to determine how best to serve the governing party's interests. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). Legislators rely on computer software that overlays state maps with voters' political data to determine the partisan impact on a proposed district of adding or removing voters in groups as small as a block.[6] Citizens with favored views are assembled into districts in a manner most likely to ensure that their preferred candidates will prevail and their political views carry the day. Citizens with disfavored views are "packed," "cracked," or otherwise assigned to districts in ways designed to minimize their political efficacy and defeat their political views. Partisan gerrymandering is thus unambiguously an official act of viewpoint discrimination.

That is precisely what Maryland and North Carolina did here. The states relied on citizens' past voting history to classify them by viewpoint, and then used that classification to decide whether those

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[6] Michael Wines, *Just how Bad is Partisan Gerrymandering? Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/us/gerrymander-political-maps-maryland.html.

citizens should receive favored or disfavored treatment in the redistricting process. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 503 (D. Md. 2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). This type of state action is, by its very nature, at war with the First Amendment.

In Maryland, the challenged congressional districts were drawn using partisan data, including past voting history. *Benisek*, 348 F. Supp. 3d at 503-04. The draft map shown to the state's most senior Democratic leaders was paired with "party registration data and voter turnout data," to develop the final map. *Id.* at 504. Explicit statements by lawmakers and other public officials confirmed the intention to use this information to draw districts in such a manner that the speech preferred by the legislature would prevail in Maryland's Sixth District. *Id.* at 498 (describing undisputed evidence in the record demonstrating legislative intent to disfavor Republican voters). The record findings leave no doubt that Maryland assigned its citizens to election districts based on their political viewpoints.

The North Carolina record demonstrates the same practice. The consultant employed by the North Carolina Redistricting Committees consciously employed "past election data to draw maps that were more favorable to Republican candidates." *Rucho*, 318 F. Supp. 3d at 804 (internal quotation marks omitted). After a federal district court struck down parts of that plan as an illegal racial gerrymander, the chairs of the Redistricting Committees again directed the consultant "to use political data," specifically precinct-level election results, to draw a remedial map. *Id.* at

805. Subsequently, the joint Redistricting Committee adopted districting criteria that relied *only* on population and past election data and that *explicitly* sought to maintain a partisan makeup of 10 Republicans and 3 Democrats. *Id.* at 807-08; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (finding the statute viewpoint discriminatory where the legislature's "stated purposes" were to "target [certain] speakers and their messages for disfavored treatment"). The record findings conclusively demonstrate the North Carolina legislature's use of citizens' viewpoints as the basis for their treatment in the redistricting process.

The process used by each state in drawing the district maps, as well as explicit statements by lawmakers and other public officials, lays bare the legislatures' discrimination against voters on the basis of viewpoint: they assigned citizens disparate treatment based on past expressed views for the purpose of diluting disfavored speech in upcoming elections. In this way, partisan gerrymandering works a double First Amendment injury: it punishes past speech by burdening future speech. Such disfavored treatment imposed because of viewpoint violates the First Amendment. *See Citizens United*, 558 U.S. at 336-37.

The Court need not evaluate the efficacy of a partisan gerrymander to recognize it as viewpoint discrimination. [7] The First Amendment broadly prohibits state action constituting viewpoint

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[7] *See generally* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018).

discrimination regardless of whether that state action achieves its intended effects.[8] The same principle applies to partisan gerrymanders: intentional efforts to discriminate on the basis of viewpoint violate the First Amendment, regardless of whether they succeed. Viewpoint discrimination itself undermines our democracy, in every form it takes, including the partisan gerrymander.

Moreover, quite apart from the vote-dilution, retaliation, and associational harms such viewpoint discrimination inflicts, partisan gerrymanders work a further harm by signaling to whom a district does—and does not—"belong." As the Court has recognized in the context of racial gerrymandering, gerrymandered districts send a message to elected officials about their obligations. Where legislatures draw district boundaries to favor a particular group at the expense of others, legislators understand "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). The "signaling" effected by the gerrymander, therefore, creates an independent representational harm. *Id.* at 650. While the Court decided *Shaw* on Fourteenth Amendment grounds, the logic applies equally to First Amendment claims: whenever the state draws district boundaries with the intent to favor one political party, the legislature conveys a message about whom the representative's "real" constituents are. That devalues the votes—and therefore the speech—of some constituents so that

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[8] *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Partisanship*, 116 MICH. L. REV. 351, 379-81, 403 (2017) (providing examples).

others' speech may be more effective. The same representational harms identified in *Shaw*, therefore, inhere in partisan gerrymanders.

At bottom, drawing district lines with the intention of ensuring victory for candidates of a particular political party is nothing less than imposing restrictions on disfavored views and elevating the influence of the governing party's voters at the expense of others. Such governmental conduct would not be countenanced with respect to any other form of political speech protected by the First Amendment. It is "wholly foreign to the First Amendment." *McCutcheon*, 572 U.S. at 207 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

C. Partisan Gerrymandering Does Not Survive Strict Scrutiny

As viewpoint discrimination, partisan gerrymanders must survive strict scrutiny in order to pass constitutional muster.[9] Few, if any, viewpoint discriminatory laws are sufficiently justified under this standard. *Sorrell*, 564 U.S. at 571. Indeed, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. To overcome this strong presumption against their constitutionality, the Maryland and North Carolina maps must be shown to be "the least restrictive means of achieving a

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[9] Even viewing a vote as expressive conduct rather than pure speech, strict scrutiny applies because partisan gerrymandering is directly related to that expression. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Neither succeeds.

Both Maryland and North Carolina have failed to demonstrate any legitimate, let alone compelling, interest to justify their gerrymandered districts. Their sole interest in using citizen's political viewpoints when drawing these districts was to create partisan advantage. *See* Rucho App. Br. 22. To state the obvious, "partisan advantage" is hardly a compelling governmental interest. Partisan advantage is simply a restatement of legislative intent to impose disfavored treatment on voters expressing disfavored views—the very definition of viewpoint discrimination. Where a viewpoint-discriminatory regulation "has a speech-based restriction as its sole rationale and operative principle," the state has plainly failed to offer a permissible justification. *Rosenberger*, 515 U.S. at 834.

The Maryland appellants gesture to hypothetical interests that might be served by some other theoretical use of partisan data, such as an interest in mimicking proportional representation or undoing prior partisan gerrymanders, but they offer no defense of the challenged map on these grounds.[10] *See* Lamone App. Br. 37-42. Without a compelling governmental interest justifying the gerrymanders at

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[10] The Court need not consider here whether using political data to accomplish such "egalitarian" interests would necessarily trigger a First Amendment strict scrutiny analysis, or whether a lower standard of scrutiny might be warranted. *Cf. Rosenberger*, 515 U.S. at 831 (discrimination consists of "disfavored treatment" imposed on speakers because of their viewpoint).

issue, appellants fail to meet the demanding standard to justify viewpoint discrimination.

The Court need not reach the least-restrictive-means analysis because appellants have failed to offer any compelling interest. Were the Court to reach the tailoring prong, however, both gerrymanders again would fail. To the extent appellants offer any compelling justification for their partisan gerrymanders, neither has explained how any such hypothetical interest requires discriminating against citizens on the basis of viewpoint.

Because the partisan gerrymanders neither serve a compelling interest nor are narrowly tailored, the judgments below should be affirmed under well-established First Amendment principles.

II. First Amendment Scrutiny Offers The Appropriate Framework For Determining The Constitutionality Of Partisan Gerrymandering

A. Settled First Amendment Doctrine Provides A Workable Standard For Legislatures And Courts

The application of long-established and repeatedly applied First Amendment principles to assess the constitutionality of legislative redistricting would not interfere with the consideration of myriad factors long-approved by this Court, such as contiguity, compactness, political subdivisions, communities of

interest,[11] conformity with geographic features, and equality of population—all of which the Court has accepted as legitimate, *see, e.g.*, *Shaw*, 509 U.S. at 647 (describing "traditional districting principles"), or required, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"). Such considerations do not involve line-drawing on the basis of First Amendment-protected expression. Thus, a First Amendment viewpoint discrimination analysis is well-suited to maintaining state legislatures' ability to rely on traditional districting principles—including considerations thought to be "political"—when drawing district lines.

First Amendment scrutiny of partisan gerrymanders is also entirely compatible with state legislatures' broad constitutional authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. 1, § 4, cl. 1. This authority permits states to impose "'*reasonable, nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters." *Burdick*, 504 U.S. at 434 (emphasis added) (quoting *Anderson v.*

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[11] Respect for "communities of interest" cannot justify drawing district lines on the basis of political viewpoint. Accounting for "communities of interest" means that districts should be drawn so that persons residing within a district share social, cultural, and economic interests in common. *See, e.g.*, MICH. CONST. art. IV, § 6, cl. 13(c) (requiring districts to reflect communities of interest, which include "populations that share cultural or historical characteristics or economic interests," but expressly "do not include relationships with political parties, incumbents, or political candidates").

Celebrezze, 460 U.S. 780, 788 (1983)). The Elections Clause allows states to regulate the mechanics of voting, even if the result has some impact on voter expression. It does not, consistent with the First Amendment, permit states to enact election regulations that discriminate against voters on the basis of viewpoint. *See McIntyre*, 514 U.S. at 345 (contrasting permissible measures to "control the mechanics of the electoral process" with the impermissible "regulation of pure speech"). Much as states may regulate expressive conduct "because of the action it entails, but not because of the ideas it expresses," so too states may regulate the mechanics of voting for the legal process it entails, but not for the political message it expresses. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). This Court has already affirmed as much, having held that "severe" restrictions on the First Amendment at the ballot box are subject to strict scrutiny, unlike nondiscriminatory ones. *Burdick*, 504 U.S. at 434 (citing *Norman v. Reed*, 504 U.S. 279, 289 (1992)).

Likewise, First Amendment principles are judicially manageable and thus allay concerns that courts lack administrable standards under the Equal Protection Clause to review partisan gerrymandering claims. Some members of this Court have in the past queried whether any workable standard could be articulated. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion); *id.* at 311 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 155 (1986) (O'Connor, J., concurring). Relying on established First Amendment doctrine provides clear guidelines for courts when called upon to adjudicate partisan gerrymandering claims.

A First Amendment framework does not require courts to police a standard that is unduly vague. As Justice Scalia wrote in *Vieth*, "the vaguer the test for availability, the more frequently interest rather than necessity will produce litigation." 541 U.S. at 300-01. Fortunately, the First Amendment provides a bright line rule: intentionally targeting individuals because of their partisan views and prior voting history constitutes viewpoint discrimination and is subject to strict scrutiny. Far from "attempt[ing] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), this rule only forbids insidious and deliberate viewpoint discrimination in the districting process.[12] A First Amendment framework is thus not only constitutionally mandated here, it is also both familiar to the courts and proven to be judicially administrable.[13]

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[12] In *Gaffney*, a Fourteenth Amendment case, this Court held that a redistricting map designed to achieve rough proportional representation did not offend the Equal Protection Clause because it aimed "not to minimize or eliminate the political strength of any group or party, but to recognize it." 412 U.S. at 754. *Gaffney* also confirmed that it would constitute "invidious[] discriminat[ion] . . . to minimize or cancel out the voting strength of . . . political elements of the voting population." *Id.* at 751 (internal quotation marks omitted).

[13] Indeed, this test is more manageable than the standard for scrutinizing a racial gerrymander, which requires courts to inquire into legislative motive, the predominance of racial considerations, and the interaction between federal statutory law and the Fourteenth Amendment, among other complex questions.

B. The Historical Practice Of Partisan Gerrymandering Does Not Shield It From First Amendment Scrutiny

The long-standing practice of partisan gerrymandering by some states provides no justification for its constitutionality. This is especially true here where the historical record demonstrates persistent rejection of its constitutionality from the outset. Indeed, the history of partisan gerrymandering is a history of constitutional condemnations of the practice.

The first alleged partisan gerrymander, involving Virginia's 1788 districting, was decried by residents as an effort to thwart the nascent Constitution, and by newspapers as "a violation of the right of a free people . . . to choose their representatives."[14] A quarter century later, the portmanteau "Gerry-mander" was coined to describe an audacious map, approved by Massachusetts Governor Elbridge Gerry, that was so arched and contorted it resembled a salamander. That map was immediately and resoundingly denounced as a "grievous wound on the Constitution,—it in fact subverts and changes our Form of Government."[15] The Federalists viewed the map as "a blow at the constitution and a travesty upon the Bill of Rights," and a petition presented to the

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[14] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 40-41 (1907); *see also* Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD. 781 (2011).

[15] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

Massachusetts legislature to redraw the district characterized the map as "unconstitutional, unequal, and unjust."[16] The *Boston Gazette* attributed the results of the subsequent election to the "unconstitutional hackings and hewings of the state."[17] Where the same stunt was attempted in other states over the next several decades, the reaction was the same: partisan gerrymanders are an abuse of power and "an attempt to deprive the people of their rights."[18]

Courts too have long viewed the practice of partisan gerrymandering as constitutionally suspect. In state law challenges to the practice following the end of Reconstruction, courts described partisan gerrymanders as abhorrent to the Constitution. *See, e.g., Parker v. State ex rel. Powell*, 32 N.E. 836, 846 (Ind. 1892) (Elliott, J., concurring) (observing that those "who framed our constitutional system knew and provided against the dangers of legislative usurpation of power, and the wisest among them united in devising checks upon it."); *State ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724, 730 (Wis. 1892). This Court has long evinced the same skepticism and never endorsed the practice. In fact, it has searched for decades for the right case in which to assess the constitutionality of partisan gerrymandering. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *League of United Latin Am. Citizens v. Perry*,

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[16] GRIFFITH, *supra*, at 70-71.

[17] *Id.* at 89.

[18] *Id.* at 106; *see also* Brief of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107.

548 U.S. 399 (2006); *Vieth*, 541 U.S. 267; *Bandemer*, 478 U.S. 109.

It is thus entirely consistent with the Founding era's public understanding of the Constitution to hold that partisan gerrymandering violates the rights secured by the Constitution, and it coheres with the understanding of jurists and citizens alike since that time that this practice "is wholly foreign" to the republican system of government the Constitution established. *Buckley*, 424 U.S. at 49; *cf. Wesberry*, 376 U.S. at 7-18 (relying on the historical record of constitutional skepticism of malapportionment to hold that longstanding practice unconstitutional).

Even without such continuous concern over the constitutionality of a practice, an appeal to history alone cannot spare an unconstitutional governmental action. The longstanding use of a governmental practice, even on a widespread basis, does not prevent this Court from inquiring into its constitutionality or immunize it from judicial intervention. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 944-45 (1983).

This Court has not shied away from striking down longstanding political practices for failing to meet the Constitution's mandates, even while expressly acknowledging their longevity. For example, in *Reynolds v. Sims*, the Court reiterated its commitment to the Constitution over convention by holding that the Equal Protection Clause requires state legislative districts to maintain substantially equal populations. 377 U.S. at 558. In so holding, the Court explicitly rejected the argument that the historical longevity of malapportionment bore on its constitutional analysis: "neither history alone, nor

economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.* at 579-80 (footnote omitted). Indeed, the Court made clear that when "[t]he complexions of societies and civilizations change . . . [r]epresentation schemes once fair and equitable become archaic and outdated." *Id.* at 567. What remains constant is the fundamental principle that "the weight of a citizen's vote cannot be made to depend on where he lives." *Id.*

In similar fashion, this Court has not hesitated to strike down racial gerrymandering as unconstitutional under both the Fourteenth and Fifteenth Amendments, notwithstanding its pervasiveness "[f]or much of our Nation's history," including "in parts of this country nearly a century after ratification of the Fifteenth Amendment." *Shaw*, 509 U.S. at 639-40. In a direct rejection of this protracted and ubiquitous practice, the Court perceived it posed "the risk of lasting harm to our society," and demanded such gerrymanders be held to strict scrutiny. *Id.* at 657.

Likewise, in a run of three cases over more than a decade, this Court excised the deeply entrenched practice of political patronage as a violation of the First Amendment, notwithstanding its long-running history "at the federal level at least since the Presidency of Thomas Jefferson." *Elrod v. Burns*, 427 U.S. 347, 353 (1976); *see also Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). The Court's elimination of this two-

hundred-year practice swatted down the notion that historical longevity counsels judicial restraint:

> Our inquiry does not begin with the judgment of history, though the actual operation of a practice, viewed in retrospect, may help to assess its workings with respect to constitutional limitations. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954), *with Plessy v. Ferguson*, 163 U.S. 537 (1896). Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice.

Elrod, 427 U.S. at 354-55. In keeping with its role as the guardian of the First Amendment's guarantee of free participation in our democracy, this Court should now hold partisan gerrymandering unconstitutional.

* * *

The First Amendment categorically forbids viewpoint discrimination because it is fundamentally incompatible with democratic self-government. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. Left unchecked, viewpoint-discriminatory gerrymanders invert the relationship between citizens and their elected representatives, who no longer "have an immediate dependence on, and an intimate sympathy with, the people." THE FEDERALIST NO. 52 (James Madison). Instead, citizens depend on governmental approval of their

speech to effectively exercise the right to participate in electing our political leaders. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of the First Amendment." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

CONCLUSION[19]

This Court should affirm the decisions of the district courts and hold that partisan gerrymandering violates the First Amendment.

Respectfully submitted,

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF BERNARD GROFMAN AND RONALD KEITH GADDIE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici are political scientists who specialize in redistricting, including the statistical methods used to detect and measure partisan gerrymandering. *Amici* have served as expert witnesses and consultants in redistricting cases on behalf of both states and plaintiffs, Republicans and Democrats. They have also published many peer-reviewed articles on the subject.[2]

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Professor Grofman's publications include Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 264 (2018); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 2 (2007); Bernard Grofman, William Koetzle & Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 Electoral Stud. 457 (1997); Richard G. Niemi, Bernard Grofman, Carl Carlucci & Thomas Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Pol. 1155 (1990); Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 Pol. Geography Q. 5 (1988); Bernard Grofman, Michael Migalski & Nicholas Noviello, *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 L. & Pol'y 199 (1985); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Pol. Methodology 295 (1983).

Amici seek to assist the Court in understanding recent developments in social science methodologies for identifying and measuring the extent of partisan gerrymanders. They do not take a position on whether, given the particular facts and expert witness analyses, the district courts correctly decided these cases. But *amici* firmly believe that partisan gerrymanders are justiciable, and that this Court should adopt an articulable standard for adjudicating partisan gerrymandering claims. Social science tools now allow courts to diagnose partisan gerrymanders with accuracy and precision, including identifying the specific legislative district or districts affected. They also allow courts to distinguish ordinary, acceptable politicking from conduct that rises to the level of unconstitutional discrimination against voters based on their political views. If the Court again declines to adopt a standard for unconstitutional partisan gerrymandering, politicians will have free rein to violate associational and representational rights.

Amicus Bernard Grofman is the Jack W. Peltason Chair of Democracy Studies and Distinguished Professor of Political Science at the University of California, Irvine. He has frequently served as an expert

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Professor Gaddie's publications include Charles S. Bullock, III, Ronald Keith Gaddie & Justin J. Wert, *The Rise and Fall of the Voting Rights Act* (2016); Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (2009); Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *To* Larios*: Recent Redistricting Lessons from Georgia*, 34 Fordham Urb. L.J. 997 (2007); Ronald Keith Gaddie & Charles S. Bullock, III, *Elections to Open Seats in the U.S. House: Where the Action Is* (2000).

witness and consultant in redistricting cases, including for the State of Indiana in *Davis v. Bandemer*, 478 U.S. 109 (1986), and for the plaintiffs in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). He joined *amicus* briefs on behalf of neither party in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), urging that partisan gerrymanders are justiciable. This Court has previously cited Professor Grofman's work (including volumes he edited) in over a dozen cases.[3] Scholars often credit his brief in *LULAC* with introducing the Court to the first generation of social science analysis of partisan asymmetry, and his work was cited extensively in the development of the *Gingles* test for evaluating racial vote dilution under the Voting Rights Act. Professor Grofman has also drawn redistricting plans for federal district courts, non-partisan commissions, and the U.S. Department of Justice—including recent service in 2015 as the special master to a federal district court after it declared Virginia's Congressional District 3 unconstitutional; in 2017 as the special master to a district court responsible for the redrawing of

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[3] *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *LULAC v. Perry*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Davis v. Bandemer*, 478 U.S. 109 (1986).

county commission and school district lines in a small Utah County with a large Navajo population after the previous maps were found unconstitutional under *Shaw v. Reno*; and in 2018 as the special master to a district court responsible for the redrawing of eleven Virginia legislative districts found to be unconstitutional under *Shaw*. Professor Grofman's curriculum vitae is available at https://tinyurl.com/y8ppxmvg.

Amicus Ronald Keith Gaddie is the President's Associates Presidential Professor of Political Science, Architecture and Journalism at the University of Oklahoma and an editor of Social Science Quarterly. He too has served as an expert witness and consultant in numerous redistricting cases, including for the State of Texas in *LULAC* and for the plaintiffs in *Cox v. Larios*, 542 U.S. 947 (2004). Most recently, Professor Gaddie worked as a consultant to the Wisconsin legislature's Republican leadership in drafting the map at issue in *Gill v. Whitford*; the Republican Caucus's attorneys hired Professor Gaddie to assess, among other things, the expected partisan impact of the proposed maps. Professor Gaddie has always believed that partisan gerrymanders are justiciable. He coauthored an *amicus* brief with Professor Grofman in *Gill*. His curriculum vitae is available at https://tinyurl.com/y874ysrm.

INTRODUCTION AND SUMMARY OF ARGUMENT

Modern, computer-driven redistricting now allows the political party in power to craft extremely sophisticated partisan gerrymanders. With vastly improved computer speed, memory, and storage, map

drawers can design district lines so precisely that they simultaneously maximize their party's gains and eliminate most competitive districts—ensuring that the party in power enjoys an electoral advantage that endures throughout the following decade, irrespective of voters' subsequent choices.

Left unchecked, partisan gerrymandering fundamentally undermines our democracy. It is a basic tenet of fair elections that the parties must play by the same rules. But a partisan gerrymander violates that core principle: Under a successful partisan gerrymander, one party needs fewer votes to win representation than the other party. A partisan gerrymander dilutes the votes of some members of the electorate, simply because of their partisan affiliation. And where the partisan gerrymander is unresponsive to electoral shifts, only the courts can provide a remedy.

This Court should hold that partisan gerrymandering claims are justiciable. To be precise, partisan gerrymandering occurs when a districting plan subjects voters to unequal treatment in the weight of their votes, diluting the power of disfavored citizens' votes compared to what might be expected from a plan drawn on the basis of neutral principles. But not all partisan gerrymanders are unconstitutional. The Court should adopt a test for unconstitutional partisan gerrymandering that requires a showing of packing or cracking in a particular district or set of districts that is caused by invidious discrimination and persistently costs the party out of power at least one seat. The district-specific standard we propose provides a judicially manageable framework through

which judges can and should identify and evaluate the extent of partisan gerrymanders. And social science provides ample tools—in the form of analytical tests and computer simulations—to assist the judiciary in conducting those inquiries.

ARGUMENT

I. Courts Must Provide a Check on Egregious Partisan Gerrymandering.

Invidious partisan gerrymandering occurs when a political party intentionally redraws legislative district lines to give itself a durable electoral advantage over the party out of power, penalizing disfavored voters and diluting their votes.[4] The two indispensable tools of partisan gerrymandering are "packing" and "cracking." *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (describing "familiar techniques of political gerrymandering").[5] "Cracking" means spreading opposition party voters across multiple districts so

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[4] We use the phrase "dominant party" to refer to the party doing the line drawing, even if it is not a voting majority of the electorate. The phrase "opposition party" refers to the party out of power.

[5] Other partisan gerrymandering techniques maximize partisan advantage by treating the disfavored party's incumbents disparately, through pairing two incumbents of the disfavored party in one district to preclude one's reelection ("hijacking") or separating an opposition party incumbent from her core supporters to reduce her chances of reelection ("kidnapping"). *See* Olga Pierce, Jess Larson & Lois Beckett, *Redistricting, A Devil's Dictionary*, ProPublica (Nov. 2, 2011), https://tinyurl.com/y9uuagw8; *see generally* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 151 (1985). Also belonging in the gerrymandering

that opposition party support falls short of a majority in each, rendering the opposition incapable of prevailing in any of those districts. Cracking ensures that opposition voters within the cracked districts have a diminished—and vanishingly small—opportunity to elect their candidates of choice. "Packing," in turn, means concentrating the opposition party's backers within one or a small number of districts such that the opposition party wins those districts by overwhelming margins—making those districts essentially noncompetitive. Packing dilutes the influence of opposition party voters within the packed district, rendering each such voter functionally irrelevant to the resulting landslide opposition party victory in the district, and makes it harder for the opposition to win seats because of the distribution of its supporters.

Voters who reside in districts that have been "packed" or "cracked" suffer from having their votes diluted relative to voters in a non-gerrymandered baseline district. They have a reduced opportunity for their vote to make a difference in the outcome of an election. In short, their votes "carry less weight than [they] would carry in another, hypothetical district" that was not gerrymandered. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (majority op.); *see also, e.g.*,

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lexicon is "fracking," which Professor Grofman uses to refer to a form of discontiguity in which a district contains a border that "traverse[s] a county line more than once." *See* Report of the Special Master, ECF No. 323, at 50-51, *Bethune-Hill v. Va. State Bd. of Elections*, No. 14-CV-0852 (E.D. Va. Dec. 7, 2018) (finding fracking in four Virginia legislative districts identified by the district court as unconstitutional and no such discontiguity among districts in the same part of the state whose constitutionality had not been challenged).

Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). This Court has previously held that packing and cracking injure individual voters who are subjected to racial gerrymandering by diluting their votes; vote dilution is also the injury suffered by voters bringing one person, one vote claims. Packing and cracking similarly dilute the votes of citizens subjected to partisan gerrymandering.[6]

Discrimination based on partisanship has real-world consequences. A voter who supports a disfavored party is denied an equal opportunity to use her vote to affect the representation of her district. Her vote is diluted relative to favored voters, because she is "packed" or "cracked" into a district where she does not affect the outcome. The officials representing her district are in turn unaccountable to her. Similarly, across a districting plan, voters from the disfavored party are denied an equal opportunity to affect the partisan composition of the legislature—meaning the legislative proposals they support are less likely to be introduced, debated, and passed. And because such voters have been deliberately boxed out of the political process, they may be unable to reverse the dilution of their votes by electing representatives who will ensure a more neutral distribution of political power. A

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[6] Although packing does not prevent the election of the packed voter's candidate of choice, this Court has recognized that it nonetheless causes a dilution injury because each packed individual's vote has less weight. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

partisan gerrymander thus discriminates against voters in their representational rights because of their views and political associations in a way that cannot realistically be ameliorated through the ordinary electoral process.[7] *See Bandemer*, 478 U.S. at 124 ("[E]ach political group in a State should have the same chance to elect representatives of its choice as any other political group.").

There is compelling evidence that the 2010 redistricting cycle yielded partisan gerrymandering of a magnitude that is qualitatively and quantitatively different from what we have seen in the past—as much as three times more partisan bias than in the 2000 redistricting cycle—even when controlling for residential patterns of voters and demographic change. Anthony J. McGann et al., *Gerrymandering in America* 4-5, 97-98 (2016). Indeed, there were strong increases in bias even where the same party controlled both the 2000 and 2010 redistricting processes. *Id.* at 174. This increase in the aggressiveness of partisan gerrymanders may be driven in part by the fact that, as a result of the Court's "signal[] in *Vieth v. Jubelirer* (2004) that it would not intervene ...[,] state legislatures did not have to worry about the threat of legal oversight and pushed partisan advantage to its limits" during the 2010 cycle. *Id.* Absent

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[7] Plaintiffs alleging unconstitutional partisan gerrymanders have advanced several constitutional theories. *Amici* have sought to offer a standard for identifying and evaluating a partisan gerrymander at the district level under the Equal Protection Clause and the First Amendment. But *amici* also believe that manageable standards exist for evaluating partisan gerrymanders at a statewide level.

a judicial check, the level of egregious partisan gerrymandering may worsen still in 2020 because of a marked increase in the number of legislatures under unified partisan control. *See State Partisan Composition*, Nat'l Conference of State Legislatures, https://tinyurl.com/guos34u (last updated Feb. 4, 2019).

Whether courts should intercede to police egregious partisan gerrymanders is not a matter of one's political leanings. While evidence suggests that at a national level, the net benefits of partisan gerrymandering currently accrue to Republicans, in the past, the net benefits have accrued to Democrats. McGann et al., *supra*, at 71-72, 88. The party in power has strong incentives to change the map to keep itself there. Indeed, the Court here is considering a pair of cases challenging maps enacted by Republicans on one hand and Democrats on the other. On either side, where there is improper gerrymandering it is the voters who lose: Their rights are undermined based upon their political views, and incumbents are entrenched in office without regard to changes in voter preferences. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (noting "the core principle of republican government" that "voters should choose their representatives, not the other way around").

Courts must serve as a neutral check. If the Court again declines to adopt a standard for unconstitutional partisan gerrymandering, politicians will have free rein to wield the technological advances discussed below to craft ever more egregious partisan gerrymanders. Continued judicial abdication would ensure that representatives are selected by the self-

dealing maps they enact, rather than elected by the people they ostensibly serve—locking in place electoral advantages that are, for all practical purposes, impervious to changes by the electorate.

II. Partisan Gerrymanders Can Be Identified and Measured on a Single-District Basis.

The majority opinion in *Gill* made clear that the threshold inquiry under a vote dilution theory of partisan gerrymandering requires identifying specific districts that have been packed or cracked. *See Gill*, 138 S. Ct. at 1921 ("The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked."). In our view, a successful partisan gerrymandering claim will demonstrate packing or cracking in a specific district that is caused by invidious discrimination and persistently costs the party out of power at least one seat. Fortunately, while the tests previously proposed for identifying a partisan gerrymander—including tests that included measures of partisan asymmetry like the efficiency gap and the mean-median gap—typically entailed statewide analysis, the Court need not start from scratch to identify a district-level gerrymander. Instead, the well-developed jurisprudence in racial gerrymandering cases can be adapted to determine the existence of "packing" or "cracking" in the partisan gerrymandering context. And existing social science tools can assist courts in determining the extent to which the challenged district deviates from a neutral baseline, whether the deviation is likely to persist over election cycles, and whether invidious partisan discrimination is the cause.

A. Courts can readily identify packing or cracking in a specific district that costs the party out of power at least one seat.

The Court's racial gerrymandering jurisprudence offers a well-developed framework for identifying whether a particular district has been packed or cracked. We propose adapting existing standards to the partisan gerrymandering context.[8]

Racial vote dilution claims under Section 2 of the Voting Rights Act require a showing that an electoral measure has resulted in the denial or abridgment of the right to vote based on race. *See Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986); *see also Bartlett v. Strickland*, 556 U.S. 1, 26 (2009).[9] In making a threshold determination of whether the necessary (but not sufficient) conditions for such a vote dilution claim have been met, the Court has adopted a three-pronged test, in which the plaintiff must prove that (1) she belongs to a group that is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group is politically cohesive; and (3) voting is racially polarized, and the

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[8] Elaboration of some of the tests and measurement issues discussed in this brief can be found in Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-*Gill *World*, 18 Election L.J. (forthcoming 2019) (on file with author). It will be made available online later this winter.

[9] Similarly, under Section 5 of the Voting Rights Act, courts evaluated whether an electoral change submitted for preclearance would have a retrogressive effect on the ability of minority voters to elect the candidate of their choice. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

level of racial bloc voting is such that in the challenged district the minority candidate usually loses. *See Gingles*, 478 U.S. at 48-49. This inquiry can be readily adapted for application to claims that a district has been unconstitutionally gerrymandered based on partisanship—that the voter, if not gerrymandered, could be placed in a district in which she could meaningfully contribute to the election of her candidate of choice. In adapting this test to partisan gerrymandering claims, the Court would consider three factors that parallel the *Gingles* inquiry—factors that ultimately require partisan gerrymandering plaintiffs to establish that at least one seat lost to partisan gerrymandering could be gained in a neutral plan.

The first factor we would propose is whether the opposition group is sufficiently large and geographically compact in the locality of the challenged district such that a new district can be drawn in which the opposition has a majority or in which it has a realistic opportunity to elect its candidate of choice.[10] Key to this inquiry is whether the district can be redrawn to create a majority or opportunity-to-elect district for the opposition party without reducing the overall number of districts in which the opposition forms a

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[10] While districts where the opposition party could form a majority in a hypothetical non-gerrymandered district present the most obvious claims, a proper statistical evaluation would be able to catch even subtler forms of partisan gerrymandering, such as where several competitive districts have been drawn with a thumb on the scale so that the number of competitive districts leaning toward the dominant party is greater than the number of competitive districts drawn leaning toward the opposition party.

majority. That is, this factor requires that the opposition party has been deprived of partisan advantage in at least one district in the enacted plan.

Second, courts should consider whether the opposition group is politically cohesive and voting is polarized along partisan political lines. In the present era of partisan "hyperpolarization," demonstrating political cohesiveness will be a much easier task than in past decades. Indeed, map drawers (legislators and their staff and consultants) themselves routinely use historical election data to draw maps. They do so knowing that past political preferences are highly predictive of future political fortunes. Courts, assisted by expert witnesses, can appropriately rely on these same data to evaluate the partisan consequences of alternative districting plans. Moreover, experts can adapt models to account for situations in which past partisan performance was likely attributable to idiosyncratic factors. In the racial gerrymandering context, courts have long been comfortable relying on statistical modeling to identify voters' preferences. *Cf. Growe v. Emison*, 507 U.S. 25, 41 (1993). Partisan political modeling is in fact easier in the partisan gerrymandering context than in the racial gerrymandering context, since in the latter we must model preferences based on statistical inferences about how racial minorities voted in the past, Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323, 1356 (2016) (describing challenges in drawing ecological inferences about individual preferences from aggregate information), whereas election data tell us directly how each political party previously performed. And, importantly, modeling voters' political

preferences is not about predicting actual future election outcomes. Rather, modeling establishes how a generic Democrat or Republican would perform—and thus whether a candidate from one party enters the playing field with an advantage.

The third factor we propose differs modestly for packing and cracking claims. For a cracking claim, we inquire whether opposition candidates in the challenged district regularly lose or, if the plan has not yet been implemented, whether there is compelling evidence based on past elections that they would be virtually certain to lose. In other words, the test we propose would find that a challenged district had been cracked only if opposition voters had been diluted such that they could not elect their preferred candidate. Meanwhile, for a packing claim, this factor would inquire whether the challenged district can be redrawn unpacked to create a district in which the opposition retains its ability to elect a candidate of its choice that does an equally good or better job of satisfying traditional districting criteria as the challenged district. In other words, it requires showing that the packed voters can retain the ability to elect their candidate of choice while being unpacked into another district that is at least as good at satisfying other, neutral districting criteria.

B. Testing for responsiveness can establish whether packing or cracking will *persistently* deprive opposition voters of a seat.

An additional element necessary for the identification of an unconstitutional partisan gerrymander is

a lack of responsiveness to the electoral process. Even if districts are revealed to have been packed or cracked along partisan lines, if the party out of power can alter its fate by persuading voters to support it in the next election, then there is no need for courts to intervene. In such cases, ordinary politics remain responsive to voters' preferences; if citizens do not like policies promulgated by their representatives (including the district maps they enact), they can vote them out of office. *See* Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 319 (2015) (arguing that the Court "entered the metaphorical political thicket in the 1960s on the question of malapportionment" because of "the practical problem ... that popular majorities had no political means to correct the offense"); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 865 (2015). In principle, even large-scale disparities in partisan treatment can be fleeting. A constitutional standard for partisan gerrymanders should accordingly require a separate assessment of electoral responsiveness, sometimes called "durability."

Electoral responsiveness describes whether and how representation changes when voters' preferences change. If a map is not responsive, that means that when voters change their preferences and shift their allegiances from one party to another, their representation remains unlikely to change—showing that the politicians have chosen the voters, and not the other way around. In that circumstance, we can expect citizens' votes to remain diluted regardless of the outcome of future elections. Conversely, high

responsiveness suggests that the discriminatory effect on voters may not be long-lasting.

Measuring responsiveness will also detect "self-limiting" gerrymanders—sometimes called "dummymanders," *see* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in* Redistricting in the New Millennium 183, 184 (Peter Galderisi ed., 2005)—in which map drawers crack voters across multiple districts to create margins of victory so thin that they evaporate in future elections. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). But dummymanders can occur only when there are numerous competitive districts in a map. And there is empirical evidence that dummymanders are rare. *See* McGann et al., *supra*, at 226 ("A second myth we have debunked is that partisan gerrymandering is self-limiting"). This is increasingly the case as the computer technology for conducting gerrymanders improves. In any event, assessing responsiveness "allows us to distinguish those cases in which a gerrymandering might have been attempted but was not very well done from those cases in which the partisan bias imposed by gerrymandering is expected to be both substantial and long-lasting." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 2, 13 (2007).

Social science offers tools for evaluating the durability of a gerrymander. Based on historical data—how much voters' preferences swung in prior elec-

tions—experts can identify the full range of realistically possible election outcomes and determine how many legislative seats, if any—and, critically, which seats—would change hands in response to a comparable change in voters' choices. The number of competitive districts also provides evidence of the map's responsiveness. Requiring that plaintiffs demonstrate that a disparate partisan impact will be durable throughout the decade following redistricting—that the map is not responsive to voters—ensures that courts do not intervene in the political process when it is functioning properly. If the map does not persistently obstruct competition, the voters' remedy lies at the polls, not in the courts.

C. Computer simulations can establish whether the partisan disparity in the challenged district was caused by invidious discrimination rather than neutral factors or chance.

1. Once we have identified a district or districts that have been durably packed or cracked, we know that a district or districting plan imposes disparate effects on disfavored voters that are impervious to electoral tides. But that does not end the inquiry. Rather, there is consensus among social scientists that to determine whether invidious discrimination is the cause of a disparate burden on opposition voters, it is necessary to rule out other potential causes of the district configuration—to assess whether the partisan effects of a plan are attributable, for example, to neutral principles, voters' residential patterns, or sheer random chance. *See, e.g.*, Samuel S. H. Wang, *Three Practical Tests for Gerrymandering: Application to*

Maryland and Wisconsin, 16 Election L.J. 367, 374 (2016) ("[A] standard for partisan gerrymandering requires a method for determining whether a [claimed disparity] could have arisen as part of normal variation in districting as practiced across the United States."); McDonald & Best, *supra*, at 317 ("[I]n order to distinguish unintentional from intentional gerrymanders, a benchmark of what naturally would result from any neutral line drawing has to be established."). That is, we must compare the map's disparate effects against a neutral baseline.

As this Court has noted, advantages to one party may occur because of a variety of neutral factors. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 289-90 (2004) (plurality op.); *id.* at 308-09 (Kennedy, J., concurring). For example, map drawers must comply with the Constitution's "one person, one vote" and nondiscrimination requirements. They also must comply with the Voting Rights Act by avoiding racial vote dilution. *See* Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* 343 (2009). And many states' laws also require map drawers to consider certain traditional districting criteria, like contiguity, compactness, and preservation of political subunits like cities and counties, as well as communities of interest—groups of people with a common attribute like race or ethnicity. *See, e.g.*, Justin Levitt, *Where Are The Lines Drawn?, All About Redistricting*, https://tinyurl.com/aw3qgn5 (last visited Feb. 5, 2019) (collecting current, state-by-state requirements for redistricting); *see also* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77 (1985) (Table 3) (collecting state-by-state requirements for 1980s redistricting).

Pursuit of these neutral objectives may produce inadvertent advantages to one party. For example, there is some evidence that "political groups that tend to cluster (as is the case with Democratic voters in cities) [c]ould be systematically affected by what might be called a 'natural' packing effect," *Vieth*, 541 U.S. at 290 (plurality op.)—although new empirical evidence indicates that this effect has been overstated, McGann et al., *supra*, at 135 ("[G]eographic and demographic constraints (such as the urban concentration of Democratic voters, the requirement to draw majority-minority districts, and the geographic sorting of voters) ... certainly cannot account for the increase in [partisan] bias we observe between the 2000 and 2010 districting rounds."). Similarly, compliance with the Voting Rights Act has spillover effects on a district's partisan makeup. *See* Bullock & Gaddie, *supra*, at 343. Random chance may also play a role.

Packing or cracking that is merely a side effect of indisputably legitimate objectives within the redistricting process or that is naturally occurring does not evidence actionable invidious discrimination. Any constitutional test for partisan gerrymandering will thus have to rule out these causes of vote dilution and isolate the degree of disparate partisan advantage that is "unrelated to the [legitimate] aims of apportionment," or to residential patterns or chance. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring).

Social science again provides the toolkit: extremely sophisticated and accurate methods of ruling out neutral factors as the source of partisan asymmetry. Vastly improved computing power permits experts to create hundreds (or even millions) of

computer-generated alternative maps. These computer-generated maps are produced to satisfy all traditional districting criteria to at least the same extent as the challenged plan.

It has become increasingly common in partisan gerrymandering challenges for experts to offer these computer-generated simulations of random plans drawn in accordance with traditional districting principles and reflective of the underlying partisan electoral geography (or, similarly, random permutations from a challenged map). *See, e.g.*, *League of Women Voters v. Commonwealth of Pennsylvania*, 178 A.3d 737, 770-75 (Pa. 2018) (describing the testimony of Dr. Jowei Chen, centering on computer-generated alternative maps). These simulations serve as a neutral baseline for comparison with the challenged district. From these simulations, analysts have used past voting behavior to calculate the range of likely partisan outcomes resulting from the challenged map or district to evaluate whether a challenged map or district is a statistical outlier.

This methodology enables us to establish to a high degree of statistical certainty whether packing or cracking is explainable by something other than invidious intent. For example, because the alternative maps take as a given the actual human geography of the state, any amount of packing that naturally results from residential patterns will be reflected in the alternative maps, which can also be programmed to preserve intact communities of interest or districts required by the Voting Rights Act. *See, e.g.*, Br. of Political Geography Scholars, *Gill v. Whitford*, No. 16-1161 (U.S. 2017), at 7, 12-13 & nn.10-11. These tools enable

experts to identify whether disparate effects are "manmade"—the product of deliberate efforts of the party in power to penalize the opposition—as distinct from those that may be produced by the effects of neutral districting priorities, voters' residential patterns, or chance. *See, e.g.*, Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 312 (2015). We can thus quantify and rule out any conceivable neutral justification for packing and cracking.

Political scientists have developed variations on this computer simulation methodology—with minor differences in how the random-map-generation algorithm operates, what inputs are used, and how they are prioritized. *E.g.*, *id.*; Wendy Tam Cho et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 William & Mary L. Rev. 1521 (2018); Jonathan Mattingly et al., Quantifying Gerrymandering, https://tinyurl.com/yc4cvxkg (last visited Feb. 5, 2019). But the basic method is sound, notwithstanding these nuances. Indeed, courts are already relying on it in the one person, one vote context. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) (holding district court "clearly and reversibly erred in rejecting Dr. Jowei Chen's expert testimony," based on computer generation of 500 randomly drawn redistricting plans, that a challenged population deviation was the product of partisan bias). And in a recent state court challenge to a Pennsylvania redistricting, Professor Chen offered computer simulation evidence about the degree

to which the challenged plan failed to satisfy traditional redistricting criteria compared to politically neutral plans drawn by a computer programmed to honor traditional districting factors. *See League of Women Voters*, 178 A.3d at 770-75. Such evidence can be relied on as indicative of possible partisan motive. And as discussed above, even though Professor Chen's testimony was about statewide effects, it is straightforward to transform his data into evidence that particular districts are statistical outliers.

While these computer simulations have typically been produced and evaluated on a statewide basis, they remain relevant to assessing whether a given district or set of districts exhibits packing or cracking to a degree that would be judged as statistically extreme when compared to expectations derived from maps drawn according to neutral principles. Such an analysis could be a vital component of a district-specific analysis of partisan gerrymandering, though it begins with calculations based on statewide data.

This district-level analysis could be applied to either packed or cracked districts. To detect packing, challenged districts could be ranked in terms of their actual or expected partisan advantage, with reference to voter registration data and past voting behavior. The most heavily opposition district challenged would be compared against simulation results to evaluate the extent to which it was more extreme in its partisan composition than the simulation based on neutral redistricting and whether that difference was statistically significant. The analysis would continue through the ordered list of districts, evaluating

whether the next-most-extreme district in the challenged map was also a statistical outlier with respect to its concentration of opposition voting strength compared to the neutral baseline, proceeding in this fashion until all the statistical outliers had been identified; those outlier districts would be candidates for further evaluation as potentially invidious partisan gerrymanders. A similar approach to allegedly cracked districts would use information on the *most* competitive districts in the computer-generated maps to ascertain whether districts within the challenged map exhibited a partisan advantage favoring the majority party to an extent incompatible with neutral line drawing, in terms of number of districts that were competitive with an edge toward the dominant party versus those that were competitive with an edge toward the opposition.

2. We have focused on aiding the Court in understanding the social science tools for isolating the causes of apparent partisan gerrymanders—a means of inferring whether a disparate effect on voters was intentionally imposed. But, of course, nonstatistical evidence of intent is also relevant. Numerical analyses must be supplemented by more direct inspection of district boundaries (and how they changed from the prior map) to establish invidious discrimination.[11]

Here, again, a well-developed racial gerrymandering jurisprudence illustrates how the Court can

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[11] Relatedly, single-party control of the districting process will likely be a precondition for the finding of an unconstitutional partisan gerrymander.

use nonstatistical evidence to sniff out invidious discrimination on partisan lines. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993). Certainly, public statements by legislators in the dominant party—perhaps boasting of their success in doing the best possible partisan gerrymander—can indicate that an invidious motive to maximize partisan advantage predominated.[12] So too can deviations from the ordinary legislative process, such as secrecy, limited debate, or party-line voting in the enactment of the map. And a comparison between the challenged map and its predecessor may indicate that the lines were redrawn in a direct and egregious partisan fashion, as when changes from a prior plan involved movement of opposition party strength in or out of districts with no nonpartisan justification proffered. Notably, although discriminatory partisan gerrymanders may often be visually unremarkable while still maximizing partisan advantage, contorted district lines and disregard for traditional districting criteria are surefire signals that partisan gerrymandering is afoot, even if not themselves illegal. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995)

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[12] Many legislators apparently came to believe that there would be no court-imposed checks on partisan gerrymandering in the 2010 redistricting round. Accordingly, to minimize the likelihood of a challenge to a plan on *racial* grounds, some mapmakers openly asserted that their driving motivation was to draw the best *partisan* gerrymander possible. For example, the district court in *Rucho* observed that, in North Carolina, Representative Lewis said that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 604 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679.

("Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence ... [of] the legislature's dominant and controlling rationale in drawing its district lines."); *see also, e.g.*, *League of Women Voters*, 178 A.3d at 775-76, 820-21 (2018) (describing testimony of Dr. John Kennedy regarding how specific districts in the challenged map failed to satisfy traditional districting criteria and how the modification of the prior map occurred in a directly partisan manner). The same factors that assist in the "intensely local appraisal," *White v. Register*, 412 U.S. 755 (1973), required in racial gerrymandering cases apply equally to the partisan gerrymandering context.

CONCLUSION

For the foregoing reasons, the Court should hold that partisan gerrymander claims are justiciable and adopt the standard proposed for evaluating the constitutionality of partisan gerrymanders.

Respectfully submitted,

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici are historians with a scholarly interest in the origins and adoption of the Constitution, including a particular interest in the development and evolution of American ideas about political representation. *Amici* believe that a historical understanding of these ideas, and of the practice and perception of various forms of gerrymandering in American history, may assist the Court in its analysis of the legal issues presented in this case.[1] *Amici*, whose professional backgrounds and relevant publications are set forth in the Appendix, are:

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SUMMARY OF ARGUMENT

Fair and effective representation was the bedrock principle of constitutional governance in the new American republic. The historical record surrounding the Constitution offers ample evidence of that: The Founding generation forcefully rejected the British system of government, where legislative corruption and entrenchment of factions eroded meaningful representation, and instead designed a form of government that would be dependent on the People and responsive to the People. Americans were acutely aware of the dangers to that form of fair and effective representation posed by what we now call gerrymandering. They were particularly concerned that legislative factions acting for their own hyper-partisan interests would manipulate election rules and stifle political expression in order to entrench themselves. Those concerns are reflected in Article I, the First Amendment and subsequently the Fourteenth Amendment. Moreover, through Article III, the Framers established the judiciary as the bulwark against intentional overreach by the legislative majority. The Framers' efforts to prevent the improper legislative entrenchment that results from extreme partisan gerrymandering cannot be squared with an argument that they intended to exclude the courts from taking appropriate action where necessary to uphold the principles embodied in the Constitution.

Amici seek to bring to this Court's attention the historical record surrounding the founding principles and values that should inform the analysis of partisan gerrymandering. Because these cases do not turn on the linguistic meaning of any particular phrase in the

relevant constitutional provisions, *amici* focus on the fundamental substantive founding principles, their implementation in the Constitution, and the historical debates at the framing and ratification of the Constitution relating to the issues surrounding partisan gerrymandering.

ARGUMENT

I. THE FRAMERS DESIGNED A SYSTEM OF REPRESENTATION *RESPONSIVE TO* THE PEOPLE AND CONTINUALLY *DEPENDENT ON* THE PEOPLE

A. The American Vision of Representative Democracy Was Based on a Legislature That Reflects the Body Politic and Is Responsive to Its Demands

The American Revolution was in no small part a rejection of the British theory of "virtual representation." The British theory held that those communities that sent no representatives to Parliament—including the American colonies—nevertheless were represented because members of the House of Commons were obliged to consider the greater good when legislating.[2] To the Founding generation, this idea was an object of ridicule.[3] Americans, whose colonial assemblies generally extended representation to new communities as they were organized, believed instead in a system of actual

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[2] *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989).

[3] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167-70 (1967) (explaining that virtual representation was met in the colonies "at once with flat and universal rejection, ultimately with derision"); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 24 (4th ed. 2013) (noting that the colonists "roundly rejected" the idea).

representation.[4] In the emerging American vision of representative democracy, legislative assemblies were meant to share the interests of the electorate and be responsive to its demands,[5] with the vote serving to bind representatives closely to their constituents.[6] It was "particularly essential" that the House of Representatives "have an immediate dependence on, [and] an intimate sympathy with[,] the people,"[7] to ensure "the consent of the governed" envisioned in the Declaration of Independence.[8]

Under this new vision of government, representatives would act as agents of the People[9] and remain responsive to their needs and desires.[10] Elected representatives were expected to inform

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[4] BAILYN, *supra*, at 161-75; REID, *supra*, at 128-36.

[5] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) (discussing the concept of shared interests and its significance in securing accountability of representatives).

[6] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (2d ed. 1998) (noting that in actual representation "[t]he process of voting was not incidental to representation but was at the heart of it").

[7] THE FEDERALIST NO. 52, at 355 (James Madison) (J. E. Cooke ed., 1961).

[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[9] *See* THE FEDERALIST NO. 14, *supra*, at 83-84 (James Madison) (explaining that in a republic, the People "assemble" and administer government "by their representatives and agents").

[10] *See id.* NO. 16, at 102-03 (Alexander Hamilton); *id.* NO. 35, at 221 (Alexander Hamilton).

themselves of the preferences of their constituents and act on their behalf. The result would be a government that shares a "common interest" and maintains an "intimate sympathy" with the People.[11] At the same time, it was expected that representatives would act as a filter on those preferences, "refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[12] "Duty, gratitude, interest, [and] ambition itself" were to be "the chords by which [representatives] will be bound to fidelity and sympathy with the great mass of the people."[13]

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[11] *Id.* NO. 52, at 355 (James Madison).

[12] *Id.* NO. 10, at 62 (James Madison).

[13] *Id.* NO. 57, at 387 (James Madison). Some of the Framers advocated for a Congress that would think and act exactly like its constituents, effectively functioning as a "miniature" of the body politic. For example, Theophilus Parsons argued that "[t]he rights of representation should be so equally and impartially distributed, that the representatives . . . should be an exact miniature of their constituents." Theophilus Parsons, *The Essex Result* (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 480, 497 (Charles S. Hyneman & Donald S. Lutz eds., 1983); *see also* John Adams, *Thoughts on Government* (1776) [hereinafter Adams, *Thoughts on Government*], *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, *supra*, at 401, 403. Although the system of government ultimately adopted was more similar to that advocated by Madison, the conception of a close correspondence between the electorate and the legislature was common ground that framed the debate.

There was also a recognition that maintaining a responsive government requires more than just virtuous candidates; it requires keeping elected representatives *dependent on* the People.[14] Such dependence was to be achieved by establishing frequent elections and representation in proportion to the population:

> "The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands."[15]

In this way, the new government would not allow the abuses of power in the British system, where partisan factions were able to unjustly entrench electoral power.[16]

The American vision of representative democracy centered on actual representation has long been reflected in this Court's jurisprudence. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[L]egislatures . . . should be bodies which are collectively responsive to the popular will."); *id.* at

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[14] *See, e.g.*, THE FEDERALIST NO. 57, *supra*, at 386 (James Madison).

[15] *Id.* NO. 37, at 234 (James Madison).

[16] *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 102-03 (1987).

565-66 (noting that the aim of legislative apportionment is "the achieving of fair and effective representation"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (referencing the "Constitution's plain objective of making equal representation for equal numbers of people").

B. The Founding Generation Rejected "Corruption" of Representation in the British System and Sought To Prevent Similar Undemocratic Entrenchment by Partisan Factions in the American System

At the time of the Framing, Americans saw the abuses of power in the British system, including unjust entrenchment of electoral power by partisan factions, as antithetical to their vision of representative government.[17] From the beginning, they were focused on eliminating the various forms of "corruption" that effectively defeated meaningful representation in Parliament.[18] As this Court has noted, the delegates to the Constitutional Convention

> "were quite aware of what Madison called the 'vicious representation' in Great Britain, whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. [James] Wilson urged that people must be represented as individuals, so that America would escape the evils of the

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[17] *See* ZAGARRI, *supra*, at 102-03.

[18] *See* RAKOVE, *supra*, at 208-12.

> English system under which one man could send two members to Parliament to represent the borough of Old Sarum while London's million people sent but four."

Wesberry, 376 U.S. at 14-15 (footnotes omitted). It was well known that "pocket boroughs," with small numbers of voters easily controlled by a dominant interest or aristocrat, were another tool used to defeat actual representation.[19]

To colonial Americans, the corruption in the parliamentary system was not merely an issue of numbers and suboptimal representation. Rather, it was central to the experience of unjust subjugation that led to the Revolutionary War.[20] The Founding generation believed that the legitimacy of governments created in the wake of that war depended on protecting the system of representation from such entrenched interests. Edmund Randolph warned the Constitutional Convention: "If a fair representation of the people be not secured, the injustice of the Govt. will shake to its foundations."[21]

The Framers knew the danger to fair and effective representation that partisan legislative factions could pose if they were able to entrench themselves in power regardless of the shifting views

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[19] *See, e.g.*, KIRSTIN OLSEN, DAILY LIFE IN 18TH-CENTURY ENGLAND 7 (1999).

[20] *See, e.g.*, BAILYN, *supra*, at 222-23; WOOD, *supra*, at 166.

[21] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 580 (Max Farrand ed., 1911) [hereinafter RECORDS].

of the public. Madison identified England's boroughs as a "striking example" of inequitable government in which a faction was able to block reforms that might dislodge it from its disproportionate and undemocratic power.[22] Preserving representational equality came to be seen as the most important safeguard against such entrenchment.[23] John Adams argued in *Thoughts on Government* that, to prevent "the unfair, partial, and corrupt elections" of the English system, "equal interests among the people should have equal interests" in the legislature.[24] In response to similar concerns, several states included in their constitutions plans for periodic adjustments of representation.[25] Several states also adopted some form of a declaration "[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent."[26]

In short, the new American government was designed to be dependent on, and regularly accountable to, the People. In drafting the Constitution, the Framers saw it as imperative that the electoral process be protected against influences

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[22] *Id.* at 584.

[23] WOOD, *supra*, at 170.

[24] Adams, *Thoughts on Government*, *supra*, at 403.

[25] WOOD, *supra*, at 172 (noting adoption of such provisions in New Jersey, Pennsylvania, New York, Vermont, and South Carolina).

[26] *See* DEL. DECLARATION OF RIGHTS § 6 (1776); *see also* MD. CONST. art. V (1776); N.H. CONST. arts. X, XI (1784); VA. DECLARATION OF RIGHTS § § 5, 6 (1776).

that might infringe upon the right to fair and effective representation,[27] particularly partisan entrenchment by those already in power. Without fair and effective representation, the new republic would devolve into the very type of government Americans fought to separate themselves from—one plagued by "corruption," under which the electors cannot "defeat [the faction's] sinister views by regular vote."[28]

II. THE AMERICAN VISION OF REPRESENTATION IS REFLECTED AND PROTECTED IN THE FIRST AMENDMENT, THE FOURTEENTH AMENDMENT AND ARTICLE I

The historical record is replete with evidence that the Founding generation was focused on abuses that might erode the representative nature of government. The Constitution—in particular, Article I and the First Amendment—was drafted in part to avoid such abuses by the new national government. And in

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[27] Appellants argue that partisan gerrymandering claims require measuring any "deviation[] from a proportional representation baseline." Brief for Appellants at 21-22, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019). Appellants are correct that the Framers did not adopt a proportional representation system. But that choice only reinforces how important it was to the Framers that voters have a free, equal and effective voice in *selecting* their representatives. The system of representative government the Framers designed is founded on the principle that the People will elect representatives best suited to represent their interests and that those representatives will remain dependent on and accountable to the People through frequent, effective elections. *See supra* section I.A.

[28] THE FEDERALIST NO. 10, *supra*, at 60 (James Madison).

passing the Fourteenth Amendment, the 39th Congress extended this vision to the state level.

A. The First Amendment Was Intended To Protect American Representative Ideals by Ensuring the People Could Hold Representatives Accountable Through Political Expression, Including the Vote

Since its inception, the First Amendment has been closely intertwined with ideas of popular sovereignty and representation. The right of political expression was an integral part of colonial Americans' transition from subjects of the Crown to citizens possessing "the absolute sovereignty"[29] and employing government officials as "their servants and agents,"[30] required to be "at all times accountable to them."[31] It was the device through which the People could express their voice—and through voting, have it

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[29] James Madison, Report on the Resolutions (Jan. 1800) [hereinafter Madison, Report on the Resolutions], *reprinted in* 6 THE WRITINGS OF JAMES MADISON 341, 386-87 (Gaillard Hunt ed., 1906).

[30] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 9 (J. Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell).

[31] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 250 (J. McMaster & F. Stone eds., 1888) (internal quotation marks omitted) (statement of John Smilie).

heeded—regarding the issues of the day and the performance of the government.[32]

The Framers recognized that the exchange of ideas by members of the public—unhindered by government interference—was essential for free elections and, in turn, an accountable government.[33] Madison argued that the American form of representative government required "the equal freedom" of political expression, particularly by "examining and discussing the[] merits and demerits" of candidates.[34] In opposing the Sedition Act, which criminalized malicious speech against the government, Madison argued that the Act violated the Constitution because it stifled dissemination of speech related to elections—a right necessary to keep government accountable[35] and to ensure all other rights:

> "[The Act] exercises . . . a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of *freely examining* public characters and measures, and of *free communication* among

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[32] *See* WOOD, *supra*, at 164-65.

[33] *See* Madison, Report on the Resolutions, *supra*, at 397 ("[T]he right of electing the members of the Government constitutes more particularly the essence of a free and responsible government.").

[34] *Id.*

[35] *Id.* (rejecting the Sedition Act as a "protection of those who administer the Government" from being exposed to criticisms of the People).

> the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[36]

Hamilton also emphasized the close connection between free speech and effective representation. In response to the claim of anti-Federalist writer "Brutus" that a republic is practicable only in a society without "constant clashing of opinions,"[37] Hamilton argued that it was those "differences of opinion, and the jarrings of parties in [the legislative] department of the government," that "promote deliberation and circumspection; and serve to check excesses in the majority."[38] Discouraging the "jarrings of parties" therefore runs directly counter to the foundational understanding of representative government, particularly when it is done by a partisan faction in power whose excesses the resulting opinions are meant to check.

The First Amendment prohibits government actors from stunting political expression in order to abuse or entrench their own power. As Madison explained, those in power may not restrict the right of political expression and thereby "derive an undue advantage for continuing themselves in it, which, *by impairing the right of election*, endangers the

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[36] James Madison, Virginia Resolutions of 1798, *reprinted in* 4 ELLIOT'S DEBATES, *supra*, at 528, 528-29 (emphasis added).

[37] BRUTUS I (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363, 369-70 (Herbert J. Storing ed., 1981).

[38] THE FEDERALIST NO. 70, *supra*, at 475-76 (Alexander Hamilton).

blessings of the Government founded on it[.]"[39] As one scholar has put it, "[t]he revolutionary intent of the First Amendment is . . . to deny [the government] authority to abridge the freedom of the electoral power of the people."[40] Beyond being one of those expressive activities by which "We, the People" exercise our rights to self-government, the vote is "the official expression of a self-governing [citizen's] judgment on issues of public policy," to be "absolutely protected" under the First Amendment.[41]

In sum, the Framers saw the unfettered right of citizens to express their views through political discourse, and ultimately the vote, as essential for maintaining effective representative rights and government accountability. Mechanisms that prevent translating popular will into actual representation by creating structural impediments to the effective exercise of particular voters' rights—such as partisan gerrymandering—are contrary to the First Amendment values that the Framers recognized as the cornerstone of a vibrant democracy.

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[39] Madison, Report on the Resolutions, *supra*, at 398 (emphasis added).

[40] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254.

[41] *Id.* at 256.

B. The Fourteenth Amendment Extended the Framers' Vision of Representative Government to the States

In the wake of the Civil War, proponents of the Fourteenth Amendment emphasized the need to strengthen and vindicate the Framers' concept of actual representation premised on equal rights. Reconstruction-era Republicans argued vigorously that the Framers' vision of a republic required equal representation of all citizens, and that this vision must prevail on the state level as well as the federal.[42] For example, in his famous "Equal Rights for All" speech, Senator Charles Sumner repeatedly invoked the Framers' rejection of "virtual representation"[43] and argued at length that "[t]he two ideas of Equality and a Right to Representation, so early and constantly avowed by the Fathers, are here again recognized as essential conditions of government; and this is the

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[42] President Lincoln had argued in his First Inaugural Address that "[a] majority, held in restraint by constitutional checks and limitations, and *always changing easily with deliberate changes of popular opinions and sentiments*, is the only true sovereign of a free people." Abraham Lincoln, The First Inaugural Address (Mar. 4, 1861), *in* DAVID LOWENTHAL, THE MIND AND ART OF ABRAHAM LINCOLN, PHILOSOPHER STATESEMAN 198, 201 (2012) (emphasis added). Lincoln echoed this sentiment in the Gettysburg Address, closing with the hope "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* LOWENTHAL, *supra*, at 228, 228.

[43] *See* Charles Sumner, The Equal Rights of All (Feb. 5-6, 1866), *in* 13 CHARLES SUMNER: HIS COMPLETE WORKS 119, 159-60, 170-72 (2d ed. 1900).

true definition of a Republic."[44] Proponents of the Fourteenth Amendment cast the former slave states as aristocracies and oligarchies that must henceforth be required to respect the Framers' vision of representational rights.[45]

Representative John Bingham, a champion of the Fourteenth Amendment, likewise described the Amendment as a way to finish the Framers' work by securing their actual-representation vision on the state level now that the natural barrier to doing so—slavery—had been abolished:

> "What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? Nothing at all. And I am perfectly confident that that grant of power would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been

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[44] *See id.* at 184.

[45] *See, e.g., id.* at 207-11; *see also* Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. SOUTHERN HIST. 192, 198 (1949).

> admitted to be persons. That is the only reason why it was not there."[46]

Other members of the 39th Congress shared Bingham's view that the Fourteenth Amendment was the only way to secure "the declared intent[ion] of the Constitution of [the] fathers" after the abolition of slavery.[47] For example, Ralph Buckland remarked that "[i]t is contrary to the fundamental principles of republican government" "to think that a mere fraction of the people of any of these States can control the State government for any great length of time."[48] Jacob Howard argued, quoting Madison, that "the vital principle of republican government" is "'that those who are to be bound by the laws ought to have a voice in making them.'"[49] This fundamental principle was echoed throughout the Reconstruction era. For example, Section 2 of the Fourteenth Amendment—ensuring that states received representation based on total population—included a provision to reduce representation in Congress should eligible voters have

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[46] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). The debates surrounding the Privileges or Immunities Clause of the Fourteenth Amendment also reveal a close tie between the intent of the 39th Congress and that of the Framers. *See, e.g., id.* at 1095 (statement of John Bingham) ("The amendment is exactly the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States.").

[47] *Id.* at 430.

[48] *Id.* at 1627.

[49] *Id.* at 2767.

their right to vote "in any way abridged."[50] In 1870, the states ratified the Fifteenth Amendment, which explicitly protects "the right of citizens of the United States to vote."[51] This Court has recognized the existence of this strong "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

This Court has held that gerrymanders based on unequal population size violate the Fourteenth Amendment and "run counter to our fundamental ideas of democratic government." *See id.* at 564 (quoting *Wesberry*, 376 U.S. at 8). The same interference with the Founding generation's vision of fair and effective representation is accomplished by intentional partisan gerrymandering.[52]

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[50] U.S. CONST. amend. XIV, § 2.

[51] *Id.* amend. XV, § 1.

[52] One of Appellants' *amici* argues that "[t]he original intent of the authors of the Fourteenth Amendment could hardly include a political gerrymandering cause of action" because the authors themselves benefited from gerrymandering in getting elected. Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants at 4-10, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019). This contention ignores that partisan gerrymandering has been publicly denounced throughout its history. As this brief details in Part III, partisan gerrymandering has existed since the Founding, but at every step of the way, including around the time the Fourteenth Amendment was passed, the practice was condemned—even by those who admitted benefiting from it. *See infra* section III.B.

C. Article I Reflects the American Vision of Representative Government and the Fear That Legislative Manipulations Would Impair That Vision

The Framers were acutely aware that the government's representative function could be undermined not just by restrictions on the franchise, but by malapportionment and what we now call gerrymandering. They were also aware that legislators would have the means and motive to manipulate election-related rules for partisan entrenchment, which they feared. The provisions of Article I represent the Framers' attempts to avoid such manipulation and ensure representative, responsive government.

Article I, Section 2 of the Constitution represents half of the Great Compromise reached by the delegates regarding the election of Congress: the House of Representatives was to be chosen directly "by the People"—as opposed to indirectly by the state legislatures—and in proportion to population.[53] Such a system embodied the founding principle that representatives be dependent on the People—the "great body of the society," not "an inconsiderable

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[53] Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*" and "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2 (emphasis added). In the Senate, on the other hand, each state would have two Senators, elected by the state legislatures. *See* U.S. CONST. art. I, § 3.

proportion, or a favored class of it."[54] For the House to be derived from the People, "equal numbers of people [would have] an equal number of representatives."[55] As Madison explained, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."[56] Thus, while original omissions from the electorate now seem glaring (*e.g.*, exclusions by race, gender, and economic circumstance), the Framers' concern at drafting was that the vote of each member of the existing electorate have equal weight. This Court has agreed with that interpretation, noting that "in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7-8 (footnote omitted).

The Framers also conceived of Article I, Section 2 as a way to maintain responsiveness and accountability of representatives while they held

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[54] THE FEDERALIST NO. 39, *supra*, at 251 (James Madison); *see also id.* NO. 57, at 384-85 (James Madison).

[55] *See* 5 ELLIOT'S DEBATES, *supra*, at 177. Similarly, Francis Dana argued that "the intention of the Convention was to set Congress on a different ground; that a part should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections." 2 *id.* at 49.

[56] 1 *Id.* at 462.

office. Frequent elections and shorter terms of office[57] would deepen the "chords of sympathy" between representatives and their constituents.[58] The fact that the People's opportunity to vote out their representative was never remote would create in the representatives "an habitual recollection of their dependence on the people," forcing representatives to regularly "descend to the level from which they were raised."[59] Without such responsiveness, the Framers feared, "every government degenerates into tyranny."[60]

The decennial Census requirement in Article I, Section 2 was explicitly designed to avoid entrenchment and malapportionment that would preclude a government chosen by the People and responsive to the People. Edmund Randolph, who introduced the Census Clause, argued that it was necessary because the initial apportionment of representatives "placed the power in the hands . . . which could not always be entitled to it," and "this

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[57] *See* U.S. CONST. art. I, § 2, cl. 1 (settling on two-year terms); *see also* THE FEDERALIST NO. 57, *supra*, at 384 (James Madison) ("The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.").

[58] THE FEDERALIST NO. 35, *supra*, at 221 (Alexander Hamilton).

[59] *Id.* NO. 57, at 386 (James Madison).

[60] *Id.* at 387.

power would not be voluntarily renounced."[61] The Census was pointedly aimed at representation. For example, George Mason observed that, without the Clause, "the Legislature would cease to be the Representatives of the people": If the Legislature were not constrained to redistribute representation in the future so that a majority of the people could elect a majority of the Legislature, then "the power w[oul]d be in the hands of the minority, and would never be yielded to the majority,"[62] which would "complain from generation to generation without redress."[63]

The Elections Clause in Article I in the first instance gives state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for the House and Senate.[64] From the beginning, the Framers were focused on ways it might be abused. Two delegates from South Carolina—a notably malapportioned state, with the larger plantations near the Atlantic Coast wielding unequal power over the state's legislative districting[65]—insisted that the states exclusively should be relied on to regulate districting.[66] Madison responded by warning that states would manipulate rules and districting for partisan political ends:

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[61] RECORDS, *supra*, at 579.

[62] *Id.* at 586.

[63] *Id.* at 578.

[64] U.S. CONST. art. I, § 4, cl. 1.

[65] *See* RAKOVE, *supra*, at 223.

[66] 5 ELLIOT'S DEBATES, *supra*, at 401.

> "It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district[;] these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the representation in the legislatures of particular states, would produce a like inequality in their representation in the national legislature, as it was presumable that the counties having the power in the former case would secure it to themselves in the latter."[67]

At the state conventions, the Clause was the subject of much debate. The Massachusetts Convention, for example, debated it over two days. Theophilus Parsons worried that state legislatures might, upon the influence of a faction, "introduce such regulations as would render the rights of the people insecure and of little value."[68] More specifically, Parsons imagined state legislatures "might make an

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[67] *Id.* at 401-02.

[68] 2 *Id.* at 27.

unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors."[69] The historical record demonstrates a clear concern at the Framing that state legislatures would overreach in ways that would dilute the vote and erode the representative nature of the new government through partisan entrenchment. As this Court has emphasized, the Elections Clause was *not* meant to give state legislatures authority to "dictate electoral outcomes." *See Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)).

The North Carolina Appellants and their *amici* argue that the Framers dealt with these concerns exclusively by vesting oversight in Congress. They argue—with no citations to the historical record—that the Framers through the Elections Clause not only assigned to Congress the primary responsibility for overriding state legislature misconduct in election redistricting, but affirmatively rejected any role for the federal judiciary. *E.g.*, Brief for Appellants at 2, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019) ("inappropriate for federal courts"); *id.* at 4; *id.* at 21 ("affirmatively inappropriate"); Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants at 3-4, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019) ("necessarily excludes"); *id.* at 6 ("denies"); *id.* at 17 ("[d]eprives"); *id.* at 23 (courts as "threats"). Appellants assert it "never occurred to

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[69] *Id.*

anyone in the framing generation" that there would ever be any role for the courts in addressing apportionment. Brief for Appellants, *supra*, at 34; *see also id.* at 5, 32-33; Brief of Speaker Michael C. Turzai, *supra*, at 9. One *amicus* goes so far as to argue that "the Elections Clause forecloses judicial intervention on political grounds under *any* constitutional provision." Brief of Speaker Michael C. Turzai, *supra*, at 4.

These arguments misconstrue the historical record. Many of the delegates were worried that *Congress* would abuse its power under the Elections Clause to entrench itself. Some opponents of the Clause argued that it could give Congress the ability to "perpetuate itself indefinitely by cancelling elections."[70] Others were worried that the Clause would give Congress undue influence over the outcome of elections. For example, Charles Turner voiced the concern at the Massachusetts Convention that Congress could change the place of elections such that "representatives chosen will not be the true and genuine representatives of the people, but creatures of the Congress; and so far as they are so, so far are the people deprived of their rights, and the choice will be made in an irregular and unconstitutional manner."[71]

Therefore, although the Framers settled on Congress as the first line of defense if the *states* abused their power, it is unlikely, given the concerns

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[70] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 173 (2010).

[71] 2 ELLIOT'S DEBATES, *supra*, at 30.

about Congress, that the Framers saw Congress as the *only* defense. To the contrary, there is historical evidence that at least some expressly contemplated that the courts would intervene. For example, at the North Carolina Convention, John Steele assuaged concerns about Congress and the Elections Clause by noting "[t]he *judicial power* of that government is so well constructed as to be a check" and "[i]f the Congress make laws inconsistent with the Constitution, *independent judges will not uphold them*, nor will the people obey them."[72] That prediction of independent judges protecting the right to an effective vote has come true, as reflected in this Court's decisions regarding one-person one-vote. *See, e.g.*, *Wesberry*, 376 U.S. at 18.

The Framers took great care in establishing a representative government—one by the People and for the People. Fearing precisely the harms to that ideal government that partisan gerrymandering brings about, they provided protections throughout the Constitution—in Article I and the First Amendment (and subsequently the Fourteenth Amendment). And, as discussed next, in Article III the Framers created the system of checks and balances pursuant to which the judiciary could intervene if necessary when those provisions are violated.

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[72] 4 *Id.* at 71 (emphasis added).

III. THROUGH ARTICLE III, THE FRAMERS ESTABLISHED THE JUDICIARY AS AN IMPORTANT BULWARK AGAINST LEGISLATIVE OVERREACH AND MAJORITARIAN ENTRENCHMENT

Although Appellants and their *amici* argue that the Framers affirmatively intended to preempt any judicial review of congressional redistricting, such claims are demonstrably ahistorical. As noted above, the debates regarding the Elections Clause in particular included reference to the role of an independent judiciary. More generally, the Framers through Article III established the judiciary as an "impenetrable bulwark" against assumptions of power and violations of the Constitution. Throughout history, partisan gerrymandering has been publicly denounced as antithetical to the American vision of representative government, and there is no historical reason to suggest the Framers intended to eliminate any role for the judiciary in preventing improper legislative entrenchment.

A. The Framers Saw the Judiciary as a Means To Protect the People Against Abuses of Power and Violations of Constitutional Rights by the Legislature

Anticipating that elected representatives might attempt to augment their power or enact laws in contravention of the Constitution, the Framers designed a system of government in which the

judiciary acts as a check on legislative overreach.[73] The Founding generation had witnessed the effects of entrenchment of partisan legislative factions in England, which led them to reject the English approach of the legislature and judiciary being part of a single branch.[74] Instead, the judiciary would be an independent branch, "an impenetrable bulwark against every assumption of power in the legislative or executive."[75] At the ratifying conventions, several delegates emphasized the importance of judicial review in providing a check on encroachments by both the state and federal legislatures.[76] This power-

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[73] *See* THE FEDERALIST NO. 78, *supra*, at 526-27 (Alexander Hamilton) (recognizing that "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"); *see also* Adams, *Thoughts on Government*, *supra*, at 407 ("The dignity and stability of government in all its branches . . . depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both . . . .").

[74] *See* THE FEDERALIST NO. 81, *supra*, at 542-45 (Alexander Hamilton).

[75] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

[76] *See* 2 ELLIOT'S DEBATES, *supra*, at 196 (Oliver Ellsworth of Connecticut) ("This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. . . . [I]f the states go beyond their limits . . . independent judges will declare it [void]."); *id.* at 445 (James Wilson of Pennsylvania) ("[U]nder this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department.").

checking function of the judiciary was necessary to protect the People; as Hamilton explained, the courts were "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[77]

The Founding generation expected that the judiciary would protect the People from violations of constitutional rights at the hands of the legislature. At the North Carolina Convention, for example, William Davie remarked that "there are certain fundamental principles in [the Constitution], both of a positive and negative nature, which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular states," but recognized "[w]ithout a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened."[78] Madison echoed this expectation in his speech proposing the Bill of Rights, explaining that independent courts would act as "the guardians of those rights" and would "be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[79] It was the "*duty*" of an independent judiciary "to declare all acts contrary to the manifest tenor of the constitution void" because "[w]ithout this, all the

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[77] THE FEDERALIST NO. 78, *supra*, at 524-25 (Alexander Hamilton).

[78] 4 ELLIOT'S DEBATES, *supra*, at 156.

[79] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

reservations of particular rights or privileges would amount to nothing."[80]

B. Legislative Partisan Gerrymandering Has Been Denounced Since the Founding as an Unconstitutional Abuse of Power

Appellants place significant weight on the fact that partisan gerrymandering has occurred throughout American history, yet was not brought before the courts for some time. *See* Brief for Appellants, *supra*, at 3-6, 37. But the use of a practice throughout history, even on a widespread basis, does not immunize the practice from judicial review. The long lead-up to the one-person one-vote cases provides a useful illustration of this concept.

Many gerrymanders in American history, several of which Appellants rely on, involved malapportionment—districts of unequal population size—and would therefore be impermissible today.[81]

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[80] THE FEDERALIST NO. 78, *supra*, at 524 (Alexander Hamilton) (emphasis added).

[81] Of course, the pre-Revolution gerrymanders raised by Appellants predate a formal requirement of apportionment in proportion to population. Before the writing of state constitutions, the legislatures simply assigned a certain number of representatives to geographic units without regard for the number of people in each unit. *See* ZAGARRI, *supra*, at 37-39. In many of their first state constitutions, Americans remedied this problem by adopting the principle that equal numbers of people deserved equal numbers of representatives. *See, e.g.*, PA. CONST. § 17 (1776). This was an important contribution to the

For example, Appellants point to what they call the first known gerrymander "on this side of the Atlantic," in the early 1700s in Pennsylvania. *See* Brief for Appellants, *supra*, at 3. That gerrymander involved an attempt to dilute the political power of Philadelphia voters by giving the city fewer representatives than other counties, despite the city's growing size.[82] Appellants next reference a 1732 gerrymander in North Carolina. *See* Brief for Appellants, *supra*, at 3. In that instance, the Governor had manipulated voting boundaries to promote his own agenda, in part by forming some "precincts . . . which contained not more than thirty families."[83]

Appellants go on to say that "partisan gerrymandering did not end with the ratification of the Constitution." Brief for Appellants, *supra*, at 5. They do not refer to specific gerrymanders, but a review of the history reveals that many post-ratification gerrymanders also involved districting that today would violate the one-person one-vote principle.[84] Yet despite a historical record spanning

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development of representative ideals—one that was ultimately incorporated into the structure of the House of Representatives.

[82] *See* ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 26-28 (1907).

[83] GRIFFITH, *supra*, at 28.

[84] *See* GRIFFITH, *supra*, at 42-43 (New York Federalist gerrymander in 1789); *id.* at 47-50 (New Jersey Federalist gerrymander in 1798); *id.* at 53-54 (Philadelphia Democratic gerrymander in 1802); *id.* at 79-80 (New Jersey Federalist gerrymander in 1812); *id.* at 94 (Maryland Democratic gerrymander in 1816); DAILY OHIO ST. J. (Aug. 12, 1842) (Ohio Democratic gerrymander in 1842).

more than 200 years, this Court in *Baker v. Carr*, 369 U.S. 186 (1962), ultimately "confronted this ingrained structural inequality" and ended the "[j]udicial abstention [that] left pervasive malapportionment unchecked." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016). This Court's recognition that unequal-population gerrymanders are unconstitutional and justiciable, and its ability in the decades since to decide such claims (as well as racial gerrymandering claims), undermines the ahistorical suggestion that the Framers saw no role for the judiciary in this sphere.

Moreover, partisan political gerrymandering throughout history has been routinely denounced as unconstitutional, dangerous to the republic, and a violation of citizens' prized right of representation. The first gerrymander in the American republic is generally thought to be Patrick Henry's attempt in 1788 to deny James Madison a congressional seat by grouping Madison's home county in a district with counties believed to be more favorable to Henry's anti-Federalist cause. Although the scheme did not result in an irregularly-shaped district (as some other early gerrymanders did), the Founding generation greeted it with outrage. The press decried the scheme as a violation of the right of a free people to choose their representatives and a destruction of the majority's ability to decide.[85] The practice received still greater attention, and renewed condemnation, when Elbridge Gerry signed the notoriously outrageous 1812 districting bill that would give gerrymandering its

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[85] GRIFFITH, *supra*, at 40-41.

name.[86] Public outcry was immediate and fierce. The newspaper that published the famous political cartoon depicting the "Gerry-Mander" also decried it as a partisan violation of "the Rights of the People" and declared:

> "This Law inflicted a grievous wound on the Constitution,—it in fact subverts and *changes our Form of Government*, which ceases to be *Republican* as long as an *Aristocratic* House of Lords under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the *Majority*."[87]

Several counties issued resolutions condemning the gerrymander, and towns sent remonstrances to the legislature denouncing it as unconstitutional.[88] Federalists decried it as a threat to the safety of republican institutions, which contravened the Constitution and the Bill of Rights by usurping the majority's prerogative to govern.[89] Later that decade, Massachusetts Federalists took control of the state legislature and—still viewing the 1812 gerrymander as a grave injustice, but evidently believing it justified their engaging in similar actions—passed a new

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[86] *Id.* at 16-19.

[87] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

[88] GRIFFITH, *supra*, at 70-71.

[89] *Id.* at 71.

gerrymander to favor their party.[90] The Democratic-Republicans promptly denounced the Federalists' gerrymander as importing the English "rotten borough system."[91]

This pattern continued through the Fourteenth Amendment era and beyond. As the nature of representation increasingly came to be viewed as a national concern in the post–Civil War era, the topic of gerrymandering increasingly was raised by federal officeholders. For example, in 1870, future president James Garfield, then a congressman, acknowledged that he was a beneficiary of gerrymandering in Ohio yet emphatically declared that "no man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice, produce such results as these."[92]

Thus, from the ratification of the Constitution through the passage of the Fourteenth Amendment and beyond, partisan gerrymandering has been forcefully denounced as unconstitutional and contrary to the American vision of representation. Part of that vision was the independent judiciary's role as the "impenetrable bulwark" against legislative partisan entrenchment that sought to undermine effective representative government.

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[90] *Id.* at 88.

[91] *Id.* at 91 (internal quotation marks omitted).

[92] CONG. GLOBE, 41st Cong., 2d Sess. 4737 (1870).

C. Modern Partisan Gerrymandering Enhances the Threat to the Founding Principles of American Democracy

Extreme partisan gerrymanders today are distinct from gerrymanders of the past in ways that more directly threaten core constitutional values of actual, effective representation. Today's partisan gerrymanders, facilitated by big data and sophisticated targeting technology, create the potential for persistent entrenchment—a powerful advantage persisting for multiple election cycles despite intervening shifts in public opinion. Such a result represents the Founding generation's worst fears of an unaccountable government.

Gerrymanders in earlier periods of American history were often crude and ineffective as mechanisms of entrenchment. Gerrymanders built on county-level voting data were not particularly robust, and parties routinely miscalculated their relative levels of support.[93] The greater quantity and quality of demographic data available today allow parties to target voters more precisely and gauge their support more accurately. Today, the nation faces what

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[93] *See, e.g.*, ZAGARRI, *supra*, at 115-18 (discussing repeated miscalculations that hindered New Jersey Federalists' early attempts to gerrymander congressional districts). Likewise, in the late nineteenth century, the crude nature of the data and tools available for partisan gerrymandering created volatility that rendered partisan gerrymanders impermanent. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 45 fig.1.7 (1999) (depicting high levels of volatility in selected congressional elections from 1864 to 1900).

commentators have described as "the specter of elected officials and party officers using high-end technology and increasingly fine-grained data about voters to create maps that lock in their advantage and shut out opponents for years."[94]

According to the findings of the courts below, the partisan gerrymanders at issue in these cases are examples of this phenomenon. In Maryland, a political consulting firm used sophisticated software to draw a map that would create a 7-1 Democratic advantage by flipping the Sixth Congressional District from a predicted "Solid Republican" to "Likely Democratic" score—the largest swing of any district in the country. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 507 (D. Md. 2018). The Sixth District did flip, and a Democratic candidate was elected in the three subsequent elections. *Id.* at 519. In North Carolina, the map drawer similarly used software that relied on past voting data to draw lines according to partisan advantage; the committee predicted and ultimately obtained a 10-3 Republican advantage. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805-07, 810 (M.D.N.C. 2018).

Thus, modern partisan gerrymanders can successfully accomplish what the Framers sought to avoid—political entrenchment of partisan factions that suppresses effective representational rights. A legislative coalition safe in the knowledge that it could lose every swing seat and yet maintain control of the legislature does not satisfy the Founding generation's

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[94] Jerry H. Goldfeder & Myrna Pérez, *A Tale of (at Least) Two Gerrymanders*, N.Y.L.J. (June 22, 2017).

vision of representative government. When gerrymandering "render[s] Representatives responsive to the state legislatures who drew their districts rather than the People," *id.* at 940, it effectively defeats the historic vision of actual representation. Further, the durable nature of today's extreme partisan gerrymandering, permitting a partisan faction effectively to entrench itself throughout the decennial redistricting cycle and control the tools of entrenchment for the next one, means it is exceptionally difficult, or even impossible, for disadvantaged voters to remedy their constitutional injury through the political process. This is the very risk that the Founding generation identified and sought to avoid: that voters targeted by the practice will "complain from generation to generation without redress."[96]

* * *

As this Court said in *Wesberry*, 376 U.S. at 17, relying heavily on the Framers' ideals, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." The Constitution "leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.* at 17-18. As Alexander Hamilton expressed it, the Constitution does not

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[96] RECORDS, *supra*, at 578 (statement of George Mason).

"enable the representatives of the people to substitute their *will* to that of their constituents."[96]

Extreme partisan gerrymandering runs counter to the Founding generation's most fundamental aspiration: to create a full, fair and effective system of political representation that reflects the will of the People. The judiciary was designed to function as an "impenetrable bulwark" against infringements on the People's right to representation. Without the courts' protection, legislative assemblies might cease to "be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. The constitutional right of each citizen to "an equally effective voice," *id.*, in the election of members of the legislature would be rendered illusory. As the historical record demonstrates, only a system free of partisan gerrymandering conforms to the American vision of representative, responsive democracy.

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[96] THE FEDERALIST NO. 78, *supra*, at 525 (Alexander Hamilton).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decisions below.

Respectfully submitted,

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APPENDIX

APPENDIX

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No. 18-422, 18-726

In The Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, to champion the development of fair and realistic legal solutions, and to assist members on the vast and cutting-edge legal issues facing local government lawyers today. The IMLA provides the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at

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[1] Appellants and appellees have consented to the filing of this brief through blanket consent. Pursuant to Rule 37.6, counsel represents that no part of this brief was authored by counsel for any party, and no person or entity made any monetary contribution to the preparation or submission of the brief.

present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization whose 11,000 members serve as appointed chief executives and assistants for cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional management of local governments throughout the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," this Court has held that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Reynolds v. Sims*, 377 U.S. 533, 555, 560 (1964) (quoting *Wesberry*, 376 U.S. at 17-18).

Indeed, almost immediately after establishing the "one-person one-vote" doctrine, the Court recognized that this vital principle might apply with equal force to redistricting schemes that "designedly . . . would operate to minimize . . . the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). For "[t]he question of the gerrymander is the other half of *Reynolds v. Sims*." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part). "[T]he astute drawing of district lines [can] make[] [a] district either heavily Democratic or heavily Republican . . . . Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be." *Id.* at 176-77. As Justice Douglas observed: "The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it." *Id.* at 177.

Amici represent local communities—cities, counties, and towns—across the United States. Such localities and municipalities play an essential part in our civic society, our democratic system, our constitutional order, and in the formation of distinct communities of interest. These communities are as diverse and unique as they are integral to the life, liberty, and happiness of a pluralistic, self-governing people.

Partisan gerrymandering "defeat[s] [and] circumvent[s] the sentiments" of these communities, *id.*, carving up localities and cobbling together bits and pieces of neighborhoods for no legitimate government purpose. Even when mapmakers manage to keep some municipalities intact, it becomes "the will of the cartographers rather than the will of the people [that] govern[s]." *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting). Studies have confirmed the unfortunate truth that voters recognized long ago: those who hold the districting pen can foreordain the composition and character of a state's congressional delegation without changing the mind of a single voter.

When the state targets certain segments of the population and suppresses their electoral influence because it disfavors their political beliefs and fears the way they will vote, it denies those voters meaningful representation and leads elected officials to ignore the distinct interests of localities as coherent communities. This is the polar opposite of what this Court has recognized as "[t]he very essence of districting": "to produce a different—a more 'politically fair'—result than would be reached with elections as large." *Gaffney v. Cummings*, 412 U.S. 735, 753

(1973). The fact that the redistricting process is committed to political actors, permits the use of political considerations for legitimate purposes, and "inevitably has and is intended to have political consequences" does not mean that "racial or political groups [may be] fenced out of the political process [or have] their voting strength invidiously minimized." *Id.* at 753-54.

Although this Court has acknowledged that partisan gerrymanders "are incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and has suggested that partisan gerrymandering is not immune to judicial scrutiny, *see Hunt v. Cromartie*, 526 U.S. 541, 551 n.7 (1999) ("This Court has recognized . . . that political gerrymandering claims are justiciable."), it has declined—for decades—to articulate "the standards that would govern such a claim," *id.* This status quo cannot persist. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design.").

In the absence of any judicial remedy, legislators have grown bolder and more brazen in their abuses. This legal "no man's land" not only undermines the rule of law in general, it also spills over into adjacent areas of the law, complicating redistricting doctrine for local government lawyers everywhere. Because

many local governments *also* utilize single-member districts, this ambiguity makes it more difficult than necessary to identify the clear "dos and don'ts" of the redistricting process.

Happily, the Constitution already provides well-worn and intuitive standards that are familiar to cities, counties, and citizens alike. Whether the Court decides to ground partisan gerrymandering claims in the First Amendment, the Equal Protection Clause, or both, everyone readily understands that the Constitution prohibits the government from infringing the right to vote, from singling out citizens for disfavor based on their views, or from enacting laws that target particular groups of citizens for no reason other than disapproving their political beliefs.

Voters understand these principles innately, and attorneys navigate these legal doctrines fluently. By harmonizing the legal standards and evidentiary rules at issue in partisan gerrymandering cases with those found in the rest of redistricting jurisprudence, this Court can provide doctrinal consistency and practical tools to local government lawyers everywhere ahead of the next round of redistricting. The result will be less legal confusion, more compliant maps, and more responsive and accountable representation for voters and local communities across the country.

For these reasons, *amici* respectfully request that this Court affirm the judgments below.

ARGUMENT

I. LOCAL GOVERNMENTS PLAY A VITAL ROLE IN OUR CONSTITUTIONAL ORDER AND IN CREATING DISTINCT COMMUNITIES OF INTEREST

This Court has long recognized the critical importance of political power being exercised at the local level—that is, the level closest to those governed. *See, e.g.*, *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968). Preserving a space for more local governance "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive' by putting the States in competition for a mobile citizenry.'" *Ariz. State Legis.*, 135 S. Ct. at 2673 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

Each of these enduring and essential aspects of governance aptly applies to our nation's great cities, small towns, and rural counties. This makes the views of local governments especially relevant to the instant cases.

To begin, local governments have a distinct ability to reflect the particular needs and interests of diverse communities across the country. As Justice Brandeis famously argued, decentralization can foster innovation in policymaking. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel

social and economic experiments without risk to the rest of the country.").

Just as the fifty states serve as "laboratories of democracy," the thousands of cities and counties throughout our nation innovate with respect to policy in all sorts of substantive areas. Whether tackling public health challenges, advancing economic development, developing novel strategies for environmental protection, grappling with the challenges of public safety, or addressing so many other policy challenges, our cities, towns, and counties have been true laboratories of democracy, with innovations at the local level often later being adopted by states and the national government when they have succeeded (and cabined when they fail). *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219 (2014) (discussing dynamics of local innovation and policy diffusion). Ensuring that all three levels of governance remain empowered in our federal system is vitally important to preserving this experimentation and accountability.

In addition, municipalities offer uniquely democratic benefits of participation. From the original New England town meetings of the founding generation—a tradition that still endures—to communities across the country today, opportunities for ordinary citizens to participate and interact with local officials abound at the local level in ways not possible at the state or federal level. *See* 1 Alexis de Tocqueville, Democracy in America 174 (H. Reeve trans. 1961) ("It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the

provincial assemblies."). In part, this is because there generally are far fewer constituents for each elected official even in our largest global cities, compared to that of state and national politics. Diller, *supra*, at 1257-58. These representation ratios allow local leaders to respond more directly to the people who elect them.

Local governments enhance democracy in another related sense, as Alexis de Tocqueville highlighted when he noted that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." De Tocqueville, *supra*, at 76. Service on one of our nation's countless city councils, school boards, county commissions, and myriad other local bodies provides an invaluable training ground for public leaders. Eventual leaders in our state and national governments often learn their earliest lessons in the crucible of local government.

Finally, a certain amount of healthy competition among cities promotes efficiency and accountability in governance. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L.J. 72, 97 (2005) (reviewing empirical evidence that "migration patterns between city and suburbs are significantly affected by tax levels and investment in education"). Our nation's cities, towns, and counties have the flexibility to craft distinct policies to respond to the needs and preferences of mobile residents.

For these reasons and more, county and city boundaries play a key part in the redistricting process. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of

interest, particularly when the subdivision plays an important role in the provision of governmental services." *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring). Respect for locality boundaries can improve civic engagement, responsiveness, accountability, and avoid confusion for voters, candidates, and election administrators alike. *See id.* ("[D]istricts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters."). As Justice Powell once wrote:

> Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting. It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Id. at 787 n.3 (Powell, J., dissenting) (internal quotations and citations omitted).

Because localities form a natural "community of interest" with common values and concerns that run deeper than party label, they often bring tailored, apolitical solutions to local policy problems. And just as this Court has rightly associated the decentralization and devolution found in our federal system with unique benefits, so too does empowerment of and respect for localities enhance and improve our democracy.

II. PARTISAN GERRYMANDERING DISRUPTS THE REPRESENTATION OF COMMUNITIES AND STIFLES LOCAL DECISION-MAKING

While local governments facilitate civic engagement, responsiveness, accountability, pluralism, local autonomy, and liberty, partisan gerrymandering undermines these critical democratic values.

1. Gerrymandering tears coherent communities of interest apart and strings dissimilar communities together. When a congressional district is "nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State," *id.* at 787, representatives are less attuned to the unique interests of local communities and those communities are less capable of coherently conveying local sentiments "up the chain" to their federal representatives, *see, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 537-38 (E.D. Va. 2015), *affirmed in part and vacated in part*, 137 S. Ct. 788 (2017) (noting that "the splitting of municipal and county jurisdictions drew the ire of citizens, who . . . pointed out the difficulties that citizens have in knowing who to contact, who to hold accountable, and who among several legislators should coordinate or lead the representation of local city and county interests").

The Court has recognized that gerrymanders that "exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines" can "cause[] a severe disruption of traditional forms of political activity." *Bush v. Vera*, 517 U.S. 952, 974 (1996) (O'Connor, J.). In *Vera*, for example, "[c]ampaigners seeking to visit constituents 'had to

carry a map to identify the district lines, because so often the borders would move from block to block'; voters 'did not know the candidates running for office' because they did not know which district they lived in." *Id.*

Both of the partisan gerrymanders before the Court this term dismember established communities of interest and disrupt traditional political activities. In Maryland, "a blatant targeting of . . . the Republicans in Frederick County" led that county to be divided "for the first time since 1840." *Benisek v. Lamone*, 1:13-CV-3233, 2018 U.S. Dist. LEXIS 190292, *86-87 (D. Md. Nov. 7, 2018) (Bredar, J., concurring). One of the plaintiffs testified that voters in the area "were confused about the candidates [and] didn't know who they should be engaging," with Republican organizers spending most of their outreach time simply "trying to ascertain the voter's district." *Id.* at *29 (majority opinion).

Meanwhile, in North Carolina, Appellants' own expert "conceded that the 2016 plan divided numerous political subdivisions," with all but one of the districts "divid[ing] municipalities and communities of interest along partisan lines." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 883, 901, 903, 906, 907, 910, 912, 913, 915, 917, 919, 920, 922 (M.D.N.C. Aug. 27, 2018) (discussing statewide and district-specific examples). Here, too, "[v]oters and advocacy organizations elected not to participate in congressional races because they believed they could not 'have a democratic—small 'D'—democratic impact." *Id.* at 931.

Studies suggest these are more than mere anecdotes. "When a district plan is skewed against a party, its candidates contest fewer legislative seats

and have worse credentials when they do run, its donors contribute less money, and its voters are not as supportive at the polls." Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* 20-21 (unpublished manuscript available at https://ssrn.com/abstract=3330695). In short, the associational harms one might expect from partisan gerrymandering are quite real. *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (suggesting that gerrymanders may cause "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office").

2. Even when mapmakers manage to hew to municipal boundaries, partisan gerrymandering can still inflict harm and undermine local policies, interests, and decision-making. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement" to establish a gerrymandering claim). This is because the combination of political polarization and partisan gerrymandering restricts the space for pragmatic community compromises and interferes with the representation of localities—with their distinct sets of preferences—as a whole.

Polarization "means that representatives in Congress nearly always vote the party line." Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, Expert Report in *League of Women Voters of Pa.*, et al., *v.*

Commonwealth of Pennsylvania, No. 261 MD 2017, 15-16 (Pa. Commw. Ct. Nov. 27, 2017). As this has become more common, studies have shown an increasingly "muted responsiveness to localities" among representatives. *Id.* (citing Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 Am. J. of Pol. Sci. 136 (2001)). As a result, "polarization exacerbates the effects of gerrymandering on the political process." *Id.* at 16 n.10.[2]

In other words, partisan gerrymandering is about more than "bloodless concepts like seat and vote shares;" it's about the "distort[ion] [of] legislative representation—the beating heart of a democracy." Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115, 2118 (2018). Mapmakers possess the ability to swing the ideology of a state's congressional delegation dramatically—"*all without changing the mind of a single voter.*" *Id.* at 2120. *See also* Warshaw, *supra*, at 22-23. And because representatives increasingly vote the party line based on national issues rather than local concerns, citizens who are targeted by partisan gerrymanders "are artificially deprived of the opportunity to . . . have their views represented in Congress." *Warshaw*, *supra*, at 15. This has a profound impact on nuanced, local issues

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[2] Although polarization compounds the harms of gerrymandering, "[t]he consensus among Political Scientists using pre-2011 redistricting period data is that gerrymandering did not cause th[e] [rise in] polarization [since 1970]. There is not yet a consensus about the effect of redistricting on polarization in recent years." Warshaw, *supra*, at 16 n.10.

and whether voters who belong to distinct communities of interest have any voice *as a member of that local community of interest*.

To be sure, this Court made clear in *Gill v. Whitford* that "[a] citizen's interest in the overall composition of the legislature" and in the "policies adopted by the legislature" may not give rise to a claim. 138 S. Ct. at 1931. But if those interests are "embodied in [the citizen's] right to vote for his representative," *id.*, then it is all-the-more vital that the Court vigorously protect the foundational right from which this democratic representation flows.

First-hand testimony from voters in the cases before the Court reflect the damaging downstream consequences that occur when states violate these rights. As one of the plaintiffs from Maryland testified, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time." *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *71. Voters in North Carolina had similar sentiments, expressing that "they felt their vote didn't count." *Rucho*, 318 F. Supp. 3d at 931. Whether one is a Maryland Republican or a North Carolina Democrat, gerrymandering strips disfavored voters of the opportunity to have their unique voice heard in the halls of Congress.

The diminished responsiveness of representatives to *all* of their constituents is not simply troubling as a matter of structural principles, institutional stability, and enduring constitutional values; it also distinguishes modern cases from the past. One repeated concern of the Court has been accepting—*without any evidence*—the notion that representatives will not be responsive to the needs of

their constituencies as whole. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("An individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters."); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 469-70 (2006) (Stevens, J., dissenting) ("[T]his Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.").

As overwhelming statistical and testimonial evidence continue to prove, gerrymandered districts insulate representatives and absolve them of the need to give any weight to the views of those voters who have been stripped of meaningful electoral power. Thus, even when local municipal boundaries are not breached, partisan gerrymandering robs county and city constituencies of the opportunity to have their unique and diverse perspectives heard and dampens congressional concern for local community interests.[3]

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[3] This disconnect manifests in the policies enacted at the both the federal *and state* level, with local prerogatives increasingly steamrolled by legislators more focused on advancing a single ideology than providing space for constituents with diverse views to enact locally tailored solutions based on the needs of the community. For instance, in *Gill v. Whitford*, several *amici* provided examples of the growing number of local policies

In short, partisan gerrymandering frustrates the preservation of local government interests, restricts the freedom of local governments to pursue policies suited to their constituents, and impedes the ability of voters who belong to distinct communities of interest to have their views heard in Washington.

III. *AMICI* SUPPORT A CLEAR AND COHERENT APPROACH TO REDISTRICTING LAW THAT RELIES UPON INTUITIVE STANDARDS AND EVIDENCE

As organizations representing local governments and local government lawyers, *amici* recognize the need for—and advocate for—realistic legal solutions to complex legal problems. Here, too, *amici* believe that the partisan gerrymandering cases before the Court offer an opportunity to clarify the state of the law, apply well-established legal standards, and provide

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being preempted by state legislatures in states with extreme partisan gerrymandering. *See generally* Brief *Amici Curiae* of International Municipal Lawyers Association, *et al.*, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017).

Because gerrymandering "dramatically influences the representational distortion of House delegations," Stephanopoulos, *supra*, at 2144, and polarization continues to grow, local concerns have increasingly fallen by the wayside on Capitol Hill as well, *see* J.B. Wogan, *States and Localities are Losing Their Influence in Washington*, Governing (June 2014), available at http://www.governing.com/topics/politics/gov-states-localities-losing-influence.html (last accessed Jan. 18, 2019). Because Congress and state legislatures alike wield the power to override, curtail, or disregard the policies and positions of municipalities across the country, these bodies must possess the utmost democratic and constitutional legitimacy if their intrusions on local autonomy and policymaking are to be justified.

workable evidentiary guidance to courts and lawyers across the country ahead of the next major round of redistricting in 2021.

A. The Ambiguous Treatment of Partisan Gerrymandering Claims Complicates Redistricting Law for Local Governments

Although many redistricting cases and analyses focus on state legislative and congressional representation, local governments (and local government lawyers) must also navigate the various strands of this Court's redistricting case law. From one-person one-vote cases to racial dilution and racial sorting cases, localities often deal with cutting-edge legal questions before claims are brought on a wider basis.[4] In fact, challenges raised to city and county redistricting decisions are especially useful to the development of redistricting case law because they are

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[4] *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (one-person one-vote case regarding population deviations based on illegitimate consideration of partisan advantage); *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019 (9th Cir. 2016) (equal protection and *Anderson-Burdick* case regarding city's hybrid city council system utilizing ward-level primaries and at-large general election); *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011) (one-person one-vote case regarding use of citizen-voting-age population versus total population); *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002) (racial gerrymandering case); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (racial gerrymandering case regarding whether districts' shapes and demographics provide adequate circumstantial evidence to prevent summary judgment); *Calvin v. Jefferson Cnty. Bd. of Cmm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) (one-person one-vote case regarding use of prison populations in calculating equal population).

some of the few challenges that are routed through the U.S. Courts of Appeals and subject to this Court's discretionary jurisdiction. *See* 28 U.S.C. § 2284(a) (convening three-judge district courts "when an action is filed challenging the constitutionality of the apportionment of *congressional districts* or the apportionment of any *statewide* legislative body") (emphasis added).[5]

And while redistricting law has a reputation for being complex,[6] a great deal of that complexity is due to this Court's ambiguous treatment of prior partisan gerrymandering claims. *See generally* Brief of *Amici Curiae* Law Professors, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). Because the lack of a claim leaves open doctrinal gaps in racial gerrymandering law and the one-person one-vote doctrine, mapmakers and litigants alike engage in "legal arbitrage," distorting the body of law that does exist by using it to fight about conduct governed by a body of law that does not exist. *See* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After* Gill v. Whitford, 95 Ind. L.J. (forthcoming 2020) (manuscript at 60, available at https://ssrn.com/abstract=3334370) [hereinafter Parsons, *Gerrymandering & Justiciability*]. Even if

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[5] *See, e.g.*, *Public Integrity Alliance*, 836 F.3d 1019 (9th Cir. 2016), *cert. denied*, 197 L. Ed. 2d 518 (2017); *Lepak*, 453 F. App'x 522 (5th Cir. 2011), *cert. denied*, 569 U.S. 904 (2013); *Chen*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

[6] Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization In Redistricting and Voting Cases*, 59 Wm. & Mary L. Rev. 1837, 1852 (2018) ("The most charitable thing to say about the current state of racial gerrymandering law is that it is a big mess.").

the Court were to deviate from its default rule that redistricting laws are justiciable, *Baker v. Carr*, 369 U.S. 186 (1962),[7] this doctrinal vacuum would remain, leaving mapmakers and litigants to "shadowbox" over the real issues at stake, *see* Hasen, *supra*, at 1879.

In short, the law's internal inconsistency, ambiguity, and incompleteness provides the greatest headache to local government lawyers faced with the task of advising clients on the "dos and don'ts" of redistricting law, not the flexibility of any particular "do" or the rigorousness of any specific "don't." Crafting a claim (even a demanding one) that completes the redistricting-law picture would not add complexity but ease it.

As this Court has remarked, "clear distinctions" are preferable to "delphic alternative[s]" where "structural safeguards" and institutional boundaries are at issue. *See Plaut v. Spendthrift Farm, Inc.*, 514

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[7] Creating a new justiciability exception for partisan gerrymandering claims would require a substantial (and troubling) shift in this Court's political-question jurisprudence. *See generally* Brief for Constitutional Law Professors as *Amici Curiae*, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). As the district court in *Rucho* observed, "a majority of the Supreme Court *never* has found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." 318 F. Supp. 3d at 842 n.19.

Indeed, the two cases before the Court are perhaps "the most significant political-question doctrine case[s] of our generation." Parsons, *Gerrymandering & Justiciability*, *supra*, at 3. Before significantly expanding that doctrine, the Court should consider carefully the institutional, federalism, and separation-of-powers implications of such a change. *See generally id.* (arguing that the modern political question doctrine is incompatible with the limits and obligations imposed on judicial power by Article III).

U.S. 211, 239-40 (1995). Vague and equivocal treatment "simply prolongs doubt and multiplies confrontation." *Id.* at 240. The Court's approach to partisan gerrymandering has done precisely this, blurring the lines of lawful behavior and drawing legislators out beyond constitutional boundaries. As such, redistricting law would benefit from advice familiar to local government attorneys everywhere: "Good fences make good neighbors." *Id.*

B. Constitutional Doctrine Already Provides Fair and Intuitive Standards Familiar to Local Government Lawyers

As the district court in *Rucho* noted, partisan gerrymandering "violates a number of well-established constitutional standards—that the government act impartially, not infringe the right to vote, and not burden individuals based on the exercise of their rights to political speech and association." 318 F. Supp. 3d at 853. Whether the Court looks to the Equal Protection Clause, the First Amendment, or both, the Constitution provides well-worn, intuitive standards that are familiar to local governments, local government attorneys, and the public.

Applying these principles to partisan gerrymandering is not some adventuresome departure from this Court's case law, but rather a long-overdue correction that harmonizes the Court's approach to partisan gerrymandering claims with the rest of its fundamental constitutional doctrines and its overall approach to judicial neutrality.[8] As Circuit Judge

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[8] *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116

Niemeyer observed below in *Benisek*, "[C]itizens have no constitutional right to be assigned to a district that is likely to elect a representative that shares their views," but "they do have a right . . . not to have the value of their vote diminished *because of* the political views they have expressed." 2018 U.S. Dist. LEXIS 190292, at *46.

This antipathy to viewpoint-targeting is standard constitutional fare and "typical of First Amendment violations in other contexts." *Id.* (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982)). The Court does not uphold judicial independence and impartiality by steering clear of such cases, even when they involve political actors or political issues. Rather, the Court protects the Constitution and preserves its own public status by rigorously and consistently honoring these constitutional mandates. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236, 259-60 (2018) (arguing that establishing limits to partisan gerrymandering could help *protect* the Court "against

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Mich. L. Rev. 351 (2017); *Rucho*, 318 F. Supp. 3d at 927 ("How can the First Amendment prohibit the government from disfavoring certain viewpoints, yet allow a legislature to enact a districting plan that disfavors supporters of a particular set of political beliefs? How can the First Amendment bar the government from disfavoring a class of speakers, but allow a districting plan to disfavor a class of voters and candidates? How can the First Amendment protect government employees' political speech rights, but stand idle when the government infringes on voters' political speech rights? And how can the First Amendment ensure that candidates ascribing to all manner of political beliefs have a reasonable opportunity to appear on the ballot, and yet allow a state electoral system to favor one set of political beliefs over others?").

charges of partisanship" and "save the Court from having to referee . . . secondary partisan fights" over other manipulations of electoral rules).

Relying on such established principles would provide clear rules that are second-nature to local government attorneys, understandable to mapmakers, and obvious to the average citizen.[9] Just as political affiliation can be considered in hiring for *policy-level* government jobs (where the government has a legitimate interest), but not in hiring for *non-policy-level* government jobs (where it does not), *see Vieth*, 541 U.S. at 294 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)), so too can political affiliation be used to advance legitimate redistricting goals (such as consistently creating competitive districts [10] or

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[9] As Chief Justice Roberts noted at oral argument in *Gill v. Whitford*, any decision provided by the Court must be intuitive and sound in clear constitutional principles, lest the "intelligent man on the street" doubt the explanation, thereby risking damage to the "status and integrity" of the Court. *See Gill v. Whitford*, 16-1161, Oral Arg. Tr. 37:11-38:4 (Oct. 3, 2017). "Far from 'impairing' the reputation of the Court," a clear and principled decision restricting partisan gerrymandering is more likely to be received by the public like the Court's celebrated one-person one-vote doctrine—a rule that ultimately "'enhanced the prestige of the Court.'" Parsons, *Gerrymandering & Justiciability*, *supra*, at 66 (quoting John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 121 (1980)).

[10] Appellants in *Benisek* have argued that altering Maryland's Sixth District created a more "competitive" district. Br. for Appellants, *Lamone v. Benisek*, 18-726, at 6 (filed Feb. 8, 2019). But this Court has frequently reminded redistricting litigants that even *legitimate* redistricting policies cannot survive when they are applied inconsistently or in a discriminatory fashion. *See Brown v. Thomson*, 462 U.S. 835, 844 (1983) (noting that the population variations were "entirely the result of the

"allocat[ing] seats proportionately," *Vera*, 517 U.S. at 964-65 (O'Connor, J.) (citing *Gaffney*, 412 U.S. at 751-54)) but not illegitimate redistricting goals (such as partisan advantage, *see Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective")). These are well-known standards that local governments and local government lawyers throughout the country encounter and incorporate into their policy- and decision-making *every day* across a range of contexts.

Simply put, mapmakers cannot draw districts to favor Republicans just because the mapmaker "think[s] electing Republicans is better than electing Democrats," *Rucho*, 318 F. Supp. 3d at 801, or "set out to draw . . . borders in a way that [is] favorable to the Democratic party" because the mapmaker would like to see more Democrats elected, *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *10. "[T]hat is not a choice the Constitution allows . . . mapdrawers to make." *Rucho*, 318 F. Supp. 3d at 801.[11]

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consistent and nondiscriminatory application of a legitimate state policy"); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (permitting population deviations "only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination").

[11] *See also* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, *supra*; G. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for*

To be sure, introducing clear limits on partisan gerrymandering will require "resetting legislators' expectations about what behavior is constitutionally tolerable." Parsons, *Gerrymandering & Justiciability*, *supra*, at 59. But this does not make intervention impossible, inappropriate, or even uncommon. After all, "how 'justiciable' would First-Amendment issues appear today if the process of interpretation and application had been halted in 1912?" *Id.* (quoting Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 595 (1966)). New doctrine always creates a new equilibrium—this is how the Constitution's vital checks and balances maintain fidelity to that instrument over time.

Some of our Nation's most profound betrayals of that promise have occurred when this Court has failed to fulfill its own role in maintaining that equilibrium. In *Giles v. Harris*, this Court claimed it could not provide "a remedy for political wrongs" and stood idly by in the face of a sweeping disenfranchisement scheme targeting black voters. *See* 189 U.S. 475, 486 (1903). Once the Court "effectively blessed" the approach, it spread to other states and "virtual[ly] eliminat[ed] black citizens from political participation in the South" for well over half-a-century. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 313, 297 (2000). In Louisiana, for example, the number of black voters on the registration rolls dropped from 130,334 to 730 between 1896 and 1910. *See id.* at 303.

Partisan Advantage is Unconstitutional, 24 Wm. & Mary Bill Rts. J. 1107 (2016).

The Court's "narrative of nonintervention" would arise again in *Colegrove v. Green*, where a plurality cited *Giles* with *favor* for the proposition that the issue was not fit for "judicial determination." *See* Charles & Fuentes-Rohwer, *supra*, at 243 (discussing *Colegrove v. Green*, 328 U.S. 549 (1946)). In short, the same arguments raised against partisan gerrymandering claims today have been raised throughout our Nation's history. The Court relied upon them "when it refused to intervene to protect African Americans against widespread racial discrimination in the political process and when it refused to intervene to address the problem of grossly malapportioned districts." *Id.* at 240. The Court would eventually rise to meet the task before it in prior eras, and it must do so again in our own time.

Nor is resetting legislators' expectations imprudent. Quite the contrary. At present, the Court's approach sends a signal to elected officials (and to our next generation of leaders) that there is success to be had in brazen suppression, that there is power to be found in dismantling democracy, and that accountability to the voters is merely the fate of the unsavvy—a fool's game from a bygone age. [12] Representative democracy cannot long survive when the values and principles that make it possible are not

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[12] *See* Zachary Roth, *Voting Fight Shifts to Local Level in North Carolina*, NBC News (Aug. 8, 2016), http://www.nbcnews.com/politics/elections/voting-fight-shiftslocal-level-north-carolina-n625751 (noting that the "head of a leading conservative think tank" in North Carolina is "publicly urging" county election officials to "impose new schemes to limit access to the polls" because "making voting harder is just 'partisan politics'—and that's fair game") (last accessed Jan. 18, 2019).

modeled, imparted, and passed along. Here, an ounce of prevention is worth a pound of cure. By doing "a little now—rein[ing] in partisan gerrymandering," the Court can "do a lot less later—by deterring [other, more extreme] bad behavior it would otherwise have to deal with on the merits." *Id.* at 241.

In fact, the Court faces a unique opportunity this term to minimize litigation, streamline the shift to compliant maps, and reset expectations on a broad scale. *Every* map in the United States—congressional, state, and local—must be revisited following the upcoming 2020 census with or without this Court's guidance. *Amici* believe clarification by the Court would substantially benefit those tasked with drawing new maps following the census and would obviate the need for litigation that localities might otherwise face in future years based on the current amorphous state of the law. With a coherent political gerrymandering claim (or claims) in place, mapmakers will better understand what practices are and are not permissible and local government lawyers will better understand how the various strands of this Court's redistricting jurisprudence interact with one another so as to minimize or eliminate the risk of a lawsuit—political, racial, or otherwise.

C. Permitting a Variety of Evidence Would Improve Administrability

Given the diverse contexts in which a partisan gerrymandering claim could arise, *amici* also urge the Court to employ a consistent evidentiary approach to such claims and permit both plaintiffs and defendants to rely upon a variety of types of evidence in bringing and defending claims. This Court held in *Cooper v.*

Harris that a racial gerrymandering claim rests upon fundamental constitutional standards, and while certain types of evidence (such as an alternative map) may be particularly persuasive or useful in supporting such a claim, the Equal Protection Clause does not demand any "special evidentiary prerequisite." 137 S. Ct. 1455, 1479-80 (2017). This should be the case in the partisan gerrymandering context as well.

Expert evidence, for example, should be permitted to maintain or defend a claim. Such evidence will often be the best evidence available in the pursuit or defense of a partisan gerrymandering claim. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 870-80, 893-94 (relying on "extreme statistical outlier" analyses to support findings of discriminatory intent and effect). Expert evidence has not flummoxed lawyers or judges in racial dilution cases, racial sorting cases, or any other number of cases in which such evidence is deployed. *See id.* at 853-58 (citing examples of judicial reliance on statistical and social science evidence as proof of a violation of a constitutional standard).

Moreover, this kind of evidence is becoming increasingly intuitive and accessible in the redistricting context. It does not take special technical training to understand that a map is an outlier when it is more partisan than 99% of almost 25,000 neutrally-drawn maps. *See id.* at 872. And data and studies about the impact of maps are being made available to the public online with greater and greater frequency.

That said, such studies need not be mandatory, either as a threshold showing or as a defensive necessity. For example, the district court in *Benisek* relied upon the Democratic Performance Index (DPI)

and the Cook Partisan Voting Index (PVI) to find that the plaintiffs' "electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened" by intentional state action. 2018 U.S. Dist. LEXIS 190292, at *59-61. As Judge Niemeyer observed, such analyses are sophisticated and dependable tools in their own right, commonly used by the mapmakers themselves. *See id.* at *13-14 (noting that the DPI metric was used by the consultant that designed Maryland's plan); *id.* at *25-27 (noting that the PVI metric is a "well-respected" measure, and observing that "[w]hen the Cook Report has rated a district 'Solid Republican' on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; . . . when a district has been rated as 'Likely Democratic,' the Democratic candidate has won 94% of the time") (citing James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010)).

Independent, nonpartisan organizations have relied on similar kinds of modeling to demonstrate how gerrymandering can diminish the weight of invidiously targeted votes and undermine voters' equal opportunity to exercise the franchise and impact the political process. For example, FairVote predicted the outcome in 361 of 435 congressional seats ahead of the 2016 election with 100% accuracy using no information other than 2010-2014 election results and whether an incumbent was running in the race.[13]

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[13] FairVote, *Monopoly Politics 2018*, at 2, available at https://fairvote.app.box.com/v/MonopolyPolitics2018 (last accessed Jan. 18, 2019) [hereinafter, "FairVote, *Monopoly Politics 2018*"].

These projections were made in *November 2014—two years* before the election—and were only updated to account for races in which representatives announced they would not be seeking reelection in 2016.[14] "In these districts, the challengers [were] powerless to affect the outcome, regardless of their funding, their qualities as candidates, or their ability to motivate supporters."[15]

Members of Congress elected from such "safe" seats (with a 10-percent advantage, for example) "need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities in their district." *LULAC*, 548 U.S. at 470–71 (Stevens, J., dissenting in part). Pretending that such partisan gerrymanders are not readily identifiable or do not substantially impact the ability of targeted voters to meaningfully affect the political process would be sheer judicial fiction.

Of course, if a representative resides in a district that is particularly favorable based on natural geography or other legitimate redistricting considerations, a partisan gerrymandering claim cannot lie. *See Gill*, 138 S. Ct. at 1933. Similarly, the mere fact that one candidate wins and one candidate loses any given race does not, standing alone, prove or negate the existence of an invidious suppressive effect. This is the same evidentiary approach local government attorneys encounter in the Court's racial dilution case law. *See Thornburg v. Gingles*, 478 U.S.

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[14] Andrew Douglas, *FairVote's Monopoly Politics 2016 Projections Updated*, FairVote (Sept. 22, 2015) http://www.fairvote.org/fairvote_s_monopoly_politics_2016_projections_updated (last accessed Jan. 18, 2019).

[15] FairVote, Monopoly Politics 2018, *supra*, at 2.

30, 57 (1986) (noting that the "loss of political power through vote dilution is distinct from the mere inability to win a particular election").

In other words, it simultaneously can be true that a voter possesses no right to live in any particular district or win any particular election, and that the same voter possesses the right not to have the electoral odds intentionally stacked against her. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting that the Constitution protects citizens "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights"); Kang, *supra*, at 383 ("Party members may not have any constitutional entitlement to electoral success, but they should have a constitutional expectation against the government actively trying to burden their representational interests based on their partisan affiliation and beliefs.").

Evidence need not prove impossibility (and, therefore, an ability to divine the future) in order to prove the existence of a meaningful burden. The evidence need only show that the gerrymander was intended to dilute the influence of the targeted voters and that the gerrymander's success is assured under any likely electoral scenario.[16] These elements can be

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[16] *See Rucho*, 318 F. Supp. 3d at 867 ("[A] plaintiff must show that the dilution . . . is likely to persist in subsequent elections."); *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *60 ("Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so.").

proven through a variety of evidence, and the Court should not foreclose this evidence just as it does not foreclose it in other redistricting cases.[17]

* * *

By adopting a consistent and understandable evidentiary approach and relying on well-established, familiar, and coherent constitutional standards, the Court can provide local governments and their lawyers a clear lay of the land heading into the next round of redistricting, forestall a range of racial and political gerrymandering claims that might otherwise arise,

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[17] That the Court already allows defendants in racial sorting cases to rely upon a range of evidence to prove that politics, not race, predominated in the linedrawing process demonstrates that courts are more than capable of receiving and considering a host of different circumstantial and direct evidence in deciding whether the "essential basis" used in forming a district was racial or political. *See Bethune-Hill*, 137 S. Ct. at 799. If political considerations are found to predominate, the only remaining intent question is whether that political purpose is legitimate or illegitimate. *Compare Easley v. Cromartie*, 532 U.S. 234, 239-47 (2001) (legitimate interest in pursuing a 6-6 "partisan balance"), *with Rucho*, 318 F. Supp. 3d at 808 (illegitimate interest in pursuing a 10-3 "partisan advantage"). This question parallels that already ably managed in the racial gerrymandering context, where courts distinguish between legitimate and illegitimate racial considerations in redistricting. *Compare City of Rome v. United States*, 446 U.S. 156, 177 (1980), *abrogated in part by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (legitimate interest in preventing racial dilution and securing equal opportunity to elect), *with Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (illegitimate interest in racial maximization). *See also Gill v. Whitford*, 16-1161, Oral Arg. Tr. 7:8-9 (Oct. 3, 2017) (JUSTICE GINSBURG: "[Doesn't] max-Republican . . . have the same problem that 'max-Black' did?").

and help preserve the faith and voice of voters residing in distinct, local communities across the country.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgments below.

Respectfully submitted,

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No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF AMICUS CURIAE TEXAS HOUSE REPRESENTATIVE CARL ISETT IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Honorable Carl Isett is a former seven term member of the Texas House of Representatives. Representative Isett was first elected in 1996 and participated in the redistricting process in 2001 and 2003 in the Texas Legislature. During his tenure he served as president of the bipartisan Texas Conservative Coalition, served on the Redistricting Committee, was elected by his colleagues to serve on the steering committee for the House Research Organization, served on the Appropriations Committee, and was chair of Budget Oversight for the Insurance Committee. Moreover, he was a candidate in the 2003 special election for the United States House of Representatives from the 19th district of Texas. Representative Isett is a regular commentator on the political process in Texas, and, owing to his former service with the House Research Organization, regularly advises on the process of enacting legislative proposals.

In advance of the 2020 Census and the 2021 redistricting effort in Texas, Representative Isett believes that Texas must ensure that redistricting faithfully follows all federal constitutional and statutory mandates, a requirement best fulfilled by adherence to the traditional redistricting criteria found in the

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Fair Lines America Foundation, a 501(c)(3) entity, provided funding for the preparation of this brief.

state constitution and procedural guidelines. This means that districts should be sufficiently compact and preserve communities of interest. Representative Isett believes that Article I, § 4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, specifically the state legislatures, and that clear legal guidance on the issue of how much reliance upon traditional redistricting criteria can be taken is crucial to the forthcoming redistricting effort.

SUMMARY OF ARGUMENT

Legislatures have relied upon traditional redistricting criteria to draw districts void of racial criticisms. Traditional redistricting criteria are objective and designed to give legislators non-racial and non-partisan rules to follow. This case presents the clear question of whether the use of objective, traditional districting criteria creates a safe harbor from liability from allegations of partisan gerrymandering. Unless significant legal protection is given to the use of objective criteria in the redistricting process, it will be the courts, through litigation, and not the legislature, through legislation, who will draw new district maps every decade.

ARGUMENT

The State of North Carolina redistricting plan at issue in this case comports with traditional redistricting criteria. The North Carolina General Assembly followed the traditional redistricting criteria out of a legal obligation, and honoring such criteria limited the legislative discretion in drawing districts. The limitations imposed by the criteria should be a sufficient deterrent to a claim of partisan gerrymandering made by the Appellees and should protect North Carolina, or another state that similarly complies with its traditional redistricting criteria, from facing a federal partisan gerrymandering claim.

Most states use some form of traditional redistricting criteria in construction of their legislative districts. Because of the decision in *Shaw v. Reno*, 590 U.S. 630 (1993), and its progeny such as *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004), *Stephenson v. Bartlett*, (*Stephenson I*), 355 N.C. 354, 562 S.E.2d 377 (2002), and *Stephenson v. Bartlett*, (*Stephenson II*), 357 N.C. 301, 582 S.E.2d 247 (2003), criteria are more important than ever before. In particular, a record of arbitrary disregard for redistricting criteria, unlike in this case, could fatally flaw a districting plan imposed by a legislature. The first accusation that would be made is that the plan's failure to follow state mandated rules of map drawing was indicative of racial predominance or of vote dilution.

While traditional redistricting criteria may vary widely from state to state,[2] they constitute a restriction upon unfettered partisan configuration of legislative districts. This in turn provides a sufficient limitation on partisan gerrymandering such that if a jurisdiction substantially adheres to its traditional redistricting criteria it should not be subject to litigation for partisan gerrymandering. However, each time the Court fails to sustain a theory, a new theory arises. For example, since the standing decision in *Gill v. Whitford*, 138 S.Ct. 1916 (2018), the Court has seen an increase in the number of gerrymandering cases.

I. NOT ALL DISTRICTING IS PARTISAN GERRYMANDERING

As a threshold matter, it is important to define what gerrymandering is, and more importantly for the present question, what it is not. Whenever political gerrymandering is mentioned, "heads nod sagely for the conversation is then on familiar ground." Robert G. Dixon, Jr., *Democratic Representation: Reapportionment In Law And Politics* 459 (1968). The gerrymander has a long, albeit dubious, history in American politics. Although the practice may have had its roots in the "rotten boroughs" of England,[3] it became a part of

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[2] A list of state constitutional and statutorily required redistricting criteria can be found at http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

[3] So-called "rotten boroughs" are a different type of political manipulation that does not require bizarre shapes or geographic inflation but simply differential populations between districts. This problem is solved by vigorous enforcement of the one person-one vote principle. *See Baker v. Carr*, 368 U.S. 168 (1962);

American political folklore in 1812, courtesy of Massachusetts Governor Elbridge Gerry.

Governor Gerry signed into law a redistricting of Essex County which strung a series of towns together in a contorted manner. Gilbert Stuart (better known for his portraiture) was engaged in a conversation with the editor of the *Boston Weekly Messenger* over the map of the district. Stuart noticed one fairly compact district surrounded by the contorted district, and proceeded to sketch in a head, wings and claws, noting the likeness to a dragon. The editor thought it looked more like a salamander, whereupon Stuart is alleged to have said, "Better call it a 'Gerrymander.'" Ironically, Gerry had signed the bill only because he doubted the governor's power to veto a legislative districting.[4] *See* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 397-98 (1930).

As is clear from the history of the first gerrymander, originally there were two critical components, a bizarre geographic configuration and the linking of disparate communities into a single district. This original definition would have been easily recognized by the founders. They envisioned districts which embraced communities with all of their countervailing interests and pressures as a check and balance on

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Wesberry v. Sanders, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

[4] Another irony is that Gerry's other accomplishments are often overshadowed by his gerrymander. He was a signer of the Declaration of Independence, delegate to the Constitutional Convention, twice elected to Congress, and elected Vice President of the United States with James Madison in 1812.

political faction. *See* The Federalist No. 10 and No. 55. As the founders recognized in such districts, representatives will be more inclined to be attentive to the individual concerns of their local community and less inclined to march in lockstep to the agenda of any particular political faction.

The original gerrymander was seen as an attempt to subvert those countervailing interests and pressures. In the years before *Baker v. Carr*, 368 U.S. 168 (1962), the legislative failure to redistrict at all, resulting in increasing malapportionment of legislative districts, was called the "silent gerrymander." *See,* Baker, *Gerrymandering: Sanctuary or Next Judicial Target, in* REAPPORTIONMENT IN THE 1970S 122 (N. Polsby, ed. 1971). Despite the fact this was called a gerrymander, when in reality this was a "rotten borough." This is an example that, as with so many terms, gerrymandering has morphed in the modern era to become a general pejorative for any districting system the user of the term thinks is "unfair." "It equally covers squiggles, multimember districting, or simple non-action, when the result is racial or political misrepresentation." Robert G. Dixon, Jr., *Democratic Representation: Reapportionment In Law and Politics* 460 (1968).

As applied to the case before the court, and all the partisan gerrymandering cases since *Davis v. Bandemer*, 478 U.S. 109 (1986), plaintiffs have sought to overlay some version of a proportional partisan result requirement on a system of community representation. What has gone generally unrecognized in the popular discussion is that these two concepts are, more often than not, at odds with each other.

Community based representation may result in proportional representation, but it is actually unlikely to have that result. This is because people live in various communities at disproportionate rates to their political affiliation. *See* Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2009). Moreover, placing a partisan overlay on community-based representation is directly at odds with the founders view of controlling the vicissitudes of political faction. The partisan overlay would have, in the founders' minds, actually increased the opportunities for partisanship.[5]

II. USING TRADITIONAL DISTRICTING CRITERIA LIMITS PARTISAN GERRYMANDERING

In the modern era of standards set out by the U.S Constitution and the Voting Rights Act, states have superseded those with many statutory redistricting requirements. States have, since the beginning of the Republic, adopted their own redistricting criteria, or principles, for drawing districting plans. Many of the principles, or criteria, are found in state constitutions or statutes adopted by a legislature (or commit-

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[5] The proportional representation systems of European parliamentary governments are profoundly different from the system envisioned by the United States Constitution. In the typical European system political parties receive seats in the parliament based upon their proportion of the vote and compromise with other political parties in order to form coalition governments. The founders, based upon their comments in the Federalist papers, intended for community-based representatives to moderate the views of their political parties in order to avoid conflict with the parochial needs and desires of their community-based constituencies.

tee that is called upon to draw a plan when the legislative process fails). Given the weighty nature of the criteria, and the fact that such measures are themselves the result of the deliberative political process, a legislature is legally bound to obey such dictates.

While each of the states has nuances to their criteria, the traditional districting criteria fall into six broad categories (1) compactness, meaning that there is a minimum distance between all the parts of a constituency, (2) contiguity, whereby all parts of a district are connected, (3) preservation of counties or political subdivisions, the avoiding of deliberate crossing of county, city, or town boundaries, (4) preservation of communities of interest, the ensuring that geographical areas, such as neighborhoods of a city or regions of a state, where the residents have common interests do not necessarily coincide with the boundaries of a political subdivision, such as a city or county, (5) preservation of core existing districts, the maintaining districts as previously drawn or determined through litigation, to the extent possible to provide for a continuity of representation, and (6) avoiding pairing incumbents, the avoidance of crafting districts that would create contests between incumbents.

These criteria can be adhered to in a myriad of different ways. For example, a state's criteria can be composed in a strict priority fashion that if adhered to strictly will create a formulaic drawing system that will leave the legislative body with little or no political discretion.[6] Alternatively, the map drawers

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[6] The most well-known formulaic draw is Iowa. Essentially the counties are put together in a manner that uses the lowest population deviation possible using whole counties. Because of

may be given the discretion to give priority to one criteria over another in one place of the map and not in other parts of the map. Most states are somewhere in between these two extremes.

Regardless of the strictness with which the criteria are enforced in the drawing of a map, the criteria constitute a very significant limitation on the political discretion available to a legislature. This limited discretion prevents partisan motivations from becoming the predominant motive in the drawing of any particular map since the predominant motive must be adherence to the traditional redistricting criteria.

Justice O'Connor recognized that adherence to the traditional redistricting criteria were a significant limit on the political discretion of the map drawers and that this fact should have significant legal effect as well. *Bush v. Vera*, 517 U.S. 952, 964 (1996). Unlike the other members of the Court, Justice O'Connor had participated in this process directly. She brought an important level of understanding of the operations of state legislatures into her opinions and decisions in these cases.[7] Justice O'Connor understood the important legal significance of traditional redistricting

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the basic homogeneity of Iowa's demography and the large number of small counties within the state this system works in Iowa but would be extremely difficult to replicate in any state beyond the upper Great Plains. North Carolina actually uses a formulaic draw for its state legislative districts but despite this face political gerrymandering litigation based on the holding in *Rucho* in state court.

[7] Arizona was a covered jurisdiction under § 5 of the Voting Rights Act and Republicans controlled the reapportionment process in 1971 when Justice O'Connor was a state senator.

criteria, in both the political and racial gerrymandering contexts.

Although Justice O'Connor was discussing the significance of traditional redistricting criteria in the racial gerrymandering context of her discussion, it is equally valid in the partisan gerrymandering context. In the *Vera* case, Justice O'Connor created a threshold standard which requires a state to subordinate its traditional redistricting criteria to racial considerations in order to be subjected to strict scrutiny. Justice O'Connor makes this point throughout her opinion by emphasizing "for strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race." *Bush v. Vera*, 517 U.S. 952, 959 (1996). She goes on to elevate the violation of the states' traditional districting criteria to a threshold issue. In part II of the decision, Justice O'Connor states "the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race. [Cite omitted] Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself." *Id.* at 962.

Likewise, Justice O'Connor notes that states "may avoid strict scrutiny altogether by respecting <u>their own</u> traditional districting principles . . . and nothing we say today should be read as limiting 'a state's discretion to apply traditional districting principles,' [cite omitted] in majority-minority, as in other districts." *Id.* at 978 (emphasis added). She repeats this point in her concurrence when she says, "states may intentionally create majority-minority districts, and may

otherwise take race into consideration without coming under strict scrutiny . . . " so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy. *Id.* at 993.

Given that traditional redistricting criteria uphold the concept of community-based representation it would seem that her comments have even more validity in the partisan gerrymandering context than they did in the racial gerrymandering context. It must not be the case that adherence to duly enacted, traditional neutral state criteria result in legal liability. If so, the effect is that most, if not all, state redistricting plans are in jeopardy.

In the present case, The North Carolina General Assembly's Joint Select Committee on Redistricting ("Joint Committee"), met, *sua sponte*, to consider criteria for a new congressional plan. The Joint Committee consisted of nineteen Senators and nineteen Representatives. During the proceedings, the Joint Committee considered and then, in an effort to provide clear direction for districting that avoided arbitrary or partisan decisions, adopted seven criteria to be used in drawing a new congressional plan. The North Carolina Assembly's criteria that they used as guideposts included reequipments for equal population, contiguity, political data, partisan advantage, preservation of an existing district, compactness, and incumbency. The Joint Committee stated that the criteria would not be ranked in order of importance, that drawing maps is largely a balancing act, but that making reasonable efforts at redistricting would not include violating any of the other criteria.

Understanding how each broad area of criteria limits legislative discretion will illuminate the limitation on partisanship that ensues from compliance with the requirement. Overarching the criteria themselves is the fact that criteria are the product of the legislative process, and, like all procedural rules for a deliberative body, serve as the time-honored guard against majoritarian rule.

Traditional redistricting criteria endure from decade to decade as a counterweight to the otherwise uncontrolled will of the then dominant political party. Failing to recognize that such traditional redistricting criteria thwart majoritarian impulses will have the effect of sanctioning a legislative body to disregard any state mandated criteria so long as it never runs afoul of federal law.

A. Compactness is a Non-partisan Criteria

The federal constitution does not have a requirement of compactness. *Gaffney v. Cummings*, 412 U.S. 735 (1973). However, a lack of compactness may draw expert criticism as evidence of racial or partisan gerrymandering. Courts have been reluctant to adopt a mechanical or mathematical test for compactness. Depending on the districts, compactness may be geographical or based on population. As long as the same method is used to determine compactness by legislatures, the benchmark demonstrated a compelling state interest and goal. States should be able to utilize and rely on the test of compactness as a clear tool to avoid accusations of impermissible gerrymandering.

The North Carolina General Assembly, relying upon the fact that previous federal courts had criticized

the lack of compactness, particularly in the 1st and 12th districts, adopted a compactness criteria that it would make reasonable efforts to construct districts in the 2016 Congressional Plan that improve the compactness of current districts and keep more counties and voter tabulation districts whole as compared to the enacted plan. The General Assembly even dictated that the division of counties shall be made for reasons of equalizing population, consideration of incumbency, political impact, and that reasonable efforts should be made not to divide a county into more than two districts. Importantly, the Joint Committee adopted this criterion on a bipartisan basis by a vote of 27-7.

The North Carolina General Assembly followed this criterion explicitly. In fact, the map divided only 13 counties and 13 voting districts (or precincts). Of the thirteen divided counties, 11 were counties with a population of 100,000 or more. Thus, smaller counties with populations under 100,000 were general wholly included in a specific district. When counties were divided, they were only divided once.

Compactness makes the excluding of unfriendly voters and the combining of friendly voters from disparate communities into a district far more difficult. The reliance upon compactness as a traditional redistricting criterion leads to an analytical view of districting and helps to preserve a state from litigation based upon partisan gerrymandering. Here, Appellees would have the court find that even were a legislature to rely upon compactness measures, it can still face liability for political gerrymandering even though partisanship had no part in the final districting decision.

B. Contiguity Ensures Legitimacy

Like compactness, there is no federal constitutional requirement that districts be comprised of contiguous territory. *Davis v. Bandemer*, 478 U.S. 109 (1986). However, courts have disallowed point and crisscross contiguity without contiguity being specifically mentioned in constitutional provisions. *Stephenson v. Bartlett*, (*Stephenson II*), 357 N.C. 301, 582 S.E.2d 247 (2003). Obviously, non-contiguous districts raise questions of purpose and legitimacy. It is rational for a state to require contiguous districts and, much like compactness, provides for pure motives when districting. Here, the North Carolina General Assembly specifically noted its intent to avoid federal litigation when the Joint Committee affirmed the concept of "point contiguity" would not be used. *See Shaw v. Hunt*, (*Shaw II*), 861 F.Supp 408, 468 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

C. Preserving Counties and Political Subdivisions is a Clear and Objective Criteria

States have long required preservation of county lines in creating districts where possible. The rational interest on behalf of the state is obvious. Counties, as political subdivisions of the state, help administer elections. Each county has a chief elections officer who works with and reports to the state's chief election officer. Quite simply, the county creates ballots, supervises elections, and tallies votes on election night. County lines are a natural breaking point for districts. It makes little sense to have a few precincts on the other side of a county line unless there is an absolute compelling interest to do so. This is one reason state legislative lines have been allowed to vary slightly

from absolute one-man one-vote equality. *See Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

The exact same principle applies to other jurisdiction divisions. Where a municipality or city or school district benefits from representation, states should be allowed to recognize those lines in creating districts. Having meaninglessly scattered voting precincts outside of traditional political subdivisions serves no purpose in representative government.

There is a solid check on partisan gerrymandering when a state relies upon the traditional redistricting principle of preservation of counties and political subdivisions. The acceptance of whole portions of geography disregards the partisan effect of the addition or inclusion within a district and should allow a safe harbor from partisan gerrymandering claims. The North Carolina Assembly should be afforded this protection given its limited number of county splits as discussed previously.

D. Communities of Interest is a Legitimate State Policy

While less explicit than local government jurisdictional boundaries, "historical" boundaries, or those dividing "communities of interest," are often discernable, and, in some states, have very explicit, determinable boundaries that have been used by state and federal courts in the redistricting process. *See e.g., Legislature v. Reuneche*, 10 Cal.3d 396, 110 Cal Rptr. 718, 516 P.2d 6 (1973); *Carstens v. Lamm*, 543 F.Supp. 68 (D. Colo. 1982); *Flateau v. Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982).

The honoring of communities of interest is one of the factors courts have recognized as a legitimate state policy in reapportionment. "Factors of compactness, area of political units, historical precedents, economic and political interests . . . are not required as mandatory considerations . . . but rather, permissible considerations . . . so long as they do not detract from or subvert population equality . . . ." *Dunn v. State of Oklahoma,* 343 F.Supp. 320, 329 (W.D. Okla. 1972). This is even more important in the context of *Shaw.* Whereas following jurisdictional lines, as a criterion, may cause problems under a *Shaw* test, a carefully adhered to communities-of-interest criterion is a legitimate state interest in the manner in which the lines were drawn and should serve as a defense to partisan gerrymandering claims.

E. Preservation of Core Existing Districts Creates Consistency

Consistency in maintaining districts is equally a legitimate state interest. Voters know where the district lines have been over the last decade and who has been representing them. Additionally, legislatures rightly presume the existing districts passed, or were litigated into, constitutional and Voting Rights Act muster. Preserving a district with as little change as possible creates consistency.

Legislatures should be able to rely on lines once drawn a decade ago as an effective districting criterion. In the same manner as respecting communities of interest or political subdivisions maintains and respects commonalities, so does maintaining the core of districts from one reapportionment cycle to the next.

The North Carolina Assembly relied heavily on this traditional redistricting criterion by adopting two standards: the partisan advantage standard and the focus on the preservation of the highly litigated 12th district. The partisan makeup of the Congressional delegation under then enacted districting plan was 10 Republicans and 3 Democrats. The criteria were followed in the 2016 districting plan, and, based upon statistical reports using the political data criteria adopted by the Joint Committee, the map was a weaker map for Republicans as compared to the 2011 plan, but that the 2016 plan gave an opportunity to maintain the partisan make-up of the current congressional delegation. With regard to the 12th district, the 2016 map eliminated the serpentine nature of the district but preserved the Charlotte based core of the district.

The criteria of protecting the cores of existing districts recognizes that a district over time creates a community of interest and reduces the voter confusion created by constantly radically changing the configurations of the district lines. When this criterion is used for districts of both parties it will significantly limit the political discretion of the legislature.

F. Avoiding Pairing Incumbents Respects Voters' Choices

The traditional redistricting criteria of avoiding pairing incumbents is inherently a check on partisan gerrymandering. Closely linked to preserving core existing districts, the criteria ensure that a state will enjoy the benefits, perceived or actual, of incumbency in the re-election of existing elected officials regardless of their political affiliation.

The North Carolina Assembly recognized and relied upon this traditional criterion when the Joint Committee, in an overwhelmingly bipartisan vote, adopted its incumbency criteria. The state recognized that candidates for Congress are not required by law to reside in a district they seek to represent but they worked to ensure that incumbent members of Congress were not paired with another incumbent in one of the new districts constructed in the 2016 Congressional Plan. In fact, only two incumbents, Democrat Congressman David Price and Republican Congressman George Holding, were placed in the same district, and both found themselves re-elected as members of the U.S. House of Representatives when Congressman Holding ran for a seat from a different district.

G. Combining the Criteria Increases the Limitations on Discretion by a Legislative Body

If traditional redistricting criteria are combined and strict priorities are given to certain criteria over other criteria, the result is a formulaic draw which will only produce one or two plans. Even without strict priorities, when criteria are merely combined, severe limitations on the number of options available to a legislature are created. As each criterion is layered upon the next, the number of realistic maps available to a legislature is reduced dramatically.

None of plaintiffs' experts in this case used all of the traditional redistricting criteria in their analyses that the legislature used in writing the map. While the criteria used by the North Carolina General Assembly would not have produced one or two possible maps, the realistic options in fact would be reduced to only a few dozen. This is a dramatic and adequate

brake on political gerrymandering even if a legislature seeks to gain political advantage within the confines of the traditional redistricting criteria.

III. Failure to Affirm Reliance on Traditional Redistricting Criteria Encourages Litigation

Were the Court to remove the certainty associated with states relying upon traditional redistricting criteria as a bulwark against federal claims of partisan gerrymandering, most of the 435 congressional districts in the country would become susceptible to federal litigation.

The Court, when Justice O'Connor was the deciding vote on these issues, had seemed to create this safe harbor from racial gerrymandering claims. As clearly stated, in order to invoke strict scrutiny, a plaintiff must show that the state has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (emphasis added). In fact, application of the Court's standard does not throw into doubt the vast majority of the nation's 435 congressional districts, where presumably the states have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. *Id.* at 929. (emphasis added).

The reason for that safe harbor was to give the states the ability to construct districts that would be secure from judicial scrutiny and not be vulnerable to the latest inventive political science or legal theory or

shift from the court. In the instant case, Appellees are asking the Court to throw into doubt the vast majority of the nation's congressional districts by allowing partisan gerrymandering claims even though states have relied upon traditional redistricting principles in the drawing of those districts. Were the Court to allow this interpretation and disregard the clear adherence of the North Carolina General Assembly to neutral criteria, the Court would open the floodgates to partisan gerrymandering claims throughout the country and truly plunge itself into a region of the political thicket it has deftly avoided.

CONCLUSION

The duty and privilege of redistricting belongs to the states. Each state must, pursuant to the U.S. Constitution and statutory mandates, create new districts following each decennial census. To avoid and limit accusations of racial or partisan gerrymandering, most states have enshrined in their founding documents or adopted objective criteria following concepts of compactness, communities of interest, equality of population, respect for existing districts, and following jurisdictional boundaries. The North Carolina Assembly clearly followed their objective criteria, but now finds itself accused of partisan gerrymandering.

If the Court does not create a safe harbor for states, like North Carolina, who use traditional redistricting criteria, the final map drawer in every state will be the federal courts. Map drawing by litigation was not intended by the founders. It is therefore

necessary for this Court to recognize the use of objective traditional redistricting criteria is a legitimate state purpose which protects states from accusations of partisan political gerrymandering.

For the foregoing reasons, the Court should reverse the decision below.

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No. 18-422

IN THE
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,
v.
COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan, nonprofit § 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici are experts in the important political and constitutional questions concerning partisan gerrymandering that are raised by the district court's decision. *Amici* believe, moreover, that partisan gerrymandering gives rise to a justiciable constitutional claim, and they have argued for their own standard based on violations of traditional districting criteria during their own challenge to the same congressional redistricting plan in Maryland.

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[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in this case.

See Parrott v. Lamone, No. GLR-15-1849, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016), *appeal dismissed*, 137 S. Ct. 654 (2017). *Amici* previously appeared as *amici* in *Gill*, discussing the numerous practical shortcomings of the "efficiency gap" analysis proposed by the plaintiffs in that case. *See* Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants at 4-15, *Gill v Whitford*, No. 16-1161.

SUMMARY OF ARGUMENT

The district courts in North Carolina and Maryland failed to establish a workable test for gerrymandering for two reasons. First, as the Court has frequently recognized, partisan motives are always part of the process of drawing district boundaries. In consequence, the requirement imposed by the district courts below that plaintiffs show discriminatory partisan intent does not help to distinguish a gerrymandered district from any other kind of district. Second, the district courts' requirement that plaintiffs show some sort of effect risks indirectly importing an obligation that parties' electoral outcomes approximate a system of proportional representation.

If a workable test for gerrymandering is to be constructed, this Court should adopt a standard that focuses on the quantifiable violence that partisan mapmakers do to district boundary lines and political subdivisions.

ARGUMENT

In this case and in *Lamone v. Benisek*, No. 18-726, three-judge district courts determined that the states of North Carolina and Maryland, respectively, have engaged in unconstitutional partisan gerrymandering. The Court is now asked to determine whether either district court was able to solve the central problem of gerrymandering jurisprudence, namely, that of identifying "judicially discernible and manageable standards for adjudicating political gerrymandering claims." *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion). As set forth below, the district courts have failed.

In North Carolina, the district court held that the State had engaged in partisan gerrymandering that violated the Equal Protection Clause, the First Amendment, and Article I of the Constitution, under a number of different theories. Yet the standards employed by the district court to describe these various violations share common elements. The district court found that a violation of the Equal Protection Clause is shown "if Plaintiffs establish that the 2016 Plan was enacted with discriminatory intent and resulted in discriminatory effects," without legitimate justification. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). The First Amendment was violated because "the 2016 Plan was intended to disfavor supporters of non-Republican candidates . . . [and] burdened such supporters' political speech and associational rights," and this burden was caused by that "discriminatory

motivation." *Id.* at 935. Article I was violated because "the 2016 Plan was intended to disfavor non-Republican candidates and supporters of such candidates," and in fact "yielded a congressional delegation with the intended composition," which made it a "successful 'attempt[] to "dictate election outcomes."'" *Id.* at 941 (citations omitted).

The district court in Maryland similarly found that the First Amendment would be violated if the plaintiffs could show "three elements: first, *specific intent*," meaning that district lines were drawn with the intent to burden "citizens because of how they voted or the political party with which they were affiliated," "second, *injury*—that the plaintiffs had, in fact, experienced a concrete burden," and "third, *causation*." *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 *32-33 (D. Md. Nov. 7, 2018) (internal quotations omitted).

The critical elements shared by every standard proposed by either district court are (1) the intent to draw districts that burden political opponents and (2) a resulting effect. As discussed below, these standards do not establish a workable test for gerrymandering. Because every district is drawn with partisan intent, the first element does not usefully distinguish between drawing a gerrymandered district that gives rise to a constitutional claim and drawing any other district. An element that is always present has no value as a test. Further, the need to show an effect is usually understood as the need to show some sort of change in electoral results. This element is worse than

useless, it is dangerous, because it indirectly imports a requirement of proportional representation. As long as the *absence* of proportional representation is considered to be a factor indicating partisan gerrymandering, then some form of proportional representation becomes a practical necessity.

If a test for gerrymandering is to be constructed, it must focus instead on the way mapmakers distort district lines. The test must focus, in other words, on the violation of such traditional districting criteria as district compactness and contiguity, and the extent to which district lines coincide with or ignore existing political boundaries. While both districts courts discussed these factors, and the *Rucho* court discussed them at length (318 F. Supp. 3d at 899-923), they relegated them to secondary evidence of partisan intent. This was surely unnecessary, as partisan intent was abundantly established by the frank admissions of those who drew the district lines. *See, e.g., id.* at 869; *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *10, 21-24. But it was also misguided. In fact, the violation of traditional districting criteria must be considered the key to constructing any manageable standard for identifying partisan gerrymandering. It is the only standard that can usefully distinguish a gerrymandered district from any other.

I. A Requirement that Plaintiffs Show Discriminatory Partisan Intent Is Meaningless, Because Partisan Mapmakers Always Have Partisan Intent.

The Court has frequently recognized that districting is always and everywhere animated by partisan motives. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (plurality opinion) ("whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate"); *Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("districting inevitably is the expression of interest group politics").

In consequence, it is naive for the *Benisek* court to order the State of Maryland to draw districts "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *78. This is like enjoining individuals to stop being self-centered, petty, or greedy, and will probably have as much practical effect. Gerrymandering will still go on, although mapmakers

might stop talking about it publicly. In fact, most elected officials know where their support is concentrated, with or without the aid of computers. If the district court's injunction were taken seriously, moreover, it would simply guarantee that every district in the country will be drawn by a federal judge.

The reality that partisan motives are inseparable from districting means that unconstitutional gerrymandering cannot be distinguished by partisan intent. Party spirit will be present wherever there are people, even on redistricting commissions. This element of the district courts' standards will always be met, and thus it performs no practical function as a test.

II. A Requirement that Plaintiffs Show a Particular Quantum of Electoral Harm Risks Becoming a Federal Guarantee of Proportional Representation.

To show that the partisan intent exhibited by North Carolina's mapmakers had an actionable effect, the *Rucho* court relied on a social scientist's "uniform swing analysis" and on a test of "partisan asymmetry" based on the "efficiency gap." 318 F. Supp. 3d at 885-86. The ultimate purpose of these analyses is to assess various ways in which the relative strength of the parties is apportioned by a particular district plan.

The assumption underlying these analyses is that it is possible to estimate what the parties' relative strengths "should" be in a "fair" districting

plan. As *amici* previously have argued at greater length, this assumption is doubtful, because the basic mathematical constants underlying such analyses are in dispute. *See* Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants 9-12, *Gill v Whitford*, No. 16-1161, Aug. 4, 2017.

These analyses also seek to apply *average* estimates of changes in parties' strengths over time to draw conclusions about *particular* elections. As the defendants argued below, the efficiency gap, for example, "does not take into account a number of idiosyncratic considerations" that affect particular electoral outcomes. 318 F. Supp. 3d at 890. These considerations include the quality of candidates, scandals or local issues affecting a race, the money available to parties or candidates, or the effect of wave elections. The district court responded to this argument by noting that all of these factors were present at various times in the many elections that were averaged by the social scientist. *Id.* This badly misses the point. If a wave election, and not gerrymandering, is responsible for a particular "efficiency gap" in a particular election, then it is simply wrong to rely on that efficiency gap as evidence of gerrymandering.

More fundamentally, it is dangerous to use average measures of electoral strength as part of a test for gerrymandering. The reason is that conforming to these average measures will come to be viewed as a *requirement*. Mapmakers who wish to avoid being sued will understand that they must apportion electoral strength as the social scientists

tell them they should. In this way, some form of proportional representation will become a practical fact—not by fiat, but because of the incentives imposed by the threat of federal lawsuits.

III. The Only Manageable Way to Control Gerrymandering is to Look for and Enjoin the Distortion of District Lines.

The basic operation of partisan gerrymanders requires that voters be placed within or without districts on the basis of their partisan affiliations. Because voters do not choose where to live as a favor to politicians, electoral districts must be stretched and shrunk so as to include the partisan mix of voters that best suits the partisan mapmaker. The inevitable result is noncompact, even noncontiguous districts, which needlessly cross existing political boundaries.

Such violations of traditional districting criteria—especially extreme noncompactness—can be used as functional tests to identify and enjoin gerrymandering. *See Davis v. Bandemer*, 478 U.S. 109, 173 (1986) (Powell, J., concurring in part and dissenting in part) (of the factors that "should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges," the "most important . . . are the shapes of voting districts and adherence to established political subdivision boundaries"); *see id.* at n. 12 ("In some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering."); *Vieth*, 541 U.S. at 348 (Souter, J., joined by Ginsburg, J., dissenting) (gerrymandering

can be shown in part where districts violate "traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features," noting that compactness "can be measured quantitatively in terms of dispersion, perimeter, and population ratios"). Indeed, the *Rucho* court identified the mathematical tools that could be used, including "the division of counties, municipalities, or precincts," and the Reock and Polsby-Popper compactness measures. 318 F. Supp. 3d at 899-900.[2]

The superiority of a district boundary standard focused on compactness, contiguity, and boundary crossings to the intent and effects standards proposed by the district courts can be simply demonstrated. Every district in North Carolina and Maryland—indeed, every district in the country—was draw with partisan intent, so looking for partisan intent will not help to distinguish extreme or actionable gerrymandering from all other kinds of districting. In the same vein, every district in the two states, and in the nation, will have a unique electoral profile, and one that differs from the average electoral profile to a certain extent. Nor is it surprising that that profile often will reflect the intent of the person who drew the

---

[2] Although the district court speculated in dicta that gerrymandering could be done while complying with traditional districting criteria, it acknowledged that that was not true in the case before it. While North Carolina's 2016 plan "improve[d] on the compactness of the 2011 Plan," a "number of districts . . . take on 'bizarre' and 'irregular' shapes explicable only by the partisan make-up of the precincts." 318 F. Supp. 3d at 883.

district. Once again, that electoral profile fails to distinguish a gerrymandered district from every other district.

But it is *not* the case that every other district in North Carolina and Maryland is as noncompact, for example, as the least compact districts in those states (North Carolina's old 12th District or current 2nd District, and Maryland's 3rd District). Those districts score poorly, both in their home states and nationally. Testing for compactness actually distinguishes between these and other districts. It is, in other words, a real test.

Amici respectfully submit that the only way to construct a manageable standard to identify unconstitutional gerrymandering is by considering quantifiable measures of a district plans' deviation from the traditional districting criteria of compactness, contiguity, and county, city, and precinct splits.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation respectfully request that the Court reverse the judgment of the district court.

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COMMON CAUSE, ET AL.,

Appellees.

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF PROFESSOR MICHAEL KANG AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Michael S. Kang is the William G. and Virginia K. Karnes Research Professor at Northwestern Pritzker School of Law and a nationally recognized expert on redistricting and election law.[2] Professor Kang holds a J.D. from the University of Chicago School of Law and a Ph.D. in Government from Harvard University.

Professor Kang was recognized for the Best Election Law Article of 2017 by the Association of American Law Schools Section on Election Law. *See Gerrymandering and the Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). In the article, Professor Kang argues that legislative redistricting, like all lawmaking, must be supported by a legitimate government purpose; and that because the pursuit of partisan advantage is not a legitimate government purpose, a redistricting plan that has partisan effects that result solely from partisanship should be rejected as unconstitutional.

Professor Kang believes that consideration of his thesis would assist the Court in resolving the issues presented by these appeals.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* and his counsel made any monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

[2] The views expressed herein are Professor Kang's alone and do not represent the views of Northwestern Pritzker School of Law.

SUMMARY OF ARGUMENT

Professor Kang submits that, consistent with well-established constitutional norms, the partisan effects of a redistricting plan must result from the mapmakers' pursuit of legitimate government interests, and not solely from their pursuit of a partisan advantage favoring one party over another. Courts should therefore reject a plan as unconstitutional if its partisan effects do not arise from legitimate government objectives. Under this simple standard, courts would not need an exact measure of a plan's partisan effects. The proposed standard would, as a result, be "clear, manageable, and politically neutral." *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment).

No Justice of this Court has ever opined that an excessively partisan redrawing of congressional districts is constitutional. *See, e.g., Vieth*, 541 U.S. at 292–93 (Scalia, J., plurality opinion); *id.* at 325 (Stevens, J., dissenting); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306, 1310 (2016); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). But seeking to fashion an objective constitutional standard based on whether the partisan effect of a particular redistricting plan is "excessive" has understandably vexed the courts because of the difficulties of measurement. "Excessiveness is not easily determined." *Vieth*, 541 U.S. at 31[illegible] (Kennedy, J., concurring in the judgment). By comparison, a standard requiring a showing that the plan was drawn to achieve legitimate government objectives would, as in the "one person, one vote" and Elections Clause cases, be far easier to apply.

As Justice Stevens has said, "any decision to redraw district boundaries—*like any other state action that affects the electoral process*—must, at the very least, serve some legitimate government purpose" beyond "a purely partisan desire." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 448 (2006) ("*LULAC*") (Stevens, J., concurring in part and dissenting in part) (emphasis added). The legitimate government interest standard is familiar to this Court and the lower courts. A decision to endorse that standard here would align the standard for partisan gerrymandering cases with the Court's prior decisions under the First Amendment, the Fourteenth Amendment, and the Elections Clause (U.S. Const. art. I, § 4). There is no reason for the standards to be different.

This Court's "one person, one vote" and Elections Clause decisions demonstrate that recognizing politicians might consider partisan advantage in drawing a district map does not imply that seeking to disadvantage another political party is a legitimate basis for delineating districts. The acknowledgement that legislatures are partisan bodies is a far cry from holding that they may rely on pure partisanship as a legitimate basis for their decisions. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("On the few occasions where [the Court has struck down a policy as illegitimate under rational basis scrutiny], a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group.") (quotation omitted); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The unfortunate and unintended effect of not rejecting outright redistricting with a purely partisan purpose has been to encourage redistricting plans that are openly designed to put voters favoring a particular party at a disadvantage. That, in turn, has generated numerous challenges to redistricting plans that avowedly seek partisan advantage and has led to more frequent review of those plans by this Court. By adopting a purpose-based standard for political gerrymandering, the Court would strongly discourage the growing practice of public officials openly engaging in the partisan redrawing of district lines—thus abating a practice that undermines the perception and reality of free and fair elections and lessening, if not eliminating, the need for challenges to that practice.

In each of the cases now before the Court, the redistricting plans were designed with an avowedly partisan purpose, and cannot be considered to be the product of legitimate state interests. They present quintessential examples of undiluted partisanship, with clear evidence of a pure partisan purpose in drawing the district lines. *See* Brief for Appellee Common Cause at 7–19, 41, *Rucho v. Common Cause*, No. 18-422; Brief for Appellee League of Women Voters at 6–8, *Rucho v. Common Cause*, No. 18-422; Brief for Appellees at 4–10, 51, *Lamone v. Benisek*, No. 18-726. They, therefore, cannot be sustained under a purpose-based test of constitutionality.

ARGUMENT

I. THE SOLE PURSUIT OF PARTISAN ADVANTAGE IS NOT A LEGITIMATE BASIS FOR REDISTRICTING

Under this Court's redistricting case law, the pure pursuit of party primacy is an illegitimate basis for lawmaking. As Justice Kennedy wrote in *Vieth*: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

In his plurality opinion in *Vieth*, Justice Scalia agreed that "an *excessive* injection of politics [in redistricting] is *un*lawful." 541 U.S. at 293. He also observed that, in seeking to advance legitimate lawmaking interests, the government is entitled to weigh political considerations in redistricting, including potential partisan implications. That observation is not—and should not be allowed to become—a sanction for government officials to pursue an electoral edge for one party at the expense of another. As Justice Stevens observed in *Vieth*, there had not previously been "the slightest intimation in any opinion written by any Member of [the] Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting).[3]

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[3] In *Cox v. Larios*, Justice Scalia over-appraised the support in *Vieth* for accepting "politics as usual" as a "traditional" criterion that is constitutional if not taken too far. 542 U.S. 947, 952 (2004) (Scalia, J., dissenting); *see Vieth*, 541 U.S. at 316 (Kennedy, J., con-

(....continued)

Amicus submits that a standard requiring that legitimate government interests support redistricting plans is "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). Recent lower court decisions in this and other cases demonstrate the manageability of applying such a purpose-focused standard to partisan gerrymandering. Tracking Justice Kennedy's opinion in *Vieth*, these decisions have inquired "not whether political classifications were used" or how excessive the partisan advantage is, but instead whether the government acted with only the impermissible "purpose . . . of imposing burdens on a disfavored party and its voters." *Id.* at 315.

A. There is agreement that "excessive" partisanship is not a legitimate basis for redistricting.

Although the Court has struggled to articulate a standard of constitutionality for partisan gerrymandering, no member of this Court has opined that the Constitution tolerates excessively partisan redrawing of congressional districts. Where, as here, district lines can be explained only by a partisan purpose, the plans should be declared unconstitutional.

This Court first addressed the constitutionality of partisan gerrymandering in *Davis v. Bandemer*, 478 U.S.

(continued....)

curring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."); *id.* at 351 (Souter, J., dissenting) (proposing that after a plaintiff shows a departure from "traditional districting principles," the defendants must show that "legitimate objectives" other than "naked partisan advantage" justify the redistricting).

109 (1986), when it accepted that the issue is justiciable but articulated an effects-focused standard that so far has not been met. In *Bandemer*, the Court considered an equal protection challenge to the 1981 decennial redistricting of the Indiana state legislature. The district court had found that the Republican-majority legislature drew districts with "simply no conceivable justification" other than "protecting its incumbents and creating every possible 'safe' Republican district possible." *Bandemer v. Davis*, 603 F. Supp. 1479, 1487–88 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986). Nonetheless, a plurality of the Court reasoned that in order to succeed, the plaintiffs needed to prove discriminatory effect by showing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (plurality opinion). The result was to preserve a district map that avowedly served the partisan purpose of keeping a political party in control, which intentionally burdened voting rights. The decision cast doubt on the fairness of the electoral process.

Returning to the question eighteen years later in *Vieth*, the Court again held that partisan gerrymandering cases are justiciable,[4] but rejected the *Bandemer* discriminatory effects standard without articulating a new standard. In *Vieth*, the fractured Court put forward three distinct constitutional rationales and no controlling legal standard. Justice Scalia, writing for a four-member plurality, opined that partisan gerrymandering cases are nonjusticiable despite "the incompatibility of severe par-

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[4] *See* 541 U.S. at 309–10 (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court are convinced" that "political gerrymandering claims are justiciable.").

tisan gerrymanders with democratic principles" and the recognition that "an *excessive* injection of politics is *un*lawful" in legislative districting. *Vieth*, 541 U.S. at 292–93 (plurality opinion). Justice Kennedy, in a concurring opinion, wrote that "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for identifying unconstitutional partisan gerrymandering." *Id.* at 307–08 (Kennedy, J., concurring in the judgment). Justice Stevens, in his dissenting opinion, denied that "a naked purpose to disadvantage a political minority would provide a rational basis" for a redistricting plan. *Id.* at 336–37 (Stevens, J., dissenting). In his view, the appropriate constitutional question was "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles." *Id.* at 339.

The *Vieth* plurality opinion, while not controlling, has nevertheless guided subsequent discourse on the question of whether partisan motivation could constitute a lawful basis for a redistricting plan. The plurality observed that legislative redistricting is contemplated in the Constitution. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."). Because partisan redistricting had a place in American politics since the colonial period, the plurality concluded that "partisan districting is a lawful and common practice." *Vieth*, 541 U.S. at 286 (plurality opinion). In their view, although "excessive" partisanship was unlawful, the question was not justiciable because it was impossible to craft a workable standard to assess "[h]ow much political motivation and effect is too much." *Id.* at 297 (plurality opinion). Had the focus in-

stead been on the illegitimate purpose of the legislation, there would have been no such problem.

Importantly, the plurality opinion in *Vieth* did not identify any prior case law expressing constitutional approval for partisan motivations as legitimate reasons for the drawing of district lines. Rather it cited cases which recognized that, as a practical matter, partisan concerns were commonly considered in redistricting, and which passed no judgment on whether such considerations could be a legitimate government interest or a lawful basis for government action *absent additional nonpartisan considerations*. *See* 541 U.S. at 285–86 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics."); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."). Nevertheless, the *Vieth* plurality cited those cases as support for the conclusion that seeking partisan advantage could be a legitimate basis for a redistricting plan, so long as the partisan purpose and effect were not "excessive." 541 U.S. at 293.

In *Vieth*, Justice Kennedy accepted that the excessiveness of a partisan gerrymander could be part of an undefined constitutional standard, and held open the possibility that criteria for a "clear, manageable, and politically neutral" constitutional standard could be developed in the future. 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). But he also cautioned against "adopting a standard that turns on whether the partisan interests in the redistricting process were excessive," because

"[e]xcessiveness is not easily determined." *Id.* at 316. He suggested that the proper inquiry might instead be purpose-directed, assessing under the First Amendment whether "political classifications were used to burden a group's representational rights." *Id.* at 315. He observed that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." *Id.* at 312.

There is, of course, a significant difference between taking into account political considerations and pursuing party primacy. The Court has long recognized the practical reality that legislatures are partisan bodies and thus aware of the political aspects of redistricting. *See, e.g., Gaffney*, 412 U.S. at 752–53 ("It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.").

Recognizing that legislatures are partisan bodies, however, falls far short of supporting the conclusion that pure partisanship is a legitimate basis for drawing district lines. The Court's approval of legislative consideration of partisan concerns in redistricting has been limited to circumstances in which mapmakers were, at least ostensibly, seeking to achieve *fairness* between the political parties. In *Gaffney*, for example, the Court held that a state does not violate the Constitution by attempting "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties." *Id.* at 752. The Court distinguished this from districting plans that "are

employed to minimize or cancel out the voting strength of racial *or political* elements of the voting population," an action that the Court labeled "invidiously discriminatory." *Id.* at 751 (emphasis added); *see also Harris*, 136 S. Ct. at 1306 (citing *Gaffney* for the proposition that "a state interest in maintaining the competitive balance among political parties" is a "legitimate" state interest in redistricting); *Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (approving the use of partisan considerations in a remedial redistricting plan that sought to render each party's share of the state's congressional delegation proportional to its share of the statewide vote in the most recent congressional election).

B. Identifying partisan advantage as an illegitimate basis for redistricting would address the concerns expressed in *Vieth*.

Dissents by Justice Stevens and Justice Breyer in *Vieth* and *LULAC* articulate a standard that addresses the concerns originally framed by Justice Kennedy in *Vieth*. That standard, which asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *Vieth*, 541 U.S. at 336–39 (Stevens, J., dissenting), is "clear, manageable, and politically neutral" and does not turn "on whether the partisan interests in the redistricting process were excessive," *id.* at 307–08, 316 (Kennedy, J., concurring in the judgment).

Applying that same test in his dissent in *LULAC*, Justice Stevens, joined in relevant part by Justice Breyer, expressed the view that, because the redistricting had the "sole purpose of advantaging Republicans and disadvantaging Democrats," the state had failed its "constitutional requirement that state action must be

supported by a legitimate state interest." *LULAC*, 548 U.S. at 462–63 (Stevens, J., concurring in part and dissenting in part). He cited the overwhelming evidence of purely partisan motivations for the 2003 Texas redistricting plan in concluding that "it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander." *Id.* at 447.

The decisions below demonstrate that a purpose-based standard is manageable. Building on Justice Stevens's and Justice Breyer's standard in *Vieth* and *LULAC*, the panels below reasoned that a core constitutional inquiry in partisan gerrymandering cases should be whether plaintiffs can demonstrate that the illegitimate purpose of partisan advantage—as opposed to any legitimate state interests—resulted in the partisan effects of the redistricting plan at issue. *See, e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 923 (M.D.N.C. 2018) (finding that "the dilution of . . . votes is not attributable to the State's political geography or other legitimate redistricting considerations"); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 520 (D. Md. 2018) (finding that no "legitimate redistricting goa[l] . . . explains the dramatic exchange of populations between the Sixth and Eighth Districts").

II. REDISTRICTING SOLELY TO ACHIEVE A PARTISAN ADVANTAGE IS INCONSISTENT WITH THE LONGSTANDING CONSTITUTIONAL NORM AGAINST GOVERNMENT PARTISANSHIP AS A LEGITIMATE GOVERNMENT ACTIVITY

Redistricting for the purpose of achieving partisan advantage is squarely at odds with the Court's holdings

in related areas of constitutional law that partisanship cannot be a legitimate government purpose. As reflected in this Court's First Amendment, Fourteenth Amendment, and Elections Clause jurisprudence, constitutionality should not turn primarily on the degree of harm resulting from partisanship, but rather upon the fact that disadvantaging another party was the sole basis for a map's design. These cases reflect an overarching constitutional norm against government action to seek partisan advantage as a legitimate government activity. The standard in alleged partisan gerrymandering cases should be the same standard as in these other related areas of the law.

A. The Court's First Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

When the government designs an electoral map for the sole purpose of attaining primacy for a political party, the government is intentionally burdening the core First Amendment rights of citizens with competing political beliefs and associations. That does not further legitimate state interests. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In *Vieth*, Justice Kennedy explained partisan gerrymandering implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history,

their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod*, 427 U.S. 347 (plurality opinion)). He explained that a First Amendment inquiry would focus on "whether political classifications were used to burden a group's representational rights." *Id.* at 315. In his dissent in *Vieth*, Justice Stevens also suggested a First Amendment analysis: "'[P]olitical belief and association constitute the core of those activities protected by the First Amendment' . . . . It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district." *Id.* at 324–25 (Stevens, J., dissenting) (quoting *Elrod*, 427 U.S. at 356 (plurality opinion)).

Justice Kennedy's reasoning came before the Court in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), which is a prior decision in the case that is now captioned *Lamone v. Benisek*, No. 18-726. The plaintiffs had asserted a First Amendment partisan gerrymandering claim based on Justice Kennedy's concurrence in *Vieth*. The claim invoked Justice Kennedy's reasoning that "if 'a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation,'" and that "[w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention . . . ." 136 S. Ct. at 456 (quoting *Vieth*, 541 U.S. at 315)). This Court reversed the dismissal of the claim by a single district judge because he failed to refer the claim to a three-judge panel. *See id.* Because Justice Kennedy's legal theory was "uncontradicted by the majority in any of [the Court's] cases," the claim invoking it was not "'constitutionally insubstantial,'" and should have been referred to a three-judge

panel. *Id.* (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)). On remand, the three-judge panel appropriately adopted a standard reflecting the longstanding First Amendment norm prohibiting a partisan purpose for state action absent a legitimate state interest. *See Benisek*, 348 F. Supp. 3d at 520 (holding that "the intent to flip party control" was an "illegitimate" basis for redistricting); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801–02 (D. Md. 2017). That panel's judgment is now before this Court.

The decisions below in *Benisek* are consistent with the longstanding norm against government action for partisan advantage under the First Amendment, as adopted in the Court's government patronage cases. The patronage decisions uniformly reject government employment actions taken because of partisanship, which the Court found to be an illegitimate government purpose, rather than on legitimate hiring criteria. The plurality in *Elrod* explained that by conditioning employment on party affiliation, patronage burdens political belief under the First Amendment and, more broadly, harms the democratic process. *Elrod*, 427 U.S. at 355–56 (plurality opinion).

This longstanding norm also appears elsewhere in the Court's First Amendment jurisprudence, particularly where one political party exercises control of state government to disadvantage an opposing political party. In *Tashjian*, the Connecticut Democratic Party used its control of state government to force the Republican Party into acquiescing to a primary election law over the party's objection. The Court held that the law was unconstitutional, since it burdened the associational interests of the Republican Party and its members, and recognized that "the views of the State . . . to some extent

represent the views of one political party transiently enjoying majority power." 479 U.S. at 224; *see also Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring) ("[I]t must be recognized that [the State] is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit."). Here, where representatives of one political party use the state government's redistricting authority solely for its own partisan ends, the Court's norm against partisan government should apply with equal force.

B. The Court's Fourteenth Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

The Court's decisions under the Fourteenth Amendment likewise adopt the norm against government action to achieve a partisan advantage. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To show a violation of the Equal Protection Clause, plaintiffs must prove both a discriminatory purpose and a discriminatory effect, upon which the burden shifts to the government to show that the discrimination was justified by a legitimate state interest. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). It is that same burden-shifting, interest-based analysis that the Court employs under the Fourteenth Amendment's "one person, one vote" doctrine. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). Intent to advantage or to disadvantage a political party cannot be such a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996) ("[I]f the

constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

Within its equal protection jurisprudence, this Court's "one person, one vote" doctrine prohibits even modest population deviations between legislative districts when those deviations are based solely on the illegitimate purpose of providing partisan advantage. To succeed under the "one person, one vote" doctrine, plaintiffs must show that it is more probable than not that a population deviation of less than ten percent is predominantly based on "illegitimate reapportionment factors" rather than "legitimate considerations." *Harris*, 136 S. Ct. at 1304, 1307. Even if the effect of the redistricting is relatively minor, it violates the Equal Protection Clause if it "serve[s] no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength . . . or to disadvantage a politically weak segment." *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

In *Harris*, the Court held that an Arizona Commission's redistricting plan did not violate the Equal Protection Clause because the population deviations it generated were based on a legitimate purpose—a good-faith effort to comply with the Voting Rights Act—rather than by a desire to seek partisan advantage. 136 S. Ct. at 1309. Justice Breyer, writing for the Court, reserved the question of whether "partisanship is an illegitimate redistricting factor," but stated that "[n]o legitimate purposes could explain" the population deviations in redistricting in a previous case, *Cox v. Larios*, 542 U.S. 947 (2004). *Id.* at 1310.

In *Larios v. Cox*, Georgia Democrats had redistricted the state with "two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations . . . and the protection of Democratic incumbents." 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). A three-judge district court held that the partisan gerrymander violated the "one person, one vote" doctrine and that in districting, "each population deviation requires at least *some* plausible and consistently applied state interest to justify it . . . and the defendant's two proffered justifications are plainly impermissible." *Id.* at 1352–53 (emphasis in original).

This Court summarily affirmed. In a concurring opinion joined by Justice Breyer, Justice Stevens reasoned that "the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote." *Cox*, 542 U.S. at 949. Justice Stevens made clear his belief that the "one person, one vote" violation was triggered not by the magnitude of the population deviation, but rather by partisan-motivated redistricting with no legitimate purpose. *See id.* at 949–51.

The Court's racial gerrymandering jurisprudence similarly supports the norm that naked partisan advantage is an illegitimate basis for government action. In *Cooper v. Harris*, a prior version of the districting map at issue in this case was challenged as an unconstitutional racial gerrymander, and the Court held that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . [because] the sorting of voters on grounds of their race remains suspect even if race is

meant to function as a proxy for other (including political) characteristics." *Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (citing *Miller*, 515 U.S. at 915).

Because, as the Court has recognized, "racial gerrymandering is highly correlated with political affiliation," *id.* (quoting *Easley*, 532 U.S. at 242), legislatures commonly sort voters by race for the purpose of achieving partisan advantage, *see* Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 Ohio St. L.J. 867, 871, 888 (2016) ("In the context of conjoined polarization, race and politics are mirror images of each other and can be used interchangeably for redistricting."). Look no further than the *Common Cause* decision now before the Court. After it was struck down as an unconstitutional racial gerrymander, the legislature redrew the map with the sole intent of benefitting Republicans at the expense of other political parties—and the redrawn map was functionally equivalent to its predecessor, seeking to preserve Republican advantage in 10 of the 13 congressional districts in the state. *Common Cause*, 318 F. Supp. 3d at 882 ("[T]he facts and circumstances surrounding the drawing and enactment of the 2011 Plan—the partisan effects of which the Committee expressly sought to carry forward in the 2016 Plan—further establish that the General Assembly drew the 2016 Plan to maximize partisan advantage."). The petitioners pursue the same defense as before: that their sole motivation in drawing the map was to benefit Republican voters at the expense of voters belonging to other political parties.

The Court rightfully does not allow racial gerrymandering, but as this case demonstrates, if the sole pursuit of partisan advantage was a legitimate state interest, legislatures would have free rein to achieve the same re-

sults under the guise of achieving partisan objectives. This surely was not the Court's intent in *Cooper*, which supports the norm that the sole pursuit of partisan advantage is not a legitimate state interest.

C. The Court's Elections Clause decisions support the norm that government action solely for partisan advantage is illegitimate.

The constitutional norm against purely partisan government action also drives the Court's decisions related to the administration of elections. The Elections Clause, U.S. Const. art. I, § 4, delegates authority to states to establish procedures for congressional elections. The Court has made it clear that this clause is a delegation of authority to adopt only procedural regulations for congressional elections; it does not permit states to favor or to disadvantage particular candidates. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995). States are not permitted to dictate electoral outcomes based on candidates' political positions because such action would constitute an illegitimate purpose and would be inconsistent with the constitutional norm against government action solely in support of partisan advantage. *See Cook v. Gralike*, 531 U.S. 510, 526–27 (2001); *Thornton*, 514 U.S. at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.").

In *Cook*, the Court overturned a Missouri constitutional amendment requiring each candidate's position on congressional term limits to be printed on the ballot because the amendment had the purpose of favoring cer-

tain candidates over others. 531 U.S. at 524. The Court found that the law violated the Elections Clause because its purpose was to "dictate electoral outcomes" based on candidates' positions. *Id.* at 526 (quoting *Thornton*, 514 U.S. at 833–34); *see id.* at 524–27; *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But . . . States may not infringe upon basic constitutional protections.").

Similarly, courts have emphasized the illegitimacy of government election administration with a partisan purpose in striking down voter identification laws and early voting restrictions on nonracial bias grounds. In *Obama for America v. Husted*, the Sixth Circuit affirmed a district court's injunction against an Ohio law limiting early voting because the law discriminated between classes of voters. 888 F. Supp. 2d 897 (S.D. Ohio 2012). The court in *Husted* drew upon this Court's holding in *Bush v. Gore* that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 910 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

Consistent with the constitutional norm established in these cases, the panel below in *Common Cause* held that redistricting of congressional districts for partisan advantage violates the Elections Clause. *See Common Cause*, 318 F. Supp. 3d at 941. The panel concluded that the North Carolina 2016 redistricting map "disfavor[ed] the interests of supporters of a particular candidate or party in drawing congressional districts," showed bias toward a specific political party, and was an "impermissible effort to 'dictate electoral outcomes' and 'disfavor a class of candidates.'" *Id.* at 937 (quoting *Thornton*, 514 U.S. at 833–34). The panel held that the redistricting

"violates the Elections Clause by 'infring[ing] upon basic constitutional protections.'" *Id.* at 938 (quoting *Kusper*, 414 U.S. at 56–57).

III. REQUIRING THE GOVERNMENT TO ESTABLISH THAT THE PARTISAN EFFECTS OF REDISTRICTING WERE THE INCIDENTAL RESULT OF ITS PURSUIT OF LEGITIMATE STATE INTERESTS WOULD PROVIDE A CLEAR AND ADMINISTRABLE STANDARD AND A MEANINGFUL CHECK ON ILLEGITIMATE PARTISAN GERRYMANDERING

An electoral map with partisan effects that can be explained only by the intent to achieve partisan advantage violates the Constitution. However, a map with partisan effects that can be explained as the necessary consequence of the government's pursuit of legitimate state interests—such as respect for traditional political boundaries and subdivisions, compactness and contiguity, the preservation of communities of interest, and compliance with the Voting Rights Act—should be upheld. Focusing the constitutional inquiry on the requirement of a legitimate state interest in redistricting, rather than on the excessiveness of the partisan effects, would render unnecessary the need to define excessiveness of partisan effect that has proved so vexing for the courts since *Vieth*.

A. A constitutional standard based on a requirement that an acceptable plan be designed to further legitimate state interests would provide a manageable and meaningful check on the redistricting process.

Applying the proposed standard, the government would need to demonstrate that the partisan effects of a redistricting plan were the incidental result of the government's pursuit of legitimate state interests rather than an effort to provide an advantage to one political party at the expense of another. A redistricting plan could be upheld if the government successfully showed that the partisan effects of redistricting were indirect but necessary results of legitimate state interests. If plaintiffs established both partisan intent and effects, and the government could not explain the partisan effects of its redistricting plan as the product of legitimate state interests, a map would be struck down as the unconstitutional result of lawmaking based on the "naked purpose to disadvantage a political minority." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting); *cf. Romer*, 517 U.S. at 632–36 (1996) (ruling that bare animus to disadvantage a group, even outside a fundamental right or protected class, does not qualify as a legitimate state interest); *USDA v. Moreno*, 413 U.S. at 534–35 (concluding that equal protection "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Such a standard would be familiar. As highlighted in Point II, *supra*, constitutional standards based on partisan purpose already control in related areas of law under the First Amendment, the Fourteenth Amendment, and the Elections Clause. In considering a challenge to

partisan redistricting under the "one person, one vote" doctrine in *Harris*, the Court concluded that a plaintiff must show that "it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality." 136 S. Ct. at 1310. Similarly, prior to *Vieth*, *Bandemer* required courts to assess whether a redistricting plan constituted "intentional discrimination against an identifiable political group." 478 U.S. at 127. In addition, courts have long assessed legislative purpose in the context of racial discrimination claims under the Fourteenth Amendment. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding a zoning ordinance did not violate the Constitution because there was no proof that "discriminatory purpose was a motivating factor in the Village's decision"). As evidenced by its application in related contexts, the proposed standard would be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment).

A redistricting body might attempt to cloak an impermissible partisan purpose in a pretextual rationale, but courts have shown themselves to be adept at analyzing whether explanations are genuine or pretextual. In egregious cases, like those presented by the 2001 Georgia House of Representatives and 2002 Georgia Senate redistricting plans at issue in *Cox*, lower courts have had no trouble determining that the partisan effects of the redistricting resulted solely from a government purpose to advantage one political party. In *Whitford v. Gill*, the district court found that it could distinguish between the impermissible partisan purpose that predominated and the pretextual recitation of compactness and contiguity that was facially consistent with the final redistricting plan. *Whitford v. Gill*, 218 F. Supp. 3d 837, 891–96, 922–27 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct.

1916 (2018). In that case, although the electoral districts were largely compact and contiguous, the court rejected the State of Wisconsin's claim that the redistricting plan could be justified in terms of legitimate state interests because the redistricting body had considered and intentionally rejected numerous alternative maps that achieved the same degree of compactness and contiguity in favor of maps with greater and more durable partisan effect. *Id.*[5]

The necessary inquiry into illegitimate partisan purpose also may be helpfully informed by empirical measures of partisan effect such as the "efficiency gap" metric put forward by Eric McGhee. *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55 (2014). As recognized below and in *Whitford*, empirical measures of partisan effect are probative as to the true purpose of the redistricting body in implementing the redistricting plan at issue.

In addition to empirical measures of a partisan effect, other indicia of impermissible intent can be helpful in identifying partisan purpose: the settings for computers in the design of maps, the timing of the redistricting effort (e.g., mid-decade versus constitutionally mandated decennial redistricting), the deviation from prior proce-

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[5] This Court vacated the district court's judgment in *Gill* based on the plaintiffs' failure to demonstrate standing, and remanded the case to provide the plaintiffs the opportunity to prove standing consistent with its opinion. *See Gill*, 138 S. Ct. at 1933–34. On remand, the district court "delay[ed] the trial and any decision on the merits" pending this Court's decisions in these cases (*Common Cause* and *Benisek*). *Whitford v. Gill*, No. 18-cv-763-jdp, 2019 WL 294800, *1 (W.D. Wis. Jan. 23, 2019).

dural norms in the redistricting process, the proportion of same-party incumbents forced to compete in the same district, the use of partisan experts in drawing redistricting, the choice of a plan based on the relative partisan effect of various proposed maps as compared to the selected redistricting plan, and the contemporaneous statements from individuals involved in the redistricting process as well as their subsequent testimony.

While pretextual explanations can be discredited, under the Court's current standards, many legislators do not even bother with a pretext. In view of this Court's decisions which have served to effectively encourage rather than discourage partisanship in designing plans, members of redistricting bodies have with increasing frequency openly acknowledged that the motivation underlying a redistricting plan was to entrench one political party at the expense of another. *See, e.g.*, *LULAC*, 548 U.S. at 453 ("According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, 'political gain for the Republicans was 110% of the motivation for the Plan, . . . it was the entire motivation.'") (quotation omitted) (Stevens, J., concurring in part and dissenting in part).

Legislators have not infrequently advanced a facially neutral rationale, but then have felt free to speak in more candid terms that provide direct evidence of partisan intent. For example, in the run-up to the 2012 presidential election, Pennsylvania House Republican leader Mike Turzai asserted that Pennsylvania's voter-identification law, which had purportedly been designed to protect the integrity of the ballot from voter fraud, was "gonna allow [Republican presidential nominee Mitt] Romney to win the state of Pennsylvania, done." Mac-

kenzie Weinger, "Pa Pol: Voter ID Helps GOP Win State," *Politico* (June 25, 2012) (quoting Rep. Turzai).[6]

While a purpose-focused standard would provide a meaningful check against partisan gerrymandering, it would not prevent political bodies from playing their traditional role in redistricting. Just as under the "one person, one vote" doctrine, it would neither burden political actors with a standard of conduct that would be difficult to meet nor pose a risk that all redistricting decisions would become subject to judicial challenge. As Justice Breyer explained in *Vieth*, "[t]he use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends." 541 U.S. at 360 (Breyer, J., dissenting). Under the purpose-based standard *Amicus* advocates, an inquiry into legislative purpose will arise only when a plaintiff is able to present evidence of a partisan bias in a redistricting plan, and would lead to the overturning of a redistricting plan only if a state is unable to put forward a legitimate government interest explaining the redistricting plan's partisan effect. Just as the courts are not flooded with "one person, one vote" cases, under the same proposed standard only a small minority of redistricting plans are likely to raise serious questions regarding their constitutionality under a purpose-based standard.

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[6] *Available at* www.politico.com/story/ 2012/06/pa-pol-voter-id-helps-gop-win-state- 077811

B. Requiring the government to ground its decisions in a legitimate purpose would provide essential support for well-established constitutional norms.

While such a standard might directly invalidate only a relatively limited number of redistricting maps where the government cannot articulate a legitimate, non-pretextual purpose for the redistricting plan, the rule would provide a strong motivation for government officials to adhere to constitutional principles and to internalize a "sense of constraint" on partisan excesses in the redistricting process. This is precisely what has taken place in the context of racial gerrymandering, where, following *Shaw*, legislatures internalized the principles underlying that decision and have generally conformed the redistricting process to those principles. *See* Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 68–70 (2004). If the Court imposes a clear rule prohibiting partisan gerrymanders, legislators would be less likely to describe redistricting in terms of "cannibaliz[ation]" of the other party, *see Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), or assert that redistricting is "the business of rigging elections," *see* John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, Winston-Salem J. (Jan. 27, 1988) (quoting State Senator Mark McDaniel criticizing the North Carolina legislature). Instead, legislators would need to identify and articulate a basis for redistricting that adheres to democratic principles. Driven by the law requiring them to do so, legislatures would be far more likely to design districts that actually do conform to those principles.

CONCLUSION

Amicus respectfully proposes that the Court endorse the purpose-based standard set forth in this brief for resolving challenges to partisan gerrymandering, and submits that application of this standard is a basis for affirming the decisions below in *Rucho v. Common Cause*, No. 18-422 and *Lamone v. Benisek*, No. 18-726.

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR *AMICUS CURIAE* ERIC S. LANDER IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[*]

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A mathematician and geneticist, Dr. Lander was one of the principal leaders of the Human Genome Project and led the analysis of its vast dataset. Dr. Lander serves as President and Founding Director of the Broad Institute of Harvard and MIT, a nonprofit research institution focused on genomic medicine. He is also a professor on the faculties of Harvard and MIT.

Dr. Lander served from 2009 to 2017 as Co-Chair of the President's Council of Advisors on Science and Technology (PCAST), an advisory group that directly advised the President of the United States on a wide range of matters, including information technology. He currently serves on the Defense Innovation Board (DIB), which advises the Secretary of Defense on innovative uses of technology for national defense.

Dr. Lander was elected to the U.S. National Academy of Sciences in 1997 and to the U.S. National Academy of Medicine in 1999. He has received numerous major awards for his research, including for his work analyzing large datasets.

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[*] Counsel for all parties have filed with the Clerk of this Court letters granting blanket consent to the timely filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part, and no person other than the named *amicus curiae* and his counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

Dr. Lander wishes to emphasize that this brief represents his own personal views. It is in no way intended as a statement of policy or position by the United States Government, the Broad Institute, Harvard, MIT, or any other entity.

At the heart of this case is the question of whether there exists a judicially manageable standard for recognizing extreme partisan gerrymanders. As a leading researcher in the analysis of large datasets, Dr. Lander has a strong interest in alerting this Court to recent technological advances that now enable the adoption of a judicially manageable, computer-based, objective standard that would (i) enable courts to evaluate claims of excessive partisan gerrymandering by determining the extent to which a redistricting plan is an extreme outlier—at either the statewide level or individual district level—compared to the universe of possible redistricting plans compatible with the State's declared goals; (ii) provide guidance and reasonable leeway to States; and (iii) protect voters' constitutional rights.

Dr. Lander filed an *amicus curiae* brief in *Gill v. Whitford*, No.16-1161, that described how, in principle, extreme outlier analysis could provide a foundation for assessing claims of excessive partisan gerrymandering.

Understanding extreme outlier analysis is even more important here, because the plaintiffs in this case presented expert testimony applying extreme outlier analysis, and the District Court relied upon that testimony as part of the basis for its findings.

This brief explains the principles underlying the application of extreme outlier tests at both the statewide and district levels and the results of applying them to North Carolina's 2016 plan, as presented at trial.

SUMMARY OF THE ARGUMENT

This case presents the question of whether there exists any judicially manageable standard that would enable courts to determine when the partisan bias of a statewide redistricting plan, or any individual district within that plan, is so excessive as to render it unconstitutional.

There is no dispute that "excessive" partisan gerrymandering is both harmful and unconstitutional. In *Vieth v. Jubelirer,* 541 U.S. 267 (2004), all nine Justices of this Court agreed that, while *some* partisanship is permitted in redistricting, *excessive* partisan gerrymanders are incompatible with democratic principles and violate the Constitution.

The open question has been whether there exists any "judicially discoverable and manageable standards" for *recognizing* excessive partisan gerrymanders. *Vieth v. Jubelirer,* 541 U.S. 267, 277-278 (2004) (plurality opinion), quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962). This Court has waited to see if such a standard might emerge from a deeper understanding of the process of gerrymandering.

In the past decade, advances in computer technology have now finally made it possible to apply a straightforward, objective and judicially manageable test—termed an 'extreme outlier test.' An extreme outlier standard is based on a simple

principle: Just as political parties use computers to *create* excessive partisan gerrymanders by searching the universe of possible redistricting plans to find ones that impose an extreme burden on citizens who previously voted for an opposing party, one can use computers to *recognize* an excessive partisan gerrymander by seeing if its partisan impact is extreme *relative to the universe of possible plans.*

With modern computer technology, it is now straightforward to (i) generate a large collection of redistricting plans that are representative of all possible plans that meet the State's declared goals (e.g., compactness and contiguity); (ii) calculate the partisan outcome that would occur under each such plan, based upon actual precinct-level votes in one or more recent elections; (iii) display the distribution of the outcomes across these plans; and (iv) situate the State's chosen plan along that continuum to reveal the degree to which that plan is an outlier. One can analyze outcomes for a statewide plan as a whole, or for an individual district within a plan.

In this way, it is now straightforward to measure the *quantitative degree* to which a partisan gerrymander is *excessive.* For example, one can readily determine whether a redistricting plan is more extremely partisan (at a statewide level or for any individual district) than, say, 80%, 90%, 95%, or 99% of the possible plans from which the State might have chosen.

Notably, the Federal Government relies upon the same approach (testing whether a particular outcome is an extreme outlier among the distribution of all possible outcomes) in many critical real-world situations, including national defense, public safety,

finance and health. Specific examples include the design of nuclear weapons, safety of nuclear weapons in storage, safety of nuclear power plants, hurricane storm track prediction, and stress testing of large banks, among others.

An extreme outlier standard avoids the criticisms that have been leveled at many previously proposed approaches. Specifically, it (i) is judicially discoverable, in that the test is inherent in the constitutional principle (to test whether a redistricting plan is *excessive*, determine the fraction of possible alternative plans that it *exceeds* with respect to its electoral outcome); (ii) is judicially manageable, in that it is an objective mathematical method that has a *right* answer; (iii) accounts for a State's natural political geography, including "natural packing"; and (iv) does not expect or enforce proportional representation.

An extreme outlier standard can be applied to statewide maps or to any individual district—making it applicable both to claims of associational harm under the First Amendment and to claims of vote dilution under the Fourteenth Amendment or Article I, § 2.

An extreme outlier standard would also provide guidance to the States about the degree to which a proposed redistricting plan is excessive and thus would be likely to minimize litigation.

This appeal is the first case in which this Court has had the opportunity to review a district court decision that incorporates an extreme outlier standard.

The District Court heard undisputed testimony from two experts who demonstrated that North Carolina's 2016 Plan is more extreme—at *both* the statewide level and the individual district level—than more than 99% of all possible plans that the State could have chosen.

Based in part on this and related testimony (as well as direct evidence of intent), the District Court properly found North Carolina's 2016 Plan and most of its districts to be unconstitutional as an excessive partisan gerrymander.

With technology having finally provided a straightforward, judicially discoverable and manageable standard for assessing excessiveness in partisan gerrymandering cases, the remaining question is: How extreme is *too* extreme?

This Court faced this same question in its legislative redistricting cases after *Baker v. Carr*, 369 U.S. 186 (1962): With respect to the population of legislative districts, how extreme a difference is too extreme?

There is, of course, no mathematically or constitutionally 'ordained' threshold—in either context.

In the 'one person, one vote' context, this Court adopted a presumptive threshold of 10% for allowable population differences among state legislative districts.

This Court may similarly someday choose to provide a presumptive threshold for how extreme a redistricting plan may be (say, not more extreme than 80%, or 90%, or 95% of all possible plans).

However, there is no need to do so at this time, because the redistricting plan in this case is *so extreme* as to exceed any plausible threshold.

ARGUMENT

I. ADVANCES IN TECHNOLOGY NOW PROVIDE A STRAIGHTFORWARD, JUDICIALLY MANAGEABLE STANDARD FOR RECOGNIZING EXCESSIVE PARTISAN GERRYMANDERS

There is no dispute that "excessive" partisan gerrymandering is both harmful and unconstitutional. Indeed, all nine Justices of this Court in *Vieth v. Jubelirer,* 541 U.S. 267 (2004), agreed that, while *some* partisanship is permitted in redistricting, *excessive* partisan gerrymandering is incompatible with democratic principles and violates the Constitution.

The open question has been whether the issue is justiciable — that is, whether there exist "judicially discoverable and manageable standards" for *recognizing* excessive partisan gerrymanders. *Vieth v. Jubelirer,* 541 U.S. 267, 277-278 (2004) (plurality opinion), quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962).

This Court has waited to see if such a standard might emerge from a deeper understanding of the process of partisan gerrymandering.

Justice Kennedy, in *Vieth,* expressed hope that new technologies "may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That

would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards." 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

In the past decade, advances in computer technology have now made it possible to apply a straightforward, objective and judicially manageable test—termed an 'extreme outlier test'—to enable courts to decide when a statewide redistricting plan or an individual district is so excessively partisan as to be unconstitutional.

An extreme outlier standard is based on a simple principle: Just as political parties use computers to *create* excessive partisan gerrymanders by searching the universe of possible redistricting plans to find ones that impose an extreme burden on citizens who previously voted for an opposing party, one can use computers to *recognize* an excessive partisan gerrymander by seeing if its partisan impact is extreme *relative to the universe of possible plans.*

While the principle is simple, it has not been feasible to apply it in practice—until recently. In the past decade, however, advances in computer technology have made it straightforward to *measure the quantitative degree to which a partisan gerrymander is excessive.* For example, one can readily determine whether a redistricting plan is more extremely partisan than, say, 80%, 90%, 95%, or 99% of the possible plans from which the State might have chosen.

In effect, computer technology has finally caught up with the electoral problem it created.

Importantly, an extreme outlier standard can be applied to statewide maps or to any individual district—making it applicable both to claims of associational harm under the First Amendment and to claims of vote dilution under the Fourteenth Amendment or Article I, § 2.

II. EXCESSIVELY PARTISAN GERRYMANDERS ARE CREATED BY USING COMPUTER TECHNOLOGY TO FIND EXTREME OUTLIERS

Partisan gerrymandering seeks to draw voting districts to "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

To do so, parties use information about voters' political affiliations based on their political expression in recent elections. Typically, the approach involves two steps:

(i) for each voting precinct, examine the partisan outcomes in one or more recent elections (that is, the number of voters who supported each party); and

(ii) based on these data, aggregate the precincts into new districts to create a redistricting plan with a number of 'packed' districts, in which the proportion of voters who previously supported an opposing party is unusually high, and a larger number of 'cracked' districts, in which the proportion of voters who previously supported the opposing party is unusually low.

Compared to the vast majority of possible redistricting plans compatible with a State's declared objectives (such as compactness and contiguity), the resulting plan is chosen to be an extreme outlier at both the district level and the statewide level.

At the district level, cracking aims to burden political opponents by assigning many of them to districts in which their proportion—and thus their chance of electing a representative from their preferred party—is much lower than would be the case under the vast majority of possible redistricting plans.

At the statewide level, cracking and packing aim to burden political opponents by creating a redistricting plan under which they are assigned to legislative districts designed to ensure that they elect as few representatives as possible.

Currently, partisan gerrymandering uses precinct-level data from recent elections because it is readily available and, empirically, tends to be predictive of future political outcomes.[1]

Increasingly, it is becoming simple to profile *individual voters*—based on website usage, search queries, social media and purchasing decisions—to predict their partisan associations with even greater accuracy than previously possible. In the future, political parties will thus increasingly have data that

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[1] For example, the Legislature's expert mapping consultant, Dr. Thomas Hofeller, testified that past voting behavior, as reflected in past election results, is the best predictor of future election success. Ex. 2037. Past election data have become the industry standard for predicting the partisan performance of a districting plan. JS App-11-12; *see also* JS App-175-177.

would allow them to discriminate against their opponents not just at the level of precincts, but at the level of city blocks, houses, apartments and individual persons.

If this Court finds that claims of excessive partisan gerrymandering are non-justiciable, partisan gerrymandering will likely become even more sophisticated, extreme and targeted.

III. IN ITS 2016 PLAN, NORTH CAROLINA SOUGHT TO CREATE AN EXTREME PARTISAN GERRYMANDER

There is no dispute among the parties that, in creating its 2016 Plan, North Carolina sought to create an extreme partisan gerrymander.

As the District Court found, the North Carolina General Assembly set the following criteria for its mapmakers:

(i) use population data and election results from the 2010 and 2014 mid-term elections;

(ii) aim to create districts with equal population, compactness and contiguity; and

(iii) aim to create districts that ensure that the congressional delegation will have 10 Republicans and 3 Democrats.

When asked about the third criterion, Representative David Lewis, co-chair of the General Assembly's Joint Select Committee on Congressional Redistricting, said that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to

draw a map with 11 Republicans and 2 Democrats." Ex. 1005. at 50:7–10.

To follow these instructions, the General Assembly's expert mapping consultant examined a wide range of possible redistricting plans to find one that was as extreme as possible.

The 2016 Plan achieved the stated goal. While Republican candidates received 53% of the statewide vote, they prevailed in 10 of the 13 (77%) congressional districts.

The question is thus not whether North Carolina *sought* to adopt an extreme partisan gerrymander. Appellants have effectively conceded that they did.[2]

Rather, the issue is whether there is a judicially manageable standard that courts can use to *objectively determine* whether North Carolina adopted an extreme partisan gerrymander.

As described in the next section, there now is such a standard.

IV. AN EXTREME OUTLIER TEST CAN RECOGNIZE EXCESSIVELY PARTISAN GERRYMANDERS BY APPLYING THE SAME TECHNOLOGY USED TO CREATE THEM

Just as extreme partisan gerrymanders are *created* by examining a large number of possible redistricting plans to find an extreme outlier, an extreme partisan gerrymander can now be *recognized* by determining how extreme the plan is when

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[2] *See also* JS App-157-159.

compared to a large collection of plans sampled at random from the universe of all possible plans consistent with a State's declared redistricting goals (e.g., compactness and contiguity).

With modern computer technology, it is straightforward to (i) generate a large collection of redistricting plans that are representative of all possible plans that meet the State's declared goals (e.g., compactness and contiguity); (ii) calculate the partisan outcome that would occur under each such plan, based upon actual precinct-level votes in one or more recent elections; (iii) display the distribution of the outcomes across these plans; and (iv) situate the State's chosen plan along that continuum to reveal the degree to which that plan is an outlier. One can analyze outcomes for a statewide plan as a whole, or for an individual district within a plan.

As described in Section VII *infra*, the approach of randomly sampling from a universe of outcomes to identify extreme outliers is routinely used by the Federal Government for a wide range of critical national needs, including national defense, the safety of nuclear power plants and hurricane storm track predictions.

To illustrate the concept: A State's plan might be compared to a collection of 10,000 plans sampled

randomly from the universe of all possible plans that meet the State's redistricting criteria.[3,4]

For each district in each of those 10,000 plans, one can calculate the total number of Republican and Democratic votes that would have been cast in that district if the plan had been used in any recent election—by simply adding up the votes that were cast in each precinct assigned to the district under the plan.

This information can then be used to analyze the State's plan at the statewide or individual district level, making it applicable both to claims of associational harm under the First Amendment and to claims of vote dilution under the Fourteenth Amendment or Article I, § 2.

(i) Statewide analysis. A statewide analysis asks: Is the State's plan an extreme outlier with respect to the *overall number of representatives* elected by voters associated with a given political party?

To answer the question, one compares the overall electoral outcome (the total number of districts won by the party) under the State's plan to the outcome under each of the 10,000 plans.

Suppose, for example, that the State's plan resulted in 3 Democratic representatives, but only 20 of the 10,000 randomly sampled plans resulted in an

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[3] The precise size does not matter provided that it is large enough, which one can confirm by checking that results remain essentially the same when the size is increased.

[4] Methods for drawing random samples, representative of a large distribution of outcomes, are well developed in computational analysis; see Section VII *infra*.

outcome this low. Then, the State's plan would be more extremely partisan than 99.8% of all possible redistricting plans.

(ii) District analysis. A district-level analysis asks: Is a *particular district* in the State's plan an extreme outlier with respect to the proportion of voters associated with a given political party? The proportion may be either extremely high (packing) or low (cracking).

One can answer the question for a particular district by comparing the proportion of voters associated with the party in the district in the State's plan to the proportion in the corresponding district in each of the 10,000 plans.[5,6]

Suppose, for example, a particular district in the State's plan has the fourth highest proportion of Democrats, with the proportion being, say, 46%. If the proportion of Democrats in the fourth highest district was 46% or less in 50 of the 10,000 plans, then the State's plan would impose a burden (in terms of vote dilution of Democratic voters in this district) more extreme than in 99.5% of possible plans.

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[5] Here, the corresponding district means the district with the same rank in terms of proportion of voters associated with the party.

[6] The question can also be answered by considering the impact on each individual precinct within a district—by comparing the district containing the precinct in the State's plan to the district containing that precinct in each of the 10,000 sampled plans—to see if it is an extreme outlier with respect to the proportion of voters associated with a given political party (that is, packing and cracking).

V. THE DISTRICT COURT PROPERLY APPLIED AN EXTREME OUTLIER STANDARD TO NORTH CAROLINA'S 2016 PLAN

In a four-day trial held in October 2017, the District Court heard expert testimony by two computational scholars, Dr. Jonathan Mattingly of Duke University and Dr. Jowei Chen of the University of Michigan, who had each published extensively on the use of computational analysis to determine the extent to which redistricting plans are extreme outliers. Both experts applied extreme outlier tests to North Carolina's 2016 Plan, and each reached effectively identical conclusions.

The discussion below focuses on the analyses performed by Dr. Mattingly, who examined a sample of 24,518 plans. The work was described in his deposition and testimony at trial—as well as in his expert's report and an academic article,[7] about both of which he testified in deposition and at trial.[8]

Dr. Chen performed similar analyses, using a sample of 3,000 plans, and reached the same conclusions concerning the extent to which North Carolina's 2016 Plan is an extreme outlier.

(i) Statewide analysis. Dr. Mattingly compared the number of Democratic representatives that would have been elected under North Carolina's 2016 Plan

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[7] Sachet Bangia et al., *Redistricting: Drawing the Line*, arXiv:1704.03360v2 (arXiv preprint 2017), available at: https://arxiv.org/pdf/1704.03360.pdf (last visited Feb. 25, 2019).

[8] JA-345-362 (Excerpts from Jonathan Mattingly PowerPoint Demonstrative), 364-392 (Excerpts from Transcript of Bench Trial, Direct Examination of Dr. Jonathan Mattingly).

versus under each of the 24,518 sampled plans. The analyses were performed using precinct-level results from both the 2016 and 2012 elections.

The results, shown in Figure 1, clearly demonstrate that North Carolina's 2016 Plan is an extreme outlier.

Based on data from the 2016 election, the outcome of the State's Plan (only three Democrats elected in a plan with 13 districts, despite Democrats receiving 47% of votes statewide) was more extreme than for 99.3% of the 24,518 sampled plans.

Based on data from the 2012 election, the outcome of the State's Plan (in that case, four Democrats elected in a plan with 13 districts[9]) was more extreme than for 99.7% of the 24,518 sampled plans.

Interestingly, Dr. Mattingly also applied the extreme outlier test to a redistricting plan that had been drawn by a bipartisan panel of retired North Carolina justices and judges in August 2016 ("Judges' Plan").[10] In contrast to North Carolina's Plan, the Judges' Plan was not an extreme outlier. To the

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[9] The statewide Democratic vote in the 2012 House election was higher than in 2016 (51% vs. 47%).

[10] *See Nonpartisan Redistricting Panel Reveals Unofficial NC Congressional Voting Map*, available at: https://sanford.duke.edu/articles/nonpartisan-redistricting-panel-reveals-unofficial-nc-congressional-voting-map (last visited Feb. 25, 2019).

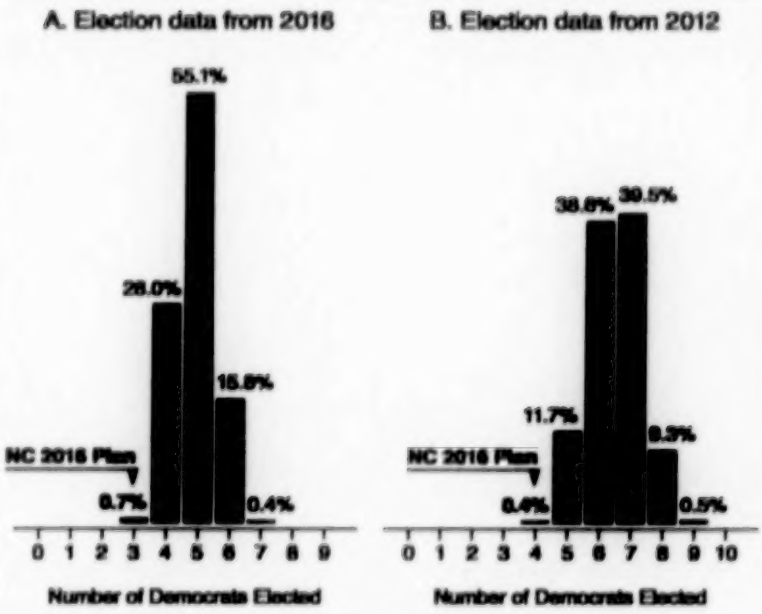

Figure 1. Extreme Outlier Test: Statewide. The figure compares the total number of Democrats elected statewide under North Carolina's 2016 Plan to the total number that would be elected under each of the 24,518 plans sampled from the universe of possible redistricting plans. (Panels A and B show results based on the precinct-level results for the 2016 and 2012 election, respectively.)

Panel A, for example, shows that 0.7%, 28%, 55.1%, 15.8% and 0.4% of the 24,518 plans result in 3, 4, 5, 6, and 7 Democratic districts, respectively. North Carolina's 2016 Plan resulted in 3 Democratic districts.

(The figure has been redrawn, for clarity, from the data in Common Cause Plaintiffs' Exh. 3040, JA-353 and JA-345.)

contrary, it was squarely in the middle of the distribution.[11]

(ii) District-level analysis. Dr. Mattingly sorted North Carolina's 13 districts in increasing order of the proportion of Democratic voters. He then compared these proportions in each district to the proportion in the comparably ranked district in each of the 24,518 sampled plans.

Based on data from the 2016 election, the results, shown in Figure 2, clearly demonstrate that North Carolina's Plan is an extreme outlier at the district level for at least six districts.

The top three districts (NC-1, NC-4, NC-12) show *extreme packing*. The proportion of Democratic voters in these districts is *higher* than in, respectively, 99.7%, 100% and 100% of the 24,518 sampled plans.[12]

The next three districts (NC-13, NC-2, NC-9) show *extreme cracking*. The proportion of Democratic voters in these districts is *lower* than in, respectively, 100%, 99.9% and 99.8% of the 24,518 sampled plans.[13] The State's plan thus imposed more extreme vote dilution on the Democratic voters in these districts than in virtually all other alternative plans.

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[11] For the Judges' Plan, the result was equal to the median of the distribution based on data from the 2012 election and differed by one from the median of the distribution based on data from the 2016 election. JA-341.

[12] The aggregate proportion of Democratic voters in these three districts is *higher* than in *all* of the 24,518 sampled plans—showing extreme packing.

[13] The aggregate proportion of Democratic voters in these three districts is *lower* than in *all* of the 24,518 sampled plans—showing extreme cracking.

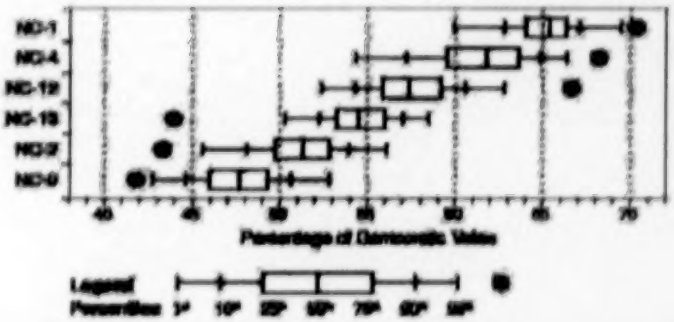

Figure 2. Extreme Outlier Test: Individual districts. The figure shows an extreme outlier test applied to the six districts with the highest proportion of Democratic voters (*NC-1, NC-4, NC-12, NC-13, NC-2, NC-9).*

For each of the individual districts, the plot shows the proportion of Democratic voters under North Carolina's 2016 Plan (blue circle) and the percentiles for the corresponding districts in each of the 24,518 plans sampled from the universe of possible redistricting plans. (The leftmost and rightmost bars indicate the 1st and 99th percentiles.)

For North Carolina's 2016 Plan, the first three districts are in the highest 1% of plans (extreme *packing*). The proportion is ***higher*** than in, respectively, 99.7%, 100%, and 100% of the sampled plans. The next three districts are in the lowest 1% of plans (extreme *cracking*). The proportion is *lower* than in, respectively, 100%, 99.9% and 99.8% of the sampled plans.

(The figure is redrawn, for clarity, from the data in Common Cause Plaintiffs' Exh. 3040, JA-357. The figure has been rotated, and bars at the 0th and 100th percentiles have been replaced by bars at the 1st and 99th percentiles.)

Dr. Mattingly obtained similar results based on data from the 2012 election, with seven districts being more extreme than 99% of the sampled plans.[14]

The same conclusions are reached when districts are analyzed at the level of the individual precincts contained within them.[15]

The General Assembly did not dispute that its intention was to produce a partisan gerrymander designed to ensure that 10 Republicans would be elected. Nor did it dispute the experts' analysis that the 2016 Plan was more extreme than more than 99% of all possible plans.

The District Court carefully considered and explicitly cited the analysis of the expert witnesses showing that North Carolina's 2016 Plan is an extreme outlier, as part of reaching its conclusion that the plan—at both the statewide level[16] and at the

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[14] JA-349.

[15] Dr. Mattingly subsequently published an extreme outlier analysis based on considering the individual precincts within each district, as described in footnote 6. It similarly shows that the 2016 Plan is an extreme outlier: In that plan, 233 of the 2,692 precincts are subject to packing or cracking more extreme than in more than 99% of the 24,518 sampled plans. (In most of the sampled plans, the number of such precincts does not exceed four.) *See* Jonathan Mattingly, *Localized view of Quantifying Gerrymandering*, Quantifying Gerrymandering (2019) available at https://sites.duke.edu/quantifyinggerrymandering/2019/03/04/localized-view-of-quantifying-gerrymandering/ (last visited Mar. 4, 2019).

[16] *See* JS App-120-121; 127-129; 131-132; 159-171; 181-187; 209-211.

level of many individual districts[17]—is an extreme partisan gerrymander that violates the Constitution.

VI. AN EXTREME OUTLIER STANDARD IS NOT SUSCEPTIBLE TO CRITICISMS THAT HAVE BEEN LEVELLED AT SOME PREVIOUSLY PROPOSED APPROACHES

An extreme outlier standard is not susceptible to criticisms that have been levelled at some approaches that have been used in partisan gerrymandering cases.[18] In particular, an extreme outlier standard (i) is judicially discoverable and manageable, (ii) employs an objective, well-established mathematical method, with a *right* answer, (iii) accounts for a State's actual political geography, and (iv) does not expect or enforce proportional representation.

A. An extreme outlier standard is judicially discoverable and manageable.

An extreme outlier standard is judicially discoverable in the sense that it flows directly from the constitutional principle at issue.

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[17] *See* JS App-230; 235-236; 240-241; 247-248; 254-255 and 258-259; 269; 272-273.

[18] Chief Justice Roberts has expressed concern that some approaches involving political-science metrics were of questionable relevance or reliability ("sociological gobbledygook"). Transcript of Oral Argument, *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 40. Such concerns would not apply to an extreme outlier test, which directly measures excessiveness and which the Federal Government and others have successfully relied upon in critical situations for many decades.

In *Baker v. Carr*, 369 U.S. 186 (1962), for example, this Court found that claims of excessive population differences between legislative districts are justiciable, and in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Constitution requires substantially equal legislative representation for all citizens in a State regardless of where they reside. 377 U.S. at 565.

In those cases, the constitutional problem (excessive population differences between districts) implied a natural judicial standard for recognizing it (measuring how excessive the differences are).

The remaining issue was to decide, in any given case, whether the population difference between districts was *too* excessive.

No mathematically 'ordained' threshold is set forth or inherent in the Constitution concerning when population differences between districts are too excessive. However, this Court adopted a reasonable threshold to make the standard readily manageable.

With respect to state legislative districts, this Court held that, as a general matter, an apportionment plan with a maximum population range under 10% falls within the category of minor deviations, but a plan with larger disparities requires justification by the State. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146 (1993); *Gaffney v. Cummings*, 412 U.S. 735 (1973).[19]

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[19] With respect to *congressional* districts, Art. I, § 2, provides that representatives be chosen "by the People of the several States," thus requiring population equality as nearly as is practicable; the State must demonstrate that any population deviations were necessary to achieve some legitimate state

Similarly, this Court has long agreed that *excessive* partisan gerrymandering violates the Constitution. The constitutional problem (excessive partisan gerrymandering) implies the natural judicial standard for recognizing it (measuring the *excessiveness* of a gerrymander).

To measure excessiveness, the extreme outlier test compares a putative gerrymander to all possible redistricting plans compatible with the State's declared goals. (This quantitative measure could, of course, be combined with other factors—such as direct evidence of legislative intent, as in this case.)

Concerning the degree of excessiveness, this Court might someday choose, after the benefit of some experience, to provide a presumptive threshold for excessive partisan gerrymandering—just as it did for legislative redistricting cases after *Baker v. Carr*.

As with the 'one-person, one-vote' standard, there is no constitutionally 'ordained' threshold for excessive partisan gerrymandering.

At present, however, there is no need for this Court to adopt a presumptive threshold, because North Carolina's 2016 Plan is *so extreme* in its partisan bias as to exceed any plausible threshold.

B. An extreme outlier standard employs an objective mathematical approach, with a *right* answer.

An extreme outlier standard concerns a straightforward, quantitative mathematical question

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objective. *See Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 763 (2012); *Karcher v. Daggett*, 462 U.S. 725 (1983).

to which there is a *right* answer: What fraction of redistricting plans are less extreme than the plan?

Extreme outlier analysis belongs to a well-established field and, as described in Section VII *infra*, the method is widely used by the Federal Government for a wide range of critical needs, including national defense and public safety.

If a redistricting plan were to be challenged, each interested party could run its own analysis, using readily available data, methods and cloud computing resources.

In the unlikely event that the parties reached meaningfully different answers, they could present testimony challenging and supporting the methodologies.

Given that extreme outlier tests are widely used throughout science—including for national defense and other critical national needs, the U.S. scientific community would rapidly become involved in resolving any methodological disagreement.

Indeed, the U.S. National Academy of Sciences has publicly announced that it would convene scientific experts to assist in helping the scientific community reach consensus with respect to the analysis of redistricting plans.[20]

Courts could rest assured that meaningful methodological disputes will not persist. The field will rapidly settle on standard and reliable methods.

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[20] *See Statement on Analysis of Voting Redistricting Plans*, available at: http://www.nasonline.org/about-nas/leadership/speeches-statements-interviews-mcnutt.html (last visited Feb. 19, 2019).

C. An extreme outlier standard accounts for a State's actual political geography.

An extreme outlier standard accounts for a State's actual political geography, because it compares a redistricting plan to the universe of all possible redistricting plans drawn on the same political geography.

If Democrats are overrepresented in cities, this condition will affect the universe of all possible redistricting plans—resulting in most plans having some degree of "natural" packing.

For a plan to be an extreme *outlier*, it must be extreme relative to the universe of all possible plans.

D. An extreme outlier standard does not expect or enforce proportional representation.

This Court has been clear that the Constitution does not require proportional representation.[21]

Notably, an extreme outlier standard does not consider in any way whether a plan achieves proportional representation.

To the contrary, an extreme outlier standard *expects* that representation will be non-proportional whenever there is "natural" packing.

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[21] "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation, or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Davis v. Bandemer*, 478 U.S. 109 (1986) at 130 (plurality opinion) (citations omitted).

VII. THE UNITED STATES RELIES ON AN EXTREME OUTLIER APPROACH FOR A WIDE RANGE OF CRITICAL NEEDS, INCLUDING NATIONAL DEFENSE

An extreme outlier standard for excessive partisan gerrymandering would be analogous to extreme outlier approaches used in many other settings.

Almost immediately after computers were developed, scientists realized that they could be used to make accurate inferences about distributions of outcomes, even when the number of underlying possibilities is extremely large. In particular, these methods can be used to recognize whether an outcome is an extreme outlier.

The concept first arose in 1946 in the context of designing a hydrogen bomb.[22] As the power of modern computers has grown, a variety of computational methods have been developed for drawing a large sample that is representative of an entire universe of outcomes.[23]

The technology is now routinely applied to many critical real-world situations, including

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[22] Nicholas Metropolis, *The Beginning of the Monte Carlo Method*, 15 Los Alamos Sci. 125 (1987), available at http://permalink.lanl.gov/object/tr?what=info:lanl-repo/lareport/LA-UR-88-9067 (last visited Feb. 19, 2019).

[23] The initial techniques were called Monte Carlo methods, but many additional methods have been developed. *See* Christian Robert & George Casella, *Monte Carlo Statistical Methods* (2004); *Sequential Monte Carlo Methods in Practice*, (Arnaud Doucet, Nando de Freitas, & Neil Gordon eds., 2001); Andrew Gelman, et al., *Bayesian Data Analysis*, (3rd ed. 2013).

national defense, public safety, finance, and health. A few examples include:

• *Design of nuclear weapons, safety of nuclear weapons in storage, and safety of nuclear power plants.* As to weapons design, the computational analysis considers the vast number of paths that neutrons may take and assess the risk that 'criticality' will fail to occur. In the latter two cases, the analysis considers the risk that it *will* occur.[24]

• *Hurricane storm track prediction.* Methods called ensemble-based forecasting represent the distribution of possible outcomes in a 'cone of uncertainty;' this approach has enabled highly accurate assessments of which cities are safe and which are at risk.[25]

• *'Stress-testing' of large banks.* In the wake of the 2008 financial crisis, the Federal Reserve instituted its Supervisory Capital Assessment Program, which calculates the distribution of losses

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[24] Forrest B. Brown, *A Review of Best Practices for Monte Carlo Criticality Calculations*, Los Alamos Report LA-UR- 09-03136 (2009), available at https://mcnp.lanl.gov/pdf_files/la-ur-09-3136.pdf (last visited Feb. 19, 2019).

[25] Thomas M. Hamill, et al., *NOAA's Future Ensemble-Based Hurricane Forecast Products*, 93 Bull. Amer. Meteor. Soc. 209 (2012); Jo Craven McGinty, *As Forecasts Go, You Can Bet on Monte Carlo*, Wall St. J., Aug. 12, 2016, available at https://www.wsj.com/articles/as-forecasts-go-you-can-bet-on-monte-carlo-1470994203 (last visited Feb. 19, 2019).

that can occur, to identify extreme outliers.[26] Stress tests continue to be applied.[27]

Additional examples include conflict resolution in air traffic control,[28] safety of building structures under earthquake hazards,[29] and crashworthiness of automobiles.[30]

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[26] Randy Heffernan, *Fed Uses Monte Carlo Simulation for Stress Test*, Risk & Decision Analysis News Blog, May 29, 2009, available at https://blog.palisade.com/2009/05/29/fed-uses-monte-carlo-simulation-for-stress-test/ (last visited Feb. 19, 2019); Board of Governors of the Federal Reserve System, *The Supervisory Capital Assessment Program: Design and Implementation*, Apr. 24, 2009, available at https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090424a1.pdf (last visited Feb. 19, 2019).

[27] *See OCC Releases Dodd-Frank Act Stress Test Scenarios for 2019*, available at: https://www.occ.treas.gov/news-issuances/news-releases/2019/nr-occ-2019-13.html (last visited Feb. 25, 2019).

[28] Andrea Lecchini Visintini, et al., *Monte Carlo Optimization for Conflict Resolution in Air Traffic Control*, 7 IEEE Trans. Intell. Transp. Syst. 470 (2006).

[29] V. Bolotin, *Seismic Risk Assessment for Structures with the Monte Carlo Simulation*, 8 Probabilist. Eng. Mech. 169 (1993); Sinan Akkar & Yin Cheng, *Application of a Monte-Carlo Simulation Approach for the Probabilistic Assessment of Seismic Hazard for Geographically Distributed Portfolios*, 45 Earthq. Eng. Struct. D. 525 (2016).

[30] Stephen M. Summers & William T. Hollowell, *NHTSA's Crashworthiness Modeling Activities*, National Highway Transportation Safety Administration, Paper #251 (2001), available at https://www-nrd.nhtsa.dot.gov/pdf/esv/esv17/proceed/00178.pdf (last visited Feb. 19, 2019).

VIII. OVER THE PAST DECADE, EXTREME OUTLIER APPROACHES HAVE BECOME INCREASINGLY APPLIED TO ASSESS REDISTRICTING PLANS

For more than 50 years, scholars have recognized the wisdom of evaluating a proposed redistricting plan by comparing it to the universe of other possible plans. In 1967, Drs. James Thoreson and John Liittschwager programmed the University of Iowa's IBM 7044 digital computer to sample and evaluate 150 redistricting plans.[31] However, the computing power was so limited that their analysis could only be conducted at the level of counties, which is far above the level at which redistricting actually occurs. Various scholars sought to apply the approach in the 1970s and 1980s, but the technology was still inadequate to the task.[32]

The use of computers to *create* redistricting plans became a widespread practice in the 1990s and was ubiquitous in the 2000s—leading to the

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[31] James D. Thoreson & John M. Liittschwager, *Computers in Behavioral Science: Legislative Districting by Computer Simulation*, 12 Syst. Res. Behav. Sci. 237 (1967).

[32] Yan Y. Liu, Wendy K. Tam Cho & Shaowen Wang, *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 Swarm Evol. Comput. 78, 79 (2016); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 355-6 (2016); Micah Altman, Karin MacDonald & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 Soc. Sci. Comput. Rev. 334, 335-7 (2005).

proliferation of extreme partisan gerrymandering.[33] But, the technology to *evaluate* redistricting plans lagged behind.

The situation has changed in the last decade, as computer technology has caught up with the problem that it spawned. The computing power available to professionals has increased by more than a million-fold in the past twenty-five years, owing to increases in processor speed and computer architectures that employ many processors in parallel.[34]

Multiple researchers have employed various computational methods to finally be able to evaluate redistricting plans by comparing them to a large sample of possible plans that respect a State's declared goals.

Over the past decade, the field has matured rapidly. There are many distinguished computational scientists actively applying extreme outlier methods, including Dr. Jonathan Mattingly of Duke University;[35] Dr. Jowei Chen of the University of

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[33] Micah Altman, Karin MacDonald & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 Soc. Sci. Comput. Rev. 334, 335-42 (2005); Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 Duke J. Const. L. & Pub. Pol'y 69, 78-9 (2010); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 831 (2015).

[34] Peter J. Denning & Ted G. Lewis, *Exponential Laws of Computing Growth*, 60 Commun. ACM 54, 56 (2017).

[35] Jonathan C. Mattingly & Christy Vaughn, *Redistricting and the Will of the People*, arXiv:1410.8796 (arXiv preprint 2014), available at: https://arxiv.org/pdf/1410.8796.pdf (last visited Feb. 19, 2019); Sachet Bangia, et al., *Redistricting:*

Michigan, Dr. Wendy Cho of the University of Illinois; [36] Dr. Jonathan Rodden of Stanford University, and Dr. David Cottrell of Dartmouth College; [37] and Dr. Michael McDonald of Binghamton

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Drawing the Line, arXiv:1704.03360 (arXiv preprint 2017), available at: https://arxiv.org/pdf/1704.03360.pdf (last visited Feb. 19, 2019); Gregory Herschlag, Robert Raviera, and Jonathan C. Mattingly, *Evaluating Partisan Gerrymandering in Wisconsin*, arXiv:1709.01596v1 (arXiv preprint 2017), available at: https://arxiv.org/pdf/1709.01596.pdf (last visited Feb. 25, 2019); Sachet Bangia, et al., *Quantifying Gerrymandering in North Carolina*, arXiv:1801.03783v1 (arXiv preprint 2018), available at: https://arxiv.org/pdf/1801.03783.pdf (last visited Feb. 25, 2019)

[36] Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351 (2016); Yan Y. Liu, Wendy K. Tam Cho & Shaowen Wang, *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 Swarm Evol. Comput. 78 (2016); Wendy K. Tam Cho & Yan Y. Liu, *Sampling from complicated and unknown distributions: Monte Carlo and Markov Chain Monte Carlo methods for redistricting*, 506 *Physica A* 170 (2018.

[37] Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L. J. 331 (2015); Jowei Chen & David Cottrell, *Evaluating partisan gains from Congressional gerrymandering: Using computer simulations to estimate the effect of gerrymandering in the U.S. House*, 44 Elect. Stud. 329 (2016); Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin's Act 43 Assembly Districting Plan*, 16 Election L. J. (2017), available at: http://www-personal.umich.edu/~jowei/Political_ Geography_ Wisconsin_Redistricting.pdf and https://doi.org/ 10.1089/ elj.2017.0455 (last visited Feb. 19, 2019).

University.[38] As noted above, the first two of these experts testified in the case before this Court.

These scientists have applied their computer code to redistricting plans in various States—showing that some plans are comfortably within the normal range of plans, while others lie far outside the ordinary distribution of outcomes.

Notably, the results have been consistent even when experts use different computational algorithms and computer hardware to draw large, representative samples—exactly as one would expect for a mathematical analysis when properly performed.

While the extreme outlier methodology has become firmly established over the past decade, this case is the first in which the Court has had the opportunity to consider its application to partisan gerrymandering.

IX. AN EXTREME OUTLIER STANDARD WOULD PROVIDE GUIDANCE TO THE PARTIES AND BOLSTER CONFIDENCE IN THE COURTS

An extreme outlier standard would provide practical guidance to States with respect to whether they have overstepped the bounds in pursuit of partisan advantage.

Many States would routinely evaluate draft plans under consideration to assess the degree to

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[38] Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L. J. 312 (2015); Jonathan Krasno, et al., *Can Gerrymanders Be Detected? An Examination of Wisconsin's State Assembly*, Am. Polit. Res. (2018).

which they are excessive. In this way, States could ensure that their enacted plans would be shielded from a successful court challenge.

Similarly, potential challengers could run their own evaluations to assess whether a plan would likely withstand challenge under this objective, quantitative standard.

In both ways, the adoption of the proposed approach would likely have the salutary effect of reducing litigation.

Where such litigation was brought, the objective nature of the extreme outlier approach would tend to bolster public confidence in the courts.

In those cases where a court found that a plan was unconstitutionally partisan, the clear, impartial and reliable nature of the extreme outlier standard could help communicate the legitimacy of the decision and thus to shield the court from claims of judicial activism.

For example, the public could readily understand the legitimacy of court action striking down an extreme gerrymander that was objectively more biased than, say, 90% of all possible plans that the State could have chosen and that comparably achieved the State's declared goals.

In short, an extreme outlier standard, by providing clear, objective and reliable quantitative information about the degree of partisan bias of a restricting plan, at either the statewide or district level, would bolster the perceived neutrality and legitimacy of the court's judgment.

CONCLUSION

For the reasons set forth above, this Court should endorse an extreme outlier standard as a judicially manageable standard for resolving claims of excessive partisan gerrymandering, and should hold that, in light of that standard, such claims are justiciable.

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Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Promoting and defending the voting rights of African Americans and other racial minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g., Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court. *See, e.g., Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Bethune-Hill v. Va. State Bd. of Elecs.*, 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*,

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that all parties have granted blanket consent to *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeals because they raise important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

These cases are about partisan gerrymandering. But they also have implications for longstanding efforts to root out racial gerrymandering. Race and politics are often correlated—as the history behind the North Carolina congressional map in *Rucho v. Common Cause* confirms. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465-66 (2017). Partisan gerrymandering can therefore inflict the same harm as racial gerrymandering: diluting the voting strength of racial minorities. Yet states often assert partisan gerrymandering as a defense to racial gerrymandering claims. If the Court were to declare partisan gerrymandering nonjusticiable, but continue to allow states to assert it as a defense, states could diminish the voting strength of racial minorities with impunity merely by couching their gerrymandering in political terms. To prevent that result, this Court should reaffirm that partisan gerrymandering claims are justiciable.

The defendants in *Rucho v. Common Cause* and *Lamone v. Benisek* argue that courts lack judicially manageable standards for resolving partisan gerrymandering claims. They are mistaken. Over the past several decades, this Court has developed a "flexible standard" for resolving challenges to state election laws that burden the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983). Under that standard, courts

(1) consider the character and magnitude of the alleged injuries to First and Fourteenth Amendment rights, (2) evaluate the state's purported justifications, and (3) measure the injuries against the justifications to determine whether the challenged law is constitutional. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789.

The Court should apply this "flexible standard" to partisan gerrymandering claims. Partisan gerrymandering burdens the same First and Fourteenth Amendment rights as the state election laws in decisions such as *Anderson* and *Burdick*. And courts can readily apply the *Anderson/Burdick* framework to partisan gerrymandering claims by considering the character and magnitude of the constitutional injuries that partisan gerrymandering inflicts, evaluating the state's purported justifications, and weighing the injuries against those justifications. Far from being unmanageable, this approach would bring the same methods of judicial analysis to bear on partisan gerrymandering that courts routinely use in other cases.

For example, in assessing the character and magnitude of the injuries from a partisan gerrymander, courts can draw upon cognate principles from racial gerrymandering cases. They can consider, in particular, whether partisan advantage was the predominant factor—the factor that could not be compromised—in drawing district lines. *Cf. Bethune-Hill*, 137 S. Ct. at 798. And in determining whether partisanship predominated, courts can draw on this Court's guidance concerning the types of evidence that are probative of discriminatory legislative intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-

68 (1977). Courts can also use various metrics to evaluate the magnitude of the effects of an alleged partisan gerrymander on voting and associational rights.

That is not to say, however, that the Court should use the cases now before it to fashion a one-size-fits-all approach to evidentiary matters in partisan gerrymandering cases. Rather, after confirming that partisan gerrymandering claims are justiciable and subject to the general *Anderson/Burdick* framework, the Court should allow subsidiary standards of proof within that framework to evolve over time.

The application of the *Anderson/Burdick* standards to the evidence in *Rucho* confirms that those standards are judicially manageable in partisan gerrymandering cases—and that the *Rucho* plaintiffs should prevail. North Carolina's 2016 congressional plan imposes extreme burdens on the *Rucho* plaintiffs' First and Fourteenth Amendment rights. And the State's justifications for imposing those burdens have no merit. This Court should therefore affirm the rulings in both *Rucho* and *Lamone* that partisan gerrymandering claims are justiciable, and affirm the *Rucho* district court's judgment that most of the districts in North Carolina's plan are unconstitutional.[2]

Finally, even if this Court were to rule that partisan gerrymandering claims are not justiciable, it should foreclose the all-too-common invocation of partisan gerrymandering as a defense to claims of racial gerrymandering. Partisan gerrymandering is an illegitimate practice that cannot justify denying an otherwise meritorious racial gerrymandering claim. And ruling out such a defense would prevent states from

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[2] The Lawyers' Committee takes no position on the merits of *Lamone*.

diluting the voting strength of racial minorities in the guise of partisan gerrymandering—a limitation that would become even more important in the event that partisan gerrymandering could not be affirmatively challenged.

ARGUMENT

I. The justiciability of partisan gerrymandering claims has important implications for racial gerrymandering claims.

States have a long and unfortunate history of diluting the voting strength of racial minorities through gerrymandering. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Despite efforts to eliminate it, racial gerrymandering remains a problem today. *See, e.g., Cooper*, 137 S. Ct. 1455 (2017); *Bethune-Hill*, 137 S. Ct. 788 (2017).

Partisan gerrymandering can equally dilute the voting strength of racial minorities. Because, in many jurisdictions, "racial identification is highly correlated with political affiliation," a district gerrymandered on partisan grounds can look the same as a district gerrymandered on racial grounds. *Cooper*, 137 S. Ct. at 1473 (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)). Thus, in districts with racially polarized voting patterns and substantial minority populations, partisan gerrymandering can be the functional equivalent of—and inflict the same harm as—racial gerrymandering.

States nevertheless assert partisan gerrymandering as a defense to racial gerrymandering claims. North Carolina, for example, has taken this approach at least twice. *See Cooper*, 137 S. Ct. at 1465-66, 1473; *Easley*, 532 U.S. at 239-40. Other states have done the same. *See, e.g., Ga. State Conf. of NAACP v. Georgia*,

312 F. Supp. 3d 1357, 1364 (N.D. Ga. 2018) (Georgia); *Bush v. Vera*, 517 U.S. 952, 967-68 (1996) (plurality op.) (Texas).

It can be difficult for plaintiffs bringing a racial gerrymandering claim to overcome a partisan gerrymandering defense. Even when they have compelling evidence of race-based districting, plaintiffs may need to show that those racial considerations predominated over partisan ones. *See Cooper*, 137 S. Ct. at 1473-74 & n.7. Because race and politics are correlated, however, it can be challenging "to disentangle race from politics and prove that the former drove a district's lines." *Id.* at 1473.

The litigation in *Georgia State Conference of NAACP v. Georgia* exemplifies this difficulty. In that case, the plaintiffs asserted a racial gerrymandering claim concerning two state legislative districts redrawn in 2015. 312 F. Supp. 3d at 1359. Georgia defended those districts as partisan gerrymanders. *Id.* at 1364.

When the plaintiffs moved for a preliminary injunction, the district court found that the plaintiffs had "compelling" evidence that "race predominated" in redrawing the challenged districts. 312 F. Supp. 3d at 1365. For example, the plaintiffs showed that the motivation for redrawing the districts was that their racial demographics were changing. *See id.* at 1359-60, 1365. Recent elections in both districts had been close and featured racially polarized voting patterns, and both districts were experiencing an influx of racial minorities. *See id.* at 1360. The Republican-dominated Georgia legislature did not want these demographic changes to imperil Republican incumbents. *See id.*

The plaintiffs also showed that the new maps had the desired effect: They moved just enough African Americans out of the districts to swing the results of the 2016 election in the incumbents' favor. *See* 312 F. Supp. 3d at 1363. The redistricting caused the African American share of the voting age population in each district to decrease by more than 2% (or roughly 1,000 people). *See id.* The Republican incumbents then prevailed in the 2016 election by razor-thin margins: 222 votes in one district, and 946 votes in the other. *See Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1272 (N.D. Ga. 2017). Even Georgia's in-house redistricting expert agreed that, but for the redistricting, both incumbents likely would have lost. *See* 312 F. Supp. 3d at 1360, 1363.

The plaintiffs also presented "persuasive" evidence that the map drawers redrew the districts based on racial data. 312 F. Supp. 3d at 1365. For example, the plaintiffs introduced "compelling" proof that the map drawers could only have relied on racial data when they split a number of precincts—because racial data existed at the sub-precinct level, but partisan data did not. *Id.* at 1365-66.

Despite this evidence, the district court denied a preliminary injunction. 312 F. Supp. 3d at 1369. It identified the conundrum that the state's partisan gerrymandering defense created:

> [Proving racial gerrymandering] is particularly hard to do when the State offers a defense rooted in partisan gerrymandering, as it did here. We did not move these voters because they are black, the State tells us. We moved them because they were Democrats. And under current Supreme Court precedent,

> the State tells us this motive is perfectly acceptable.

Id. at 1364. Confronted with this problem, the district court punted: It observed that the State's principal map drawer testified that she had relied only on political data, and not on racial data. *Id.* at 1367. Reasoning that the case therefore turned on a "credibility determination," the court gave the State the benefit of the doubt. *Id.*

That result epitomizes the consequences of permitting a state to assert a partisan gerrymandering defense to a racial gerrymandering claim. The Georgia legislature treated minority voters like pawns due to their race and their presumed political affiliation. Because minority voters' electoral power was increasing, the legislature stacked the deck by moving them out of competitive districts and into safe districts to ensure a particular electoral outcome. Whether the map drawer relied more heavily on political or racial data, the effect was the same: the dilution of African American voting strength. Yet the district court denied relief.

If this Court were to rule that partisan gerrymandering is not justiciable, yet still allow states to raise partisan gerrymandering as a defense to racial gerrymandering claims, it would intensify the problems highlighted by the Georgia case. States would be emboldened to engage in even more extreme partisan gerrymandering—knowing all the while that the effects would include the dilution of minority votes. The Court would, in effect, be licensing the disenfranchisement of racial minorities.

In contrast, confirming that political gerrymandering claims are justiciable, and identifying judicially manageable standards for those claims, would impose a much-needed check on the practice of asserting partisan gerrymandering as a defense to racial gerrymandering claims. That is because, in asserting such a defense, the state would be admitting that it committed an actionable constitutional violation. States would therefore be unable to inflict the harm of a racial gerrymander in the guise of a partisan gerrymander.

II. Declaring partisan gerrymandering claims non-justiciable would erroneously depart from this Court's precedent.

For over three decades, a majority of this Court has ruled that partisan gerrymandering cases are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 307-68 (2004) (Kennedy, J., concurring in the judgment; Stevens, J., dissenting; Souter and Ginsburg, JJ., dissenting; Breyer, J., dissenting). That conclusion is consistent with the bedrock equal protection principle that challenges to redistricting plans containing malapportioned districts do not present non-justiciable political questions. *See Baker v. Carr*, 369 U.S. 186, 237 (1962). To reverse course and declare that partisan gerrymandering challenges are not justiciable would be unprecedented. This Court has never before moved a class of cases from the justiciable to the non-justiciable category.

Barring judicial review of partisan gerrymandering claims would be particularly anomalous because the practice is incompatible with the core democratic tenet that "the voters should choose their representatives, not the other way around." *Ariz. State Legis. v.*

Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *see also McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 192 (2014) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The Framers would have agreed. Having considered the effects of "rotten boroughs" in Great Britain, *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), they shared a concern about political mischief infecting redistricting. They thus included a provision in Article I, § 4, permitting Congress to "make or alter" congressional districts for the purpose of "check[ing] partisan manipulation of the election process by" state legislatures. *Vieth*, 541 U.S. at 275 (plurality op.) *see also id.* at 275-76. "[T]he people should choose whom they please to govern them," Alexander Hamilton stated at the New York constitutional convention, and "[t]his great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 541 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot 2d ed. 1836)).

Modern elections are indisputably influenced by partisan gerrymanders, which have become "ever more extreme and durable" due to technology that enables "pinpoint precision in designing districts." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring). As one of the district courts below put it, "cancerous" gerrymandering has become "widespread . . . in modern politics." *Lamone* J.S. App. 35a (internal quotation marks omitted).

The consequences are profound. Lawmakers, having chosen their voters, may disregard the citizenry's needs and concerns. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable*

Standard and Other Reform Options for Partisan Gerrymandering, 46 Harv. J. on Legis. 243, 244 (2009). Even worse, "districts intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is readily measurable or not." Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2028-29 (2018).

Like the defendants here, the State of Georgia argued in *Georgia State Conference of NAACP* that partisan gerrymandering cases cannot be adjudicated until courts identify a standard measuring the precise amount of partisanship that violates the Constitution. 269 F. Supp. 3d at 1281-83. That argument conflates standards with metrics. While this Court may continue to wrestle over the proper metric for measuring discriminatory partisan effect in any particular case, *see, e.g.*, *Gill*, 138 S. Ct. at 1932-33 (discussing the utility of efficiency gap analysis), that debate does not preclude the Court, in the meantime, from identifying a general, judicially manageable legal standard that applies to all cases. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1510 (2018) ("One important point about the array of gerrymandering metrics that now exist is that no winner need be chosen among them. In other areas of election law, numerous measures happily coexist—for example, indices of population inequality, racial polarization, and geographic compactness. The same should be possible in the gerrymandering domain.").

This Court should therefore do what it has done before: identify a workable legal principle that lends

itself to a manageable test and allow lower courts to refine that test over time. In one-person, one-vote cases, for example, the Court declined to employ a specific substantive standard in concluding that Alabama's apportionment plans violated the Equal Protection Clause. It instead declared that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." *Reynolds v. Sims*, 377 U.S. 533, 569 (1964). Although Chief Justice Warren declared in *Reynolds* that "mathematical nicety is not a constitutional requisite" in such cases, *id.*, the Court later determined that certain numerical thresholds were in fact appropriate. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). By not crystallizing the particulars of the one-person, one-vote principle at the outset, *Reynolds* gave lower courts latitude to rein in severe malapportionment in the short term while allowing judicially manageable standards to evolve over time.

This Court should follow that example here and use these cases to identify the foundational legal principles guiding the adjudication of partisan gerrymandering claims.

III. This Court's decisions concerning challenges to state election laws provide judicially manageable standards for partisan gerrymandering claims.

Partisan gerrymandering implicates both the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. This Court has already developed standards for resolving challenges to state election laws that implicate those rights. *See, e.g., Burdick*, 504 U.S. at 433-34; *An-*

derson, 460 U.S. at 789. These decisions provide a judicially manageable framework for adjudicating partisan gerrymandering claims.

A. The Court has developed judicially manageable standards for challenges to state election laws.

State election laws can burden "two different, although overlapping, kinds of rights." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). One is a First Amendment right: "the right of individuals to associate for the advancement of political beliefs." *Id.* The other is a Fourteenth Amendment right: "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.*

These rights "rank among our most precious freedoms." *Williams*, 393 U.S. at 30. But they are not absolute. *Burdick*, 504 U.S. at 433. The states have the power to regulate elections, and "[e]lection laws will invariably impose some burden upon individual voters." *Id.* The question, therefore, is how to protect these fundamental rights while recognizing that, "as a practical matter, there must be a substantial regulation of elections." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

This Court has answered that question by adopting a "flexible standard" for challenges to state election laws. *Burdick*, 504 U.S. at 434. A court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789. "It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it must weigh the

constitutional injuries against the asserted state interests, taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The rigorousness of this inquiry depends on the extent of the injuries to First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434. Election laws that impose "severe burden[s]" on these rights are subject to strict scrutiny and must be "narrowly tailored to serve a compelling state interest." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 451 (2008) (internal quotation marks omitted); *see also Burdick*, 504 U.S. at 434. But election laws that impose only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights are subject to lesser scrutiny, and "the State's important regulatory interests are generally sufficient to justify" them. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

There is no question that this "analytical process" is judicially manageable. *Anderson*, 460 U.S. at 789. Indeed, it "parallels [the] work" that courts do "in ordinary litigation." *Id.* And the Court has applied it to resolve challenges to state election laws for decades. *See, e.g., Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 189-91, 202-04 (2008) (opinion of Stevens, J.); *id.* at 204-05, 209 (Scalia, J., concurring in the judgment); *Wash. State Grange*, 552 U.S. at 458; *Calif. Democratic Party v. Jones*, 530 U.S. 567, 582-86 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-70 (1997); *Burdick*, 504 U.S. at 438-40; *Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 213-14, 217-25 (1986); *Anderson*, 460 U.S. at 790-806.

B. The standards for challenges to state election laws can be applied to partisan gerrymandering claims.

These well-established standards also provide a judicially manageable framework for resolving partisan gerrymandering claims. Under that framework, the Court should (1) consider the character and magnitude of the injuries that a partisan gerrymander causes to rights protected by the First and Fourteenth Amendments, (2) identify the state's purported justifications for causing those injuries, and (3) measure the asserted injuries against the purported justifications to determine whether those justifications pass muster. *See Anderson*, 460 U.S. at 789.

1. Assessing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights

Courts are well equipped to examine the "character and magnitude" of the constitutional injuries inflicted by partisan gerrymandering. *Anderson*, 460 U.S. at 789. Those injuries include the infringement of equal protection rights that have been before this Court in its racial gerrymandering cases, as well as injuries to the associational and voting rights at issue in decisions such as *Anderson* and *Burdick*.

a. Equal protection rights. When assessing the "character and magnitude" of the constitutional injuries inflicted by a partisan gerrymander, courts should consider the state's intent. In particular, courts should analyze whether the predominant factor motivating the state—"the criterion that, in the State's view, could not be compromised," *Bethune-*

Hill, 137 S. Ct. at 798 (internal quotation marks omitted)—was to "subordinate adherents of one political party and entrench a rival party in power." *Rucho* J.S. App. 142a (quoting *Ariz. State Legis.*, 135 S. Ct. at 2658). If so, partisan gerrymandering burdens equal protection rights under the Fourteenth Amendment—and should therefore be subject to heightened scrutiny under this Court's election law cases. *See, e.g.*, *Anderson*, 460 U.S. at 786 n.7 (recognizing that the Court's election law cases have drawn on equal protection principles); *Williams*, 393 U.S. at 30 (explaining that "'invidious' distinctions" violate the Equal Protection Clause, and recognizing that equal protection rights are intertwined with the rights to associate and cast an effective vote in the election law context).

This predominant intent analysis has its roots in the Court's racial gerrymandering cases. In these cases, plaintiffs must show not merely that the legislature had some intent to gerrymander based on race, but that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (emphasis added; internal quotation marks omitted). The Court should apply a similar predominance analysis in partisan gerrymandering cases to avoid an outcome in which partisan gerrymandering would receive greater scrutiny than racial gerrymandering—which would be at odds with the principle that "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause." *Vieth*, 541 U.S. at 293 (plurality op.).

This Court's racial gerrymandering cases establish that a predominant intent analysis is judicially manageable. Indeed, those cases provide a roadmap

for analyzing the legislature's intent in the gerrymandering context. As those decisions explain, predominant intent can be proven through direct evidence, circumstantial evidence, or both. *Cooper*, 137 S. Ct. at 1464.

Direct evidence of intent includes official expressions of legislative purpose and public statements by legislators concerning their motivations. *See Cooper*, 137 S. Ct. at 1475-76; *Rucho* J.S. App. 156-57; *Lamone* J.S. App. 49a-50a. It also includes proof that the legislature considered the illicit factor at issue—for example, testimony or other evidence demonstrating that the legislature looked at political data—when drawing district lines. *See, e.g.*, *Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring); *Rucho* J.S. App. 157-59; *cf. Vera*, 517 U.S. at 961-63 (plurality op.) (determining that the state's consideration of racial data in its redistricting process contributed to the conclusion that race predominated).

Plaintiffs can also use circumstantial evidence to demonstrate the legislature's predominant intent. *See Cooper*, 137 S. Ct. at 1464. This Court's decisions concerning racial gerrymandering, as well as its decisions on racial discrimination more generally, provide guidance on the types of circumstantial evidence that bear on legislative intent—and that can therefore be used to show a predominant partisan intent. For example:

- The "historical background" of the challenged state action may be probative of unlawful intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Here, historical background could include evidence that

the state previously districted for partisan advantage. *Cf. Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 224 (1964) (finding racially discriminatory intent where "the end result of every action" taken by the county board before the challenged decision "was designed to preserve separation of the races in the schools of Prince Edward County" (internal quotation marks omitted)).

- Procedural irregularities, such as "rush[ing] the map-drawing and Committee review process," can also be probative of improper intent. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 723 (S.D. Tex. 2017); *see also Arlington Heights*, 429 U.S. at 267.
- Disregard for "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" can also contribute to a showing of predominant intent to gerrymander for partisan advantage. *Shaw*, 509 U.S. at 647 (concluding that such evidence was probative of racial gerrymandering).

Courts can consider these types of evidence, among others, to determine whether the legislature acted with a predominantly partisan intent, and thus to evaluate the "character and magnitude" of the injuries to equal protection rights caused by an alleged partisan gerrymander.

b. Associational and voting rights. Courts should also consider the "character and magnitude" of the injuries that an alleged partisan gerrymander causes to the First and Fourteenth Amendment rights addressed in decisions such as *Anderson* and *Burdick*.

Like other state election laws, partisan gerrymandering burdens the First Amendment freedom of association. It does so by "imposing burdens on a disfavored party and its voters." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). For example, "deprived of their natural political strength by a partisan gerrymander," members of the disfavored party "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also id.* (explaining that *Anderson* concluded that "similar harms inflicted by a state election law amounted to a burden imposed on associational rights" (internal quotation marks and alteration omitted)).

Partisan gerrymandering also burdens the Fourteenth Amendment right to cast an effective vote. It does so by diluting the voting strength of members of the disfavored party who reside in districts that have been packed or cracked along partisan lines. It causes, in other words, the vote of a citizen in a gerrymandered district "to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931; *see also id.* at 1935-36 (Kagan, J., concurring); *Bandemer*, 478 U.S. at 132 (plurality op.) (observing that partisan gerrymandering can result in unconstitutional vote dilution when it "consistently degrade[s] a voter's or a group of voters' influence on the political process as a whole.").

Courts are well equipped to assess the character and magnitude of these constitutional injuries from partisan gerrymandering. The analysis here is focused on effects rather than intent: The extent to

which partisan gerrymandering burdens the freedom of association and the right to cast an effective vote depends on the extent of the partisan advantage that it creates. And courts can consider a variety of evidence in analyzing the effects of a partisan gerrymander. For example, they can consider election results and expert analysis of metrics such as partisan asymmetry. *See Rucho* J.S. App. 188. And they can evaluate the durability of a gerrymander through expert evidence on other metrics, such as the sensitivity of election results to changes in circumstances. *See id.* at 190-91.

When considering such evidence, context is important, and each case will need to be evaluated on its own merits. In a "pinpoint" gerrymander like the one in *Georgia State Conference of NAACP*, which concerned only two districts rather than an entire plan, *see* 312 F. Supp. 3d at 1359, the magnitude and durability of the effects may not be as important as the direct evidence of the surgical precision with which the map drawers went about their business. In such cases, factors including deviation from traditional districting principles, *see id.* at 1362 ("more often, the new maps had a negative impact on these principles"), and unnecessary mid-cycle redistricting may, together with direct evidence of predominant partisan intent, be sufficient to show unconstitutional partisan gerrymandering, even if the durability and magnitude of the changes were relatively minor. *See id.* at 1368.

2. Considering the state's purported justifications

After analyzing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights, the next step in the *Anderson/Burdick*

framework is to assess the state's purported justifications. That step is also judicially manageable in the partisan gerrymandering context.

A state might conceivably assert a number of different justifications in a partisan gerrymandering case. For example:

- A state might contend that any burdens on First and Fourteenth Amendment rights result not from partisan intent, but instead from "political geography," such as the natural packing of Democratic voters in urban communities. *See, e.g.*, *Gill*, 138 S. Ct. at 1933; *Vieth*, 541 U.S. at 289-90 (plurality op.); *Rucho* J.S. App. 215.
- A state might also contend that its districting decisions were grounded in traditional districting principles, such as compactness, contiguity, and preservation of local government boundaries. *Cf. Gill*, 138 S. Ct. at 1927; *id.* at 1941 (Kagan, J., concurring).
- A state might further contend that it drew district lines based on a legitimate interest in minimizing the pairing of incumbents. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Courts also have judicially manageable methods for evaluating the strength of these asserted justifications. For example, the parties can submit alternative district maps that incorporate traditional redistricting principles and account for political geography. Courts can then compare the constitutional burdens imposed by those alternative maps to the burdens imposed by the actual map. If the alternative maps and the actual map impose similar burdens, the state's

justifications are strong. But if the actual map imposes greater burdens than the alternative maps, the state's justifications are weak. *See, e.g., Rucho* J.S. App. 217-22. This type of analysis—drawing on expert evidence to assess the strength of a party's explanations for its conduct—fits comfortably within the institutional capabilities of the judiciary.

3. Measuring the asserted injuries against the purported justifications

The final step in the *Anderson/Burdick* framework is to weigh the injuries to First and Fourteenth Amendment rights against the state's justifications. This step is also judicially manageable in partisan gerrymandering cases.

To be sure, evaluating the constitutional burdens vis-à-vis the state's justifications will require a case- and fact-specific analysis. And "[t]he results of this evaluation will not be automatic." *Anderson*, 460 U.S. at 789. "[H]ard judgments" will sometimes be needed. *Id.* at 790. But this Court does not declare a question non-justiciable merely because it may be hard. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring in part and concurring in the judgment). Rather, it does so when a question "turn[s] on standards that defy judicial application." *Id.* at 201 (majority op.) (internal quotation marks omitted).

Far from defying judicial application, resolving an issue of constitutional law by measuring First and Fourteenth Amendment injuries against state justifications is a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196. Indeed, it is the same exercise that this Court has applied again and again in ruling on challenges to state election laws. *See supra* at 14.

Moreover, this Court's election law decisions provide even more particularized guidance for conducting this evaluation in a judicially manageable way. Those decisions instruct that, if a state districting plan imposes severe burdens on First and Fourteenth Amendment rights, courts should apply the well-known standard of strict scrutiny. *See Burdick*, 504 U.S. at 434. That will be true, for example, if the plaintiffs have powerful evidence both that (1) the legislature's predominant intent was to draw district lines for partisan advantage, and (2) the resulting map imposes substantial burdens on the voting strength and associational rights of members of the disfavored party. In the face of such evidence, it would be difficult for the state to satisfy strict scrutiny and show that its plan is narrowly tailored to serve compelling state interests.

If, in contrast, a state plan imposes only "reasonable, nondiscriminatory" burdens, courts should generally uphold the plan based on the state's "important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Thus, for example, if the plaintiff cannot demonstrate that the legislature's predominant intent was partisan, or cannot show substantial vote dilution or associational injuries, the state will typically prevail based on its important interests in adhering to traditional districting principles.

IV. The application of these proposed standards to *Rucho* confirms that the standards are judicially manageable, and that the *Rucho* plaintiffs should prevail.

When the standards drawn from this Court's election law decisions are applied to the facts of *Rucho*, it

reinforces the conclusion that these standards are judicially manageable in the partisan gerrymandering context, and that the *Rucho* plaintiffs succeeded in proving an unconstitutional partisan gerrymander.

A. The *Rucho* plaintiffs have shown that the challenged districts impose severe burdens on their First and Fourteenth Amendment rights.

The *Rucho* plaintiffs' evidence proves that the districting plan at issue (the "2016 Plan") severely burdens their rights under the First and Fourteenth Amendments. Their evidence establishes both (1) a predominant intent to draw district lines to achieve a discriminatory partisan advantage, and (2) substantial injuries to their freedom of association and right to cast an effective vote.

1. Plaintiffs demonstrated that the General Assembly drew the 2016 Plan with a predominantly partisan intent.

The 2016 Plan had its genesis in an earlier congressional map adopted by a Republican-controlled General Assembly: the 2011 Plan. Representative David Lewis and Senator Robert Rucho were responsible for the 2011 Plan, and they engaged Dr. Thomas Hofeller to prepare it. *Rucho* J.S. App. 10. Their efforts exemplified the connection between racial and partisan gerrymandering: They designed the 2011 Plan both to achieve partisan advantage for Republicans and (based on a mistaken view of § 2 of the Voting Rights Act) to draw two majority-black districts. *See id.* at 12-13. Indeed, when voters challenged those districts as racial gerrymanders, North Carolina defended one of them as a partisan gerrymander. *See*

Cooper, 137 S. Ct. at 1473. The district court nevertheless held, and this Court agreed, that both districts were unconstitutional racial gerrymanders. *See id.* at 1481-82.

The General Assembly adopted the congressional map at issue here—the 2016 Plan—in a purported effort to remedy the racial gerrymanders in the 2011 Plan. The architects of the 2016 Plan were the same as the architects of the 2011 Plan: Representative Lewis, Senator Rucho, and Dr. Hofeller. *See Rucho* J.S. App. 15.

The *Rucho* plaintiffs offered overwhelming evidence, both direct and circumstantial, that the General Assembly's predominant intent in drawing the 2016 Plan was "to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation." *Rucho* J.S. App. 222.

a. Express statements of partisan intent. The direct evidence in *Rucho* includes numerous unabashed statements by Republican state officials that the 2016 Plan was meant to favor Republicans and disfavor Democrats.

For example, Representative Lewis and Senator Rucho instructed Dr. Hofeller that he should use political data from previous elections to draw a map that maintained the partisan makeup of North Carolina's congressional delegation under the racially gerrymandered 2011 Plan, which had produced 10 Republicans and 3 Democrats. *Rucho* J.S. App. 15.

The Republican leaders also proposed—and the Joint Committee on Redistricting adopted—criteria for the 2016 Plan that included "Political Data" and

"Partisan Advantage." *Rucho* J.S. App. 20. The "Political Data" criterion contemplated that "[t]he only data other than population data to be used to construct congressional districts shall be election results in statewide contests." *Id.* According to Representative Lewis, the purpose behind using this data was "to gain partisan advantage." *Id.* at 22. And the "Partisan Advantage" criterion itself provided that the Committee would "make reasonable efforts . . . to maintain the current partisan makeup of North Carolina's congressional delegation." *Id.* at 20.

Representative Lewis also made numerous additional statements that laid bare the Republican leadership's partisan intentions for the 2016 Plan. For example, he "acknowledged freely that [the 2016 Plan] would be a political gerrymander," and stated that the Plan was designed "to give a partisan advantage to 10 Republicans and 3 Democrats because he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Rucho* J.S. App. 22 (alterations omitted).

b. Use of political data. The *Rucho* plaintiffs also presented evidence that the General Assembly followed through on its pledge to use political data to draw district lines for the 2016 Plan.

When Dr. Hofeller drew those lines, he "was constantly aware of the partisan characteristics of each county, precinct, and [census voting district]." *Rucho* J.S. App. 17. He used past political data to assign a "partisanship variable" to each precinct based on the likelihood that it would favor Republicans or Democrats. *Id.* at 157-58. He "used the partisanship variable to assign a county, [voting district], or precinct to one congressional district or another," and "as a par-

tial guide in deciding whether and where to split [voting districts], municipalities, or counties." *Id.* at 158 (internal quotation marks omitted). Then, after drawing each draft map, Dr. Hofeller "assess[ed] the partisan performance of the plan on a district-by-district basis and as a whole." *Id.* at 159.

This evidence establishes that political data was not merely *a* factor in drawing the 2016 Plan. It was the predominant factor. Political data determined where Dr. Hofeller drew district lines. It also provided the metric by which each draft map was assessed. The 2016 Plan is thus a paradigmatic example of a plan in which partisan advantage was "the criterion that, in the State's view, could not be compromised." *Bethune-Hill*, 137 S. Ct. at 798.

c. Historical background. The history behind the 2016 Plan corroborates the conclusion that the General Assembly drew the Plan with invidious partisan intent.

As explained above, the 2016 Plan arose after this Court ruled that two of the districts in North Carolina's 2011 Plan were unconstitutional racial gerrymanders. *Cooper*, 137 S. Ct. at 1481-82. In addition to being tainted by racial considerations, the 2011 Plan was also tainted by partisan ones. Indeed, the "primary goal" of the 2011 Plan was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office," and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Rucho* J.S. App. 180 (emphasis omitted).

This history of pursuing partisan advantage in the 2011 Plan renders the 2016 Plan suspect. That is

particularly so because the General Assembly "expressly sought to carry forward the partisan advantage obtained by Republicans under the unconstitutional 2011 Plan," *Rucho* J.S. App. 179, because it aimed "to change as few of the district lines in the 2011 Plan as possible in remedying the racial gerrymander," *id.* at 15-16 (internal quotation marks omitted), and because the same Republican leaders, and the same map drawer, led the redistricting process in 2011 and 2016, *see id.* at 10, 14.

d. Irregular procedures. The 2016 Plan is also the product of procedural irregularities.

The 2016 Plan was crafted without input from the public or Democratic members of the General Assembly. Dr. Hofeller had already completed a "near-final 2016 Plan" and presented it to Representative Lewis before public hearings even began. *Rucho* J.S. App. 18-19. When a public hearing was subsequently held and comments were received, Dr. Hofeller "was not apprised of any of th[ose] comments." *Id.* at 19. And Democratic members of the Joint Committee on Redistricting were neither "allowed to consult with Dr. Hofeller" nor given access to "the state computer systems to which he downloaded the 2016 Plan" after drafting it on his personal computer. *Id.* at 23. In a gross departure from procedural norms, therefore, Republican leaders shut the public and their Democratic colleagues out of the process for developing the 2016 Plan at every turn.

e. Departure from traditional redistricting principles. The many ways in which the 2016 Plan substantively departs from traditional redistricting principles further confirm its predominant partisan intent.

"To achieve the goal of concentrating Democratic voters" and "diluting Democratic voting strength," the 2016 Plan "divides municipalities and communities of interest along partisan lines" in all but one of North Carolina's thirteen congressional districts. *Rucho* J.S. App. 228, 232; *see also id.* at 227-73. For example, in District 6, the Plan cracks apart Guilford County and the City of Greensboro, "both of which traditionally support Democratic candidates," "mov[ing] individual [voting districts] from District 6 to District 13 . . . or vice versa, for political impact." *Id.* at 244. The consequence, consistent with partisan intent, is to "submerg[e Democratic] voters in a 'safe' Republican district." *Id.*

In a number of instances, the 2016 Plan also violates the traditional principle of geographic compactness. District 2, for example, "takes on a highly irregular shape," "includ[ing] a horseshoe-shaped section of Wake County." *Rucho* J.S. App. 232. This shape allows the district to "encompass[ ] the predominantly Republican suburbs of Raleigh, but exclude[ ] the Democratic core of Raleigh, which the General Assembly placed in [a] predominantly Democratic" district. *Id.*; *see also, e.g., id.* at 259 (explaining that District 10 has "a bizarre, bulbous protrusion into Buncombe County and the City of Asheville in the Appalachian Mountains" to crack Democratic voters).

2. Plaintiffs established that the 2016 Plan burdens their voting and associational rights.

In addition to proving that the predominant intent of the 2016 Plan was invidious partisan discrimination, the *Rucho* plaintiffs offered compelling evidence that the Plan imposes severe burdens on their First Amendment freedom of association and Fourteenth Amendment right to cast an effective vote.

Plaintiffs offered evidence of widespread, enduring vote dilution at the state and district levels. At a statewide level, plaintiffs showed that the 2016 Plan "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office." *Rucho* J.S. App. 188. Similarly, at the district level, plaintiffs established that "the General Assembly cracked or packed Democratic voters in [twelve of North Carolina's thirteen] districts and thereby diluted such voters' votes." *Id.* at 273. Plaintiffs also showed that these burdens "likely will persist through multiple election cycles." *Id.* at 190. Indeed, even if "Democratic candidates captured the same percentage of the vote (53.22%) that elected Republican candidates in ten districts in 2016, Democratic candidates would prevail in only four districts." *Id.* at 191 (emphasis omitted); *see also, e.g.*, *id.* at 197 (efficiency gap analysis shows that the 2016 Plan's effects are "durable").[3]

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[3] To be clear, a plaintiff should not be required to present evidence that vote dilution has already occurred in past elections, or that it will persist for an entire election cycle, to prevail on a partisan gerrymandering claim. Evidence that vote dilution will occur in the future, even if only in a single election, establishes a

Plaintiffs also established that the 2016 Plan burdens their associational rights. *Rucho* J.S. App. 290-91. For example, plaintiffs testified that their "get-out-the-vote efforts" have been less successful because voters feel that their votes do not "count"; that they have difficulty recruiting Democratic candidates because those candidates are unlikely to be elected; and that elected representatives in "safe" districts lack incentive to respond to constituents with opposing political views. *Id.* at 152, 292-93. "[T]hese chilling effects on speech and association . . . represent cognizable, and recognized, burdens on First Amendment rights." *Id.* at 292-93.

B. The evidence belies North Carolina's purported justifications for the 2016 Plan.

In the face of this compelling evidence that the 2016 Plan imposes severe burdens on plaintiffs' constitutional rights, the *Rucho* defendants identified two supposed justifications: (1) North Carolina's political geography (reflecting the "natural packing" of Democratic voters), and (2) an interest in protecting incumbents. *Rucho* J.S. App. 215. Neither holds weight.

Defendants' reliance on natural geography fails for a number of reasons. *See Rucho* J.S. App. 215-18. For example, plaintiffs' experts drew tens of thousands of maps based on traditional districting principles and non-partisan criteria. *Id.* at 217. Those maps accounted for North Carolina's political geography. *Id.* But none achieved the level of pro-Republican bias in the 2016 Plan. *Id.* Those maps therefore demonstrate

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sufficient threat of constitutional injury to require the state to justify that threat under the *Anderson/Burdick* framework.

that political geography cannot justify the burdens that the 2016 Plan imposes on plaintiffs' constitutional rights. *See id.*

Defendants' interest in protecting incumbents fares no better. The 2016 Plan paired two incumbents. *Rucho* J.S. App. 220. But plaintiffs' expert, Dr. Jowei Chen, drew 1,000 maps that avoided pairing *any* incumbents—and did so without the partisan skew of the actual 2016 Plan. *See id.* This analysis confirms that partisan intent, not an interest in minimizing the pairing of incumbents, drove the 2016 Plan.

C. The injuries inflicted by the 2016 Plan easily outweigh the State's purported justifications.

Because the predominant factor in drawing the 2016 Plan was partisan advantage, and because the 2016 Plan imposes substantial burdens on plaintiffs' First and Fourteenth Amendment rights, it is subject—at minimum—to close scrutiny. *See supra* at 23. No matter what level of scrutiny applies, however, the State's purported justifications are far too weak to validate the extreme burdens imposed by the 2016 Plan. The district court was therefore correct not only in ruling that partisan gerrymandering claims are justiciable, but also in ruling for the *Rucho* plaintiffs on the merits.

V. At minimum, partisan gerrymandering should not be a valid defense to racial gerrymandering claims.

If this Court were nevertheless to rule that partisan gerrymandering is not justiciable, it should also bring an end to the use of partisan gerrymandering as a defense in racial gerrymandering cases. It is true that the Court, in decisions such as *Cooper v. Harris*,

has previously treated partisan gerrymandering as a potential defense to racial gerrymandering claims. *See* 137 S. Ct. at 1473-78. But it has done so against the backdrop of its rulings, in *Bandemer* and *Vieth*, that partisan gerrymandering claims are justiciable. If the Court were to change course and rule that partisan gerrymandering claims are not justiciable, it should also revisit the question whether partisan gerrymandering can be a valid defense to claims of racial gerrymandering—and hold that it cannot.

That conclusion would help to avoid the troubling consequences described in Section I of this brief. It would also reflect a simple but venerable principle: Two wrongs do not make a right. This Court has determined that partisan gerrymandering is an illegitimate practice that is "incompatible with democratic principles." *Ariz. State Legis.*, 135 S. Ct. at 2658 (quoting *Vieth*, 541 U.S. at 292 (plurality op.) (alterations omitted)). The state should not be permitted to defend one illegitimate practice (racial gerrymandering) by asserting that it engaged in another illegitimate practice (partisan gerrymandering)—particularly if voters can no longer challenge the latter practice on its own terms.

Finally, at the very least, the Court should make clear that any ruling that partisan gerrymandering claims are not justiciable does not call into question the rule that states cannot use race as a proxy for politics when drawing district lines. *See Cooper*, 137 S. Ct. at 1464 n.1, 1473 n.7.

* * *

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must

live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry*, 376 U.S. at 17-18.

Drawing electoral maps with the intent to minimize particular voices in the democratic process is inconsistent with our most fundamental constitutional values. The harm from partisan gerrymandering can also be amplified by the correlation between race and politics and the resulting risk that partisan gerrymanders will dilute the voting strength of racial minorities. To prevent that harm, this Court should reaffirm that partisan gerrymandering claims are justiciable.

CONCLUSION

This Court should hold that partisan gerrymandering claims are justiciable and affirm the judgment in *Rucho*.

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Nos. 18-422, 18-726

IN THE
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,
v.
COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,
Appellants,
v.
O. JOHN BENISEK, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Maryland

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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of mathematicians and law professors and a supporting team of students. Moon Duchin and the other *amici* mathematicians are members of a mathematical community that has worked to develop benchmarks for statistical and computational techniques that can be used to evaluate districting plans. Some have critically compared the work of other redistricting analysis teams, and some have developed their own algorithms and analytical techniques. Several *amici* have published in this area in popular forums in addition to their scholarly work.

Bridging the fields of law and mathematics, the *amici* have worked together in this brief to articulate a legal standard for adjudicating partisan-gerrymandering claims and to develop ideas for making the mathematics responsive to the needs of the Court. *Amici* write to inform the Court of the relevance and availability of reliable computational methods for evaluating these claims—methods that are illustrated using data in the North Carolina case now before the Court. A complete list of the *amici* is set forth in an addendum to this brief.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

SUMMARY OF ARGUMENT

The right to vote is more than just the right to cast a ballot. The Constitution protects an individual's right to an *undiluted* vote—a right to cast a vote that is free from being "impaired, lessened, diminished, diluted, and destroyed." *United States v. Saylor*, 322 U.S. 385, 388 (1944). The government violates the Constitution when it intentionally dilutes an individual's vote, whether on grounds of race, sex, geography, or partisanship.

An equality principle undergirds "one person, one vote": under the Constitution, the government unconstitutionally dilutes the right to vote when it draws district lines in a manner that arbitrarily distinguishes among voters. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963). This equality principle is a judicially manageable standard. A plaintiff can prove a claim of vote dilution by showing that the manner in which the government drew the district lines diminished the equal weight, power, and value of the plaintiff's vote.

Because vote dilution violates basic constitutional rights, it is essential for courts to be able to detect and act on intentional dilution where it exists. But adjudicating the potential abuses of line-drawing for partisan advantage has bedeviled this Court for decades. Drawing on many years of experience in the fields of mathematics and computational science, this brief presents and illustrates a computational method that is designed to efficiently produce representative samples—in this application, by sampling alternative valid districting plans. Courts can then reasonably infer the presence of intentional discrimination by assessing a given district in the context of valid alternative plans. Such a comparison allows courts to see whether a challenged district falls within the wide range of plans that you would expect to

see from a neutral decision-maker, or is instead an outlier.

This brief thus offers a way forward that is based on reliable and well-established tools that have been used in science and industry for decades—in applications ranging from weapons development to weather prediction. The process of generating these large, diverse ensembles of possible districts also meets the demands of our constitutional framework by taking state-specific redistricting criteria and a state's unique political geography into account before flagging certain districts as outliers.

Unconstitutional vote dilution turns on the idea that the state has departed from a baseline of equal treatment. The method we describe here identifies that baseline by quantitatively determining a normal range for a given district's composition, making dilutive "packing and cracking" clearly visible to courts, legislatures, and the public when a district is an extreme outlier from that range. An outlier finding means that the design of the district is not explained by state-specific rules or political geography, but is far better explained by partisan motives.

In one of the two cases before the Court, the State of North Carolina expressed an explicit intent to produce a partisan outcome by sorting voters into districts on the basis of partisanship, thereby admitting to singling out voters to downgrade the value of their votes. Even without an explicit statement of intent, the methods described here demonstrate impermissible intent through extreme effects. The effects of unequal treatment of individual voters in multiple districts are so stark—and are so clearly shown not to be explained by

the rules and geography—that the only reasonable inference is one of intentional discrimination.

ARGUMENT

I. Claims of vote dilution on the basis of partisanship are justiciable.

The Constitution prohibits the state from intentionally infringing on an individual's right to vote, whether through denial, "debasement[,] or dilution." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Vote dilution can take many forms—for example, stuffing a ballot box or intentionally mis-tabulating the votes. In the districting context it means that, to secure an outcome that it prefers, the state has drawn district lines in a way that intentionally discriminates among voters or treats voters differently. As a consequence of this intentional treatment, the state has minimized the weight, value, or power of certain votes. Vote dilution thus turns on the idea that the state has departed from a baseline of equal treatment and, by doing so, has intentionally diminished the weight, power, and value of an individual's vote. This Court has held for decades that the state violates the constitutional guarantee to an undiluted vote when it intentionally prefers some voters over others, whether based on race, sex, or geography. Now, this Court has the opportunity to affirm that the state likewise violates that constitutional guarantee when it prefers some voters based on their political affiliation or their political beliefs.

A. The Constitution supplies an equality principle that protects each individual from intentional vote dilution by the state.

The vote has long been regarded as among the most fundamental rights, and indeed as preservative of all other rights. *See, e.g.*, *Reynolds*, 377 U.S. at 562. This

Court has found "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. The right is personal to the individual. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) ("The right to vote is 'individual and personal in nature.'") (quoting *Reynolds*, 377 U.S. at 561).

While the "One Person, One Vote" principle can be conceptualized as a collective harm to principles of equal representation as a whole, *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 (2016), the constitutional right to have an undiluted vote described by this Court can best be understood as an individual right that arises from an individual conception of injury. The state unconstitutionally diminishes this individual right when it draws districts to intentionally minimize or cancel out the votes of some voters, just as if it had stuffed the ballot box or intentionally miscounted votes to achieve its preferred outcome. *See id.* at 557–58. This constitutional violation occurs whether the state singles out specific voters based on race, geography, or political affiliation.

1. The Constitution protects an individual's right to an undiluted vote.

Every voter has an individual right to an undiluted vote. This Court has long recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. A citizen's constitutional "right to vote free of arbitrary impairment by state action" encompasses a right to an election free "from dilution by a false tally" or "by a stuffing of the ballot box." *Baker v. Carr*, 369 U.S. 186, 208 (1962). Thus, the right to vote is not

merely the right to cast a ballot; it is the right to cast a ballot that is "honestly counted." *United States v. Saylor*, 322 U.S. 385, 388 (1944). The Constitution protects each voter's individual "right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed." *Id.* at 386.

It is similarly well established that a state's drawing of its voting districts can dilute votes, thereby infringing on the individual right to vote. For example, in *Wesberry v. Sanders*, this Court struck down the State of Georgia's congressional apportionment plan for impermissibly diluting votes. 376 U.S. 1, 4 (1964). This Court expressly framed the constitutional violation in individual terms, explaining that when the state intentionally discriminates against some voters in the construction of voting districts, it "debas[es] the weight of the [plaintiffs'] votes." *Id.* This debasement "abridge[s] the right to vote for members of Congress guaranteed . . . by the United States Constitution." *Id.*; *see also Avery v. Midland Cty.*, 390 U.S. 474, 478 (1968) ("Every qualified resident, *Reynolds* determined, has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population."); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) ("It might well be that . . . a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.").

The fact that vote dilution in apportionment cases requires a comparison with the voting power of other voters does not change the individualized character of

the right recognized in this Court's early cases. As this Court articulated, "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in substantial fashion diluted when compared with votes of citizens living in other parts of the state." *Reynolds*, 377 U.S. at 568; *cf. id.* at 580 ("Citizens, not history or economic interests, cast votes. . . . Again, people, not land or trees or pastures, vote."). This Court's prior precedents are clear: the Constitution protects an individual voter from having their vote debased or diluted.

2. The government acts unconstitutionally when it intentionally dilutes an individual's vote.

The Constitution forbids the government and its officials from intentionally interfering with or impairing an individual's right to vote. *See United States v. Classic*, 313 U.S. 299 (1941); *see also Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("The path the Court has sometimes used to enter this political thicket is marked by the label 'intent.'"). This Court has upheld this prohibition on intentional interference in a variety of contexts, finding that a state unconstitutionally dilutes or impairs an individual's vote when it artificially inflates vote counts by stuffing ballot boxes, *see Classic*, 313 U.S. at 314 (citing *United States v. Mosley*, 238 U.S. 383 (1915)), arbitrarily refuses to count ballots from certain precincts, *see Reynolds*, 377 U.S. at 555 (citing *Saylor*, 322 U.S. at 386), redistricts with the purpose of disenfranchising a distinct segment of minority voters, *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), restricts access to the primary when the primary is an instrumental mechanism of choice, *see Classic*, 313 U.S. at 314 (1941), and diminishes the strength of urban votes in

malapportioned systems, *see Reynolds*, 377 U.S. at 568. In each of these contexts, this Court reaffirmed that unconstitutional harm is done when the state manifests an intent to impair the participation of otherwise eligible voters.

The state cannot create a preferred class of voters. *See Gray*, 372 U.S. at 379–80 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."). A fundamental equality principle, grounded in the Equal Protection Clause, requires that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.* at 379.

The state impairs the participation of otherwise eligible voters when it creates a preferred class of voters. Thus, in *Gray*, this Court explained that a system in which a voter's ballot has more weight than a similarly situated voter in a neighboring county unconstitutionally discriminates between eligible voters. *Id.* at 381. The equality principle applies with the same force and with the same logic in the apportionment context and in all contexts in which the state delineates voting districts. For example, in *Wesberry*, the Court found that Georgia "grossly discriminate[d]" against the plaintiffs because its apportionment statute "contract[ed] the value of some votes and expand[ed] that of others." 376 U.S. at 7; *see also id.* at 17–18 ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the] right" to vote). Put simply, this Court has articulated and enforced a principle of equality among voters as a standard: all eligible voters have an equal right for their ballots to be cast, counted, and duly

registered free from state impairment, manipulation, and diminishment. And, as this Court has stated, the equality principle protects both the right of the voter to equal treatment and the right of the voter to equal representation. *Evenwel*, 126 S. Ct. at 1130.

Reynolds embraced this equality principle. There, this Court considered the constitutionality of the apportionment of the Alabama Legislature. *See Reynolds*, 377 U.S. at 545–46. This Court acknowledged that, together, *Gray* and *Wesberry* stand for the proposition that "in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State." *Id.* at 560. With this doctrinal foundation, the relevant question in *Reynolds* was "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in the legislature." *Id.* at 561. In other words, the fundamental equality principle *presumptively controlled*; the only question was whether there was a reason *not* to apply the fundamental equality principle to the issues presented in *Reynolds*. This Court found no such reason and affirmed the district court's order for the Alabama Legislature to be reapportioned. *See id.* at 587.

Since *Reynolds*, this Court has continually found attempted justifications to be insufficient to sustain population deviations that discriminate against similarly situated eligible voters based on their geographies—even though these claims do not implicate any suspect classifications. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1, 24 (1975); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). This Court has also affirmed that states cannot discriminate against voters under the guise of exercising "power wholly within the domain of state interest" in

their role facilitating elections. *Gomillion*, 364 U.S. at 347. Indeed, "[i]t is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 345 (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926)).

Because "the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination,'" this Court looks beyond the statutory language and stated legislative purpose for evidence of unconstitutional intent to diminish the weight of certain individuals' votes. *Reynolds*, 377 U.S. at 562–64 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Specifically, the real-world effects of state decisions can be used to discern unconstitutional intent. In *Gomillion*, this Court found an analysis of the effects of redistricting plan made a demonstration, "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U.S. at 341; *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that intent can be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose").

B. The equality principle extends to cases in which the government intentionally dilutes votes based on partisanship.

As this Court has repeated, "in situations involving elections, the States are required to insure that each person's vote count as much, insofar as it is practicable, as any other person's." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970). Insuring that each person's vote

counts equally means that the state cannot dilute the power of votes by making distinctions—such as those based upon sex, geography, or race—among voters. This standard, the equality principle, applies to cases in which the government draws voting districts that intentionally discriminate against voters because of their political affiliation just as it applies to intentional discrimination against voters based on race, sex, or geography. When this Court is confronted with districts that show clear intent to dilute the power of voters based on political belief or party affiliation—as it is in this case—it must conclude that these cases are justiciable, consistent with this Court's prior precedents.

Vote dilution based on voters' political beliefs is structurally no different than vote dilution on other bases, such as race or geography, that this Court has found justiciable. As this Court explained in *Baker*, "if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" 369 U.S. at 209–10 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). *See also Rogers v. Lodge*, 458 U.S. 613 (1982) (reaffirming the justiciability of race-based vote dilution claims and deciding one such claim on the merits); *White v. Regester*, 412 U.S. 755, 766–67 (1973) (same); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (same). This Court has stated that dilution based on sex would not be "allowable." *Gray*, 372 U.S. at 379. And this Court has repeatedly found justiciable claims of vote dilution based on discrimination by geography, in which urban voters were systematically assigned to larger districts, amounting to a lesser weight being afforded to their votes. *See, e.g., id.*; *Reynolds*, 377 U.S. at 562–64. In *Gray*, this Court explained that the justiciability of geography-based vote dilution claims follows logically from the

justiciability of race- and sex-based vote dilution claims. When "none could successfully contend" that race- and sex-based vote dilution "was allowable," "[h]ow then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Gray*, 372 U.S. at 379.

The same reasoning applies in cases alleging vote dilution on the basis of partisanship. There is no principled basis on which the merits of claims alleging party-based dilution can be distinguished from those of claims alleging intentional dilution based on race, sex, and geography. The justiciability of party-based dilution claims flows ineluctably from geography-based and race-based dilution claims. If the state impermissibly impairs the right to a vote when it dilutes the votes of those who reside in the city, *id.* at 379, draws racial gerrymanders, *see id.*, stuffs ballot boxes, *Saylor*, 322 U.S. at 389, or discriminates based on sex, *Gray*, 372 U.S. at 379, then it is difficult to see why it would not also be an impermissible impairment for the state to discriminate based on political affiliation.

Just as it would violate the Constitution if the state decided to give double votes to urban voters or to White voters, but only single votes to suburban voters or to Black voters, it would also violate the Constitution if the state gave double votes to some voters and only single votes to others on the basis of partisanship. And just as it would violate the Constitution for the state to dilute the votes cast by individuals because they reside in the city or because they are Black, it also violates the Constitution when the state dilutes votes because the voters are associated with Republicans or with Democrats. In all these intentional vote dilution cases, this Court must

conduct the *Reynolds* inquiry, and determine whether there is any constitutionally valid justification for treating voters differently, and thus violating "the basic standard of equality among voters." *Reynolds*, 377 U.S. at 561.

Here, this Court should affirm that there is no such constitutionally valid justification from departing from presumptive voter equality. *Baker* protected the "right to a vote free of arbitrary impairment by state action." 369 U.S. at 208. No person may be given greater voting power merely because of her race, her sex, or where she lives. Surely, then, she may not be given greater voting power because she is a Democrat. This is especially so given that the First Amendment protects individuals from state discrimination on the basis of their political beliefs.

For example, the government may not determine access to government employment or benefits on partisan grounds, except in certain cases in which party affiliation is relevant to the office. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74–75 (1990); *Elrod v. Burns*, 427 U.S. 347, 359–60 (1976) (opinion of Brennan, J.). Similarly, membership in a particular political organization cannot be the basis for termination from the civil service. *See Keyishian v. Board of Regents*, 385 U.S. 589, 607–08 (1967). By denying a benefit to certain persons because of their partisan affiliation or their political beliefs, their "exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). So too here: by disfavoring individuals based on their political affiliation, the state not only treats them

unequally in the exercise of the franchise, but it also penalizes and inhibits their First Amendment freedoms—a result it could not command directly.

* * *

In short, there is no constitutional principle that can explain why intentional, selective treatment based on individuals' partisanship should be adjudicated differently from intentional dilution on other grounds—race, sex, or geography. This Court has explained that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray*, 372 U.S. at 380. Moreover, there *is* a constitutional principle, embodied in the First Amendment, for why partisan association and beliefs should be protected. As *Wesberry* put it, "the right to vote is too important in our free society to be stripped of judicial protection." 376 U.S. at 7. *Reynolds* reaffirmed that, "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civic and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. at 562. The equality standard is judicially manageable, as reflected by this Court's prior precedents. Thus, this Court can, and should, conclude that these cases of intentional vote dilution on the basis of partisanship are justiciable, and that individuals deserve protection from this form of vote dilution just as for other forms already held to be unconstitutional.

II. Claims of vote dilution on the basis of partisanship can be evaluated by a reliable and well-established computational method.

In this section, we describe a powerful method to evaluate the districts in contested plans, setting a high

bar to distinguish extreme outliers from those within the range of reasonable outcomes for that state. Unconstitutional vote dilution can be proved by showing that the manner in which the government drew the lines departed from a baseline of equal treatment by diminishing the weight, power, and value of an individual's vote. The district court in the North Carolina case framed matters similarly, observing that "there needs to be a baseline from which to measure to what degree a districting plan drawn on the basis of partisan favoritism deviates from the universe of 'fair and effective' plans." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 876 n.33 (M.D.N.C. 2018) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring)). Thus, a key to adjudicating cases of partisan gerrymandering is the determination of this baseline: we must have a reliable method to distinguish a normal, neutral, or non-gerrymandered district from an intentionally abusive, gerrymandered, dilutive district. After all, a great many legally valid congressional districting plans exist for North Carolina—not simulations, but true alternative plans—and they come in enormous variety. We must therefore create a benchmark understanding of neutral districting plans in a state-specific setting. Once we have such a benchmark, we can compare it to the challenged districting plan to determine whether, in light of the evidence, an intent to discriminate is the best explanation for a district's design.

The North Carolina case provides a demonstration of how such a model can work in practice. Here, there is no doubt about the intent behind the districting plan. David Lewis, the Republican official who led the redistricting process, admitted that his caucus had selected a map designed to produce a 10-3 split "because I do not believe it's possible to draw a map with 11 Republicans and two

Democrats." Compl. at 13, *Common Cause v. Rucho*, No. 1:16-CV-1016 (M.D.N.C. 2017), 2017 WL 3981300. Representative Lewis elaborated: "I think electing Republicans is better than electing Democrats, so I drew this map to help foster what I think is better for the country." *Id.* Months later, the map produced precisely the expected 10–3 outcome.

The method outlined below demonstrates how, even without such a helpfully clear statement of intent, such discrimination could be reasonably inferred. A simple forensic analysis reveals that six of the thirteen districts are extreme outliers in their partisan composition, both in the North Carolina Congressional Plan enacted in 2012 and in its 2016 replacement that has been held unconstitutional by the district court in the current case (the "2012 Plan" and "2016 Plan," respectively).

A. A reliable and well-established computational method provides a baseline that enables the identification of outliers.

For many decades, scientists, mathematicians, technologists, and government officials have used a technique known as *Markov chain Monte Carlo* ("MCMC") for prediction, modeling, and analysis of large data sets. MCMC gets its name from combining a class of algorithms known as Monte Carlo methods with a probabilistic process called a Markov chain. It has a sixty-year track record of success in studying configurations of complex systems, and has been famously applied in settings from weapons development to weather prediction to finance to number theory to quantum mechanics. *See generally* Persi Diaconis, *The Markov Chain Monte Carlo Revolution*, Bulletin of the American Mathematical Society, April 2009, at 179; Peter L. Galison, *Image & Logic: A Material Culture of Micro-*

physics (1997). For its use in redistricting, see Br. for Eric Lander, as Amici Curiae Supporting Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

MCMC permits us to carry out a comparative analysis of districting plans by generating a large and diverse sample of districting plans—tens of thousands, millions, or billions can be efficiently generated on a standard laptop. The search can be restricted to plans that comply with a given state's districting laws, and hold constant the state's geography and voting patterns. These collections, or "ensembles," of plans provide a baseline understanding of the range of possible legally valid plans, which enables us to compare any given plan with that range and flag extreme outliers. We can refer to this assessment technique as "the method of ensembles."

Scientific consensus in the mathematics and statistics community increasingly endorses this approach to the problem of discriminatory redistricting. Many technical teams are now using this method independently of each other to understand redistricting in the United States. These teams each set up their own algorithms, running chains of map generation until they achieve high confidence that the ensemble is mathematically representative of the full universe of possibilities and provides robust, reliable results.

In the North Carolina case, plaintiff's expert Jonathan Mattingly adopted this approach and created an ensemble of 24,518 maps using a popular MCMC variant known as simulated annealing. *See districtingDataRepository*, Gitlab Community Edition, https://bit.ly/2HrB9mj. Other groups have similarly created redistricting ensembles using their own MCMC approaches. *See mggg*, Github, https://bit.ly/2TEHXTS; *redist*, Github, https://bit.ly/2EI1p8M; https://bit.ly/2XKe1F9.

Significantly, even though MCMC approaches vary, the results in the current case can be replicated. For instance, *amici* were able to compare Mattingly's ensemble to one that we prepared independently with an entirely different MCMC technique called tree-based recombination ("ReCom"), producing remarkably consonant results. To make the box-and-whisker plots shown below in Figure 1, the resulting maps were laid over Senate 2016 voting patterns to benchmark the expected partisan composition for each district in North Carolina—a similar plot could be made with respect to any other electoral data. The boxes show the middle 50 percent of plans, and the whiskers bracket the first to 99th percentile. Crucially, the two ensembles flag exactly the same districts as extreme outliers in both the 2012 Plan and 2016 Plan. This outlier finding will be illustrated for Districts #10 and #11 below (see Fig 2 and 3).

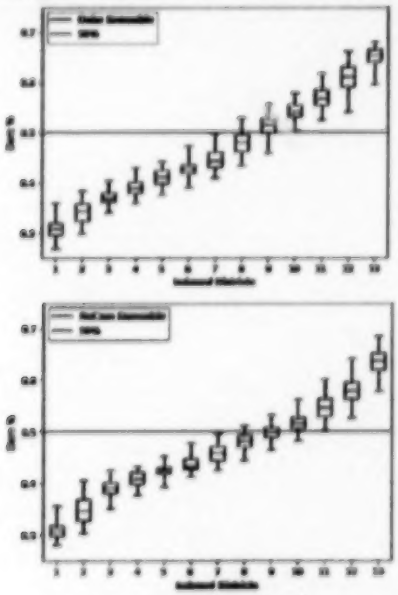

Figure 1.

These identical outlier findings, despite different MCMC designs and ensemble sizes, demonstrate the robustness of the approach. They also demonstrate that the method of ensembles is reliable and replicable, bolstering the plausibility of using outlier analysis as a legal tool.

B. This method takes into account the legal and political landscape of each state.

Individual states can and do set their own districting rules and criteria. This presents us with an explicit *ex ante* framework in each state, containing both federal rules, like equal population and the Voting Rights Act, and state-specific rules—Arizona's priority for competitive districts, Iowa's requirement that counties be preserved whole, Colorado's guidance to minimize the total perimeter of the districts, and so on.

In addition to laws governing districting, each state also has idiosyncratic physical and human geography: The Black population is concentrated in the Delta region of Mississippi; Democratic votes are concentrated in cities in Pennsylvania but in rural areas in Alaska; Iowa is a nearly-perfect grid of nearly-square counties; and so on.

The political geography, in particular, matters enormously for the determination of district behavior. For instance, if every household in a state casts three Republican votes and two Democratic votes, then as long as district lines do not split a house, every single district—no matter how its lines are placed—must necessarily reflect this 3–2 Republican tilt. This forces 100 percent of the representation to be Republican, irrespective of districting choices, which should clearly not support a finding of unconstitutional vote dilution. On the other hand, if the same 40 percent share of Demo-

cratic votes fell into several enclaves, then substantial Democratic representation would be normal and expected, and a 100 percent Republican outcome should be flagged as an outlier.

With MCMC, it is easily demonstrable that legal and political geography work together to create measurably different baselines in some states than in others. In other words, the outcomes of the districting process will and should vary a great deal from state to state, even without any discriminatory intent.

It is worth emphasizing that the technique we describe here is a *method*—not a new score of partisan skew. The method of ensembles does not produce a number or score. Instead, it generates a neutral baseline that can be used to interpret scores for a challenged district plan. The examples in the figures shown here demonstrate the method with respect to vote share, but the method applies equally to other measures or metrics of partisan skew. Thus, ensemble analysis can be flexibly applied to any one or several measures of partisanship that are specified in state rules or doctrinal criteria. A state can certainly name preferred scores of partisan fairness, as some are starting to do—Utah's new law cites partisan symmetry measures, while Missouri's uses efficiency gap. *See generally* Richard H. Pildes, *Redistricting Reform and the 2018 Elections*, Harvard Law Review Blog (Oct. 26, 2018), https://bit.ly/2TC1tAq. These methods then generate legally valid plans to benchmark state-specific reasonable values for each metric, rather than relying on universal *a priori* presumptions about ideals and thresholds. Ensembles only provide benchmarks and baselines once metrics have been selected.

C. Unconstitutional vote dilution can be identified in specific districts.

By identifying some districts as extreme outliers, the method of ensembles makes dilutive "packing and cracking" clearly visible to courts, legislatures, and the public. Packing and cracking are familiar concepts in the history of redistricting. Packed districts have elevated vote levels for a disfavored group, far beyond 50 percent and far from the baseline of the sample. Cracked districts have depressed vote share for the disfavored group, usually well under 50 percent even though the bulk of the ensemble is over that level. Because of asymmetrical geographical patterns, it may well be that very high or very low vote share in a district is completely expected without any discriminatory intent, so neither packing nor cracking is a manageable or usable concept without a method of distinguishing outliers from expected outcomes.

Exploring further the partisan composition data displayed above, we can sort the districts in order of their Democratic share and obtain a clear finding of extreme packing and cracking. The figure below uses the cracked 13th District from the 2016 Plan and the packed 4th District from that plan to illustrate how extreme outliers are made manifest by comparison with an ensemble. (These districts appear as #10 and #11, respectively, when sorted by Democratic vote share as in Figure 1.)

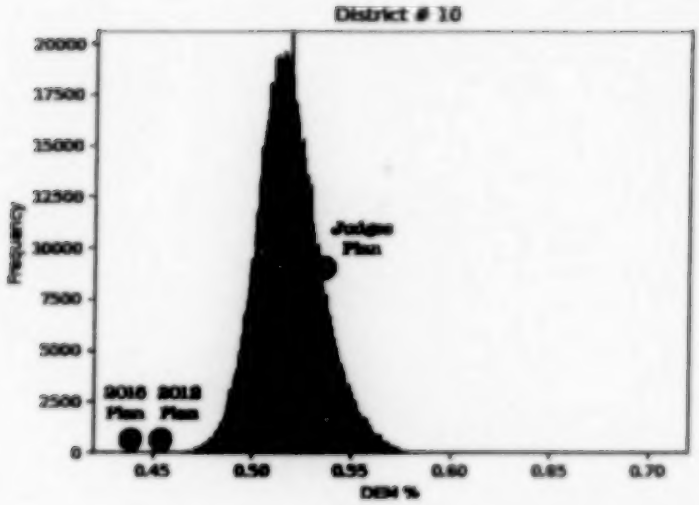

Figure 2

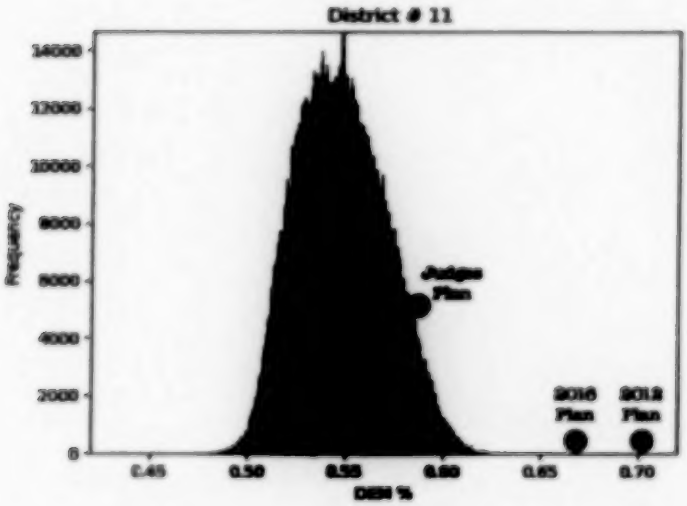

Figure 3

The extreme outlier status of these districts in both the 2012 Plan and the 2016 Plan is clearly visible here,

further thrown into relief by comparison with the corresponding districts in a plan made by a bipartisan panel of retired judges ("Judges' Plan"). Karen Kemp, *Nonpartisan Redistricting Panel Reveals Unofficial NC Congressional Voting Map*, Duke Sanford School of Public Policy (Aug. 29, 2016), https://bit.ly/2HjYyG8. Intentional minimization of the weight of votes for those districts' inhabitants is the clear inference from such extreme outlying effects.

The same effects may be observed if the comparison ensemble is sorted geographically rather than by party share, which we have done by designating a central Charlotte precinct and its district in the 2016 plan. Partisan composition in that district can then be compared to corresponding districts in the ensemble, averaged over their respective precincts. The figure below shows that the 2016 Plan clearly packs Charlotte voters. The 2012 Plan is not depicted in the figure because its packing is so pronounced that it is out of range of the plot. As with the other findings described in this section, Charlotte's outlier status is a matter of complete agreement between the Mattingly and the ReCom ensembles.

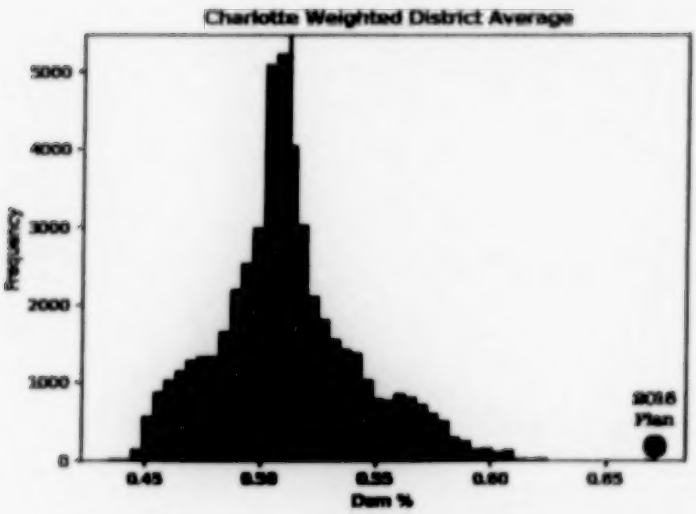

Figure 4

In sum, individual voters are harmed by living in districts that are intentionally designed to instrumentalize rather than to fully register their votes. When district design serves to effectively preordain an outcome far from the neutral baseline, it does not properly weight the votes in those districts.

Consider a scenario in which the North Carolina legislature decides to design the districts *after* a vote has been conducted, with knowledge of how votes were cast in each precinct. Having decided to concede three districts to Democrats, it can then sort the heavily Democratic precincts into those designated districts, clearly serving to diminish the weight, power, and value of those votes. The debasement of vote weight is as clear as in ballot-stuffing scenarios. The difficulty is to distinguish intentional manipulation by the state from the natural patterns of higher and lower concentration present in the vote distribution itself.

A plan composed of districts that fall far from the baseline constructed by the state's rules and geography, and in a pattern that benefits the controlling party, is not rationally explained by the rules and geography. Absent plausible justification by permissible principles, the reasonable inference is one of intentional discrimination.

D. This method is limited in scope.

A method that flags extreme outliers does not infringe on states' ability to set the rules and add districting criteria, nor on their latitude to select a plan that broadly comports with those criteria. We emphasize that the use of the method of ensembles for districting is proposed as an assessment technique, not proposed for optimization or map selection. This will never amount to usurping the state's authority to select a plan, because billions of substantially different plans remain viable, under any conception of outlier. This method does not choose a winner from among the abundance of options. This balances between state prerogatives and constitutional principles.

Importantly, even some districts or plans that look gerrymandered on their face will not be flagged as outliers by this method. For instance, Massachusetts had ten House seats in the 2000–2010 census cycle, and in that period, a Republican share of 30-37% was typical in statewide races. However, not a single Republican was elected to Congress in the five races in that cycle. This may seem to provide a cause of action for a potential claim. What an ensemble analysis clearly shows, however, is that for most elections in that cycle, no valid districting plan *whatsoever* will have even a single Republican-favoring district. Moon Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, MGGG (Oct. 22, 2019), https://bit.ly/

2SPW2cL. Not only a majority of possible plans, but indeed *every single* possible plan, produces a completely Democratic delegation. This is because Massachusetts at the time behaved much like the hypothetical state in which every household has the same voting preference: the statewide share of Republican votes is nearly replicated in every town and even precinct around the state. Thus the method of ensembles contradicts the *prima facie* suggestion of a gerrymander. This example also demonstrates that the method of ensembles does not covertly enforce a proportionality standard, but instead defers to the consequences of the state's rules and political geography.

CONCLUSION

The right to vote is personal and individual. That right is violated when a state singles out voters—in this case, because of their political beliefs—and acts with an intention to dilute their votes. The districting process by its very nature draws lines, thereby treating some voters differently from others. Thus, the process of distinguishing between this permissible line drawing and intentional, unconstitutional vote dilution is not always straightforward. The methods described here, however, demonstrate that these distinctions can be reliably made and thus that these claims can be justiciable. By flagging some districts as extreme outliers, these methods can make clearly visible to courts, legislatures, and the public when there is no rational justification for the drawing of a district and the only reasonable inference is one of intentional discrimination.

Respectfully submitted,

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No. 18-422

In The
Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of North Carolina

BRIEF FOR MEMBERS OF CONGRESS FROM THE NORTH CAROLINA DELEGATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

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INTEREST OF *AMICI CURIAE**

Amici, as members of the North Carolina delegation to the United States House of Representatives, are members of a body that has the constitutional authority, under the Elections Clause, to regulate the congressional redistricting process. In 2018, the people elected each of the *amici* under North Carolina's congressional map; accordingly, *amici* have an additional, particular interest in defending the constitutionality of the challenged map. Each of the *amici* was elected by the people of their district, and *amici* proudly represent all of those in their districts, without regard to political affiliation or voting preferences.

The members of the North Carolina delegation joining this brief are Representative George Holding, who represents the Second District, Representative Virginia Foxx, who represents the Fifth District, Representative Mark Walker, who represents the Sixth District, Representative David Rouzer, who represents the Seventh District, Representative Richard Hudson, who represents the Eighth District, Representative Patrick McHenry, who represents the Tenth District, Representative Mark Meadows, who represents the

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* Counsel for all parties have consented to this filing through letters with the Clerk. Under Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. A monetary contribution to fund the submission of this brief was made by the National Republican Congressional Committee.

Eleventh District, and Representative Ted Budd, who represents the Thirteenth District.

INTRODUCTION AND SUMMARY OF ARGUMENT

Litigants and advocates often assert that, in their view, the federal courts are the "'only institution in the United States' capable of 'solv[ing] th[e]'" perceived "problem" of too much politics in the redistricting process. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Gill* plaintiffs' counsel). Such claims of superior—indeed, of *exclusive*—judicial competence contain within them two distinct propositions, both of which "must be [analyzed] with care." *Id.* The first claim is that Congress and the States are incapable, as a practical matter, of addressing this issue; the second is that courts can effectively "solve[] this problem." *Id.* Neither of these claims withstands scrutiny.

Congress and the States have the constitutional authority to address the proper role that political considerations play in the redistricting process and are, in fact, heavily engaged in this complex, sensitive area of policymaking today. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, empowers Congress and the States to make laws regarding congressional elections, which includes the authority to enact rules that regulate the proper role of political considerations in redistricting. Both Congress and the States historically have used this authority to make laws in this area, adopting

various measures that both directly and indirectly address the redistricting issues that plaintiffs have sought to bring to this Court. This is a particularly robust area of policymaking today, as political leaders in Congress and in most of the States actively are contemplating legislation on these topics. This vigorous legislative debate, over a wide array of redistricting proposals, belies any claim that Congress and the States lack the practical ability and the initiative to remedy any problems in this sensitive area of policymaking.

While Congress and the States have the constitutional authority, clear ability, and demonstrated motivation to address the difficult issue of political influence in redistricting, decades of experience demonstrate that federal courts lack institutional competence to engage constructively in this fraught area. In every political gerrymandering case that has come to this Court for decades, plaintiffs have proposed one of two general approaches: either condemning maps that produce disproportionate statewide vote-to-seat ratios as between the two major parties, *see Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Gill*, 138 S. Ct. 1916, or invalidating maps because the drawers had too much intent to seek partisan advantage, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam). The Plaintiffs in this case follow this same pattern, with the League Plaintiffs advocating mainly for the former approach, and the Common Cause Plaintiffs arguing

mainly for the latter. This Court has rejected both approaches as failing to offer a judicially administrable, constitutionally-grounded standard. That no plaintiff has been able to come up with anything better, after all these years, vindicates the Framers' well-considered decision to leave these issues to Congress and the States.

This Court should reverse the district court's erroneous decision and make clear that Congress and the States, not federal courts, have the constitutional responsibility and authority to address issues relating to political considerations that may arise during the redistricting process.

ARGUMENT

I. Under The Constitution, Congress And The States Have The Authority To Decide The Proper Role That Political Considerations Should Play In The Redistricting Process

The assertion that federal courts are the only "'institution in the United States' capable of 'solv[ing] th[e] problem'" of political considerations in the redistricting process, *Gill*, 138 S. Ct. at 1929 (quoting *Gill* plaintiffs' counsel), relies necessarily upon the premise that other institutions in this country are not capable of acting effectively in this area. The Framers of the United States Constitution took a different view, granting to Congress and the States extensive authority to regulate congressional elections and the

redistricting process. *See* U.S. CONST. art. I, § 4, cl. 1. The power that the Constitution affords Congress and the States includes within it ample, flexible tools to regulate the role that political considerations should play in the redistricting process. Congress and the States are well equipped to address the "myriad competing considerations" involved in this sensitive area, *see Gill*, 138 S. Ct. at 1926, and have been extremely active in debating and enacting legislation in this field, including today.

A. Congress

1. The Elections Clause provides Congress with broad authority to enact laws regulating the congressional redistricting process. *See* U.S. CONST. art. I, § 4, cl. 1 (granting to Congress the authority to "at any time by Law make or alter" regulations relating to the "Times, Places and Manner of holding Elections for Senators and Representatives"). "The power of Congress over the 'Times, Places and Manner' of congressional elections," this Court has explained, is phrased in "'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Congress thus has "the power to alter [State] regulations or supplant them altogether," *id.* at 8, which includes the authority to adopt measures that limit or control the use of political considerations in the redistricting process, *see Vieth*, 541 U.S. at 275 (plurality op.) ("It is significant that the Framers provided a

remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

Notably, the Founders granted to Congress this authority, at least in part, to authorize it to address the challenges that arise from political considerations in redistricting. Responding to efforts to manipulate districts at the time of the Founding, "the Framers provided a remedy for such practices in the Constitution." *Id.* at 275 (plurality op.); *see Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) ("Partisan gerrymandering dates back to the founding."). Although some delegates to the Constitutional Convention demanded that the States retain the unfettered discretion to draw congressional districts, the Framers granted to Congress the power to "check partisan manipulation of the [drawing of congressional districts] by the States," in order to prevent partisan abuse and the resulting exclusion of minority interests. *Vieth*, 541 U.S. at 275 (plurality op.); *see also* Saikrishna Bangalore Prakash & John Yoo, *PEOPLE ≠ LEGISLATURE*, 39 HARV. J.L. & PUB. POL'Y 341, 351 (2016) ("There is little doubt that influential framers such as James Madison and Alexander Hamilton believed Congress needed such power in order to prevent a faction from magnifying its control through gerrymandering electoral districts."). A delegate to the Massachusetts convention, for example, praised the fact that Congress' power to restrain the

practice of partisan districting "provides a remedy, a controlling power in a legislature . . . without the influence of [State] commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 Debates on the Federal Constitution 27 (J. Elliot 2d ed. 1876).

2. Congress has exercised its constitutional authority to control and regulate the role that politics plays in the redistricting process. *See Vieth*, 541 U.S. at 276 (plurality op.). While most of those regulations lapsed in the early-to-mid 20th century, Congress recently has shown a renewed, robust interest in this topic, and it actively is considering numerous proposals in this sensitive area of law.

a. After the adoption of the Constitution, States frequently manipulated district lines for political gain. By the 19th century, "the gerrymander was a recognized force in party politics and was attempted in all legislation enacted for the formation of election districts." *See* E. Griffith, *The Rise and Development of the Gerrymander* 123 (1974); *see also* Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21–55 (2013). In response, Congress enacted standards governing the congressional redistricting process, which aimed—at least in part—at controlling the influence of politics on redistricting. *See* William J. Phelan, IV, Esq., *Political Gerrymandering After* League of United Latin American Citizens v. Perry*: Considering Political Science for Legislative Action*, 32 SETON HALL LEGIS. J. 89, 94–98 (2007).

Congressional regulation in this area began in earnest in the mid–19th century. In the Apportionment Act of 1842, Congress enacted federal redistricting standards, compelling the States to establish contiguous, single-member districts for congressional elections. Apportionment Act of 1842, 5 Stat. 491. Congress did this, at least in part, to stifle the States' "practice of opportunistic switching between at-large and districted congressional elections" to "manipulat[e] the rules of representation." James A. Gardner, *Forward: Representation Without a Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 913 (2006). Congress supplemented its districting standards in 1872, mandating that congressional districts contain "as nearly as practicable an equal number of inhabitants." Apportionment Act of 1872, 17 Stat. 492. Congress's 1872 intervention sought to restrict the States' attempts to manipulate district population size for political advantage. *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 29 WM. & MARY L. REV. 1921, 1932–34 (2018). And in 1901, Congress enacted a law requiring that districts be drawn in "compact territory," Apportionment Act of 1901, 26 Stat. 736, in an effort to, at least in part, "guard against gerrymandering." Kurtis A. Kemper, *Application of Constitutional "Compactness Requirement" to Redistricting*, 114 A.L.R.5th 311 (2003).

Congress declined to retain most of the above-described limitations in the 20th century, although it

did, after a period, again require single-member districts. "The requirements of contiguity, compactness, and equality of population [as well as the single-member district requirement] were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued." *Vieth*, 541 U.S. at 276 (plurality op.); *see Wood v. Broom*, 287 U.S. 1, 7–8 (1932). Several decades later, Congress enacted a law again requiring single-member districts. Act of Dec. 14, 1967, 81 Stat. 581, codified at 2 U.S.C. § 2c. Congress "thereby establish[ed] single-member districts as the preferred electoral method" and ended at-large congressional elections. Robert E. Ross & Barrett Anderson, *Single-Member Districts Are Not Constitutionally Required*, 33 CONST. COMMENT. 261, 286 (2018).

b. In recent years, Congress has shown a renewed interest in the question of political considerations in the redistricting process. *Amici* do not discuss any of these bills to praise or criticize any particular proposal, and *amici* believe that several of the bills discussed below are deeply misguided. Having said that, these proposals show that Congress actively is engaged in this area of law. *Amici* stand ready to discuss the regulations of congressional elections with their colleagues, of either party, and would support legislation that they considered to be consistent with the interests of their constituents and the Nation.

Since the lapse of the geographically-based federal districting standards, members of Congress regularly have proposed legislation that would compel the States to re-adopt these requirements and would go further

by prohibiting the States from considering politics in the redistricting process. An exemplar is H.R. 6250, proposed in 2010, which would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting, and it would have, in addition, mandated that "Congressional districts in the State may not be established with the major purpose of diluting the voting strength of any person, or group, including any political party," except where "necessary to comply" with the Voting Rights Act. H.R. 6250, 111th Cong. § 2 (2010); *see also* S. 1880, 115th Cong. § 3203 (2017); H.R. 711, 115th Cong. § 4 (2017); H.R. 712, 115th Cong. § 4 (2017); H.R. 3537, 115th Cong. § 3004 (2017); H.R. 3848, 115th Cong. § 3203 (2017); S. 2483, 114th Cong. § 4 (2016); H.R. 2173, 114th Cong. § 203 (2015); H.R. 2978, 113th Cong. § 5 (2013); H.R. 3846, 112th Cong. § 102 (2012); H.R. 3468, 98th Cong. (1983).

Members of Congress also have introduced several bills built around redistricting commissions. For example, H.R. 3025, introduced in 2009 (and then introduced in every Congress over the last decade), has provisions that would require each State to establish an independent commission that would adopt a redistricting plan; the bill also provides various criteria that the commission would use in redistricting, such as compactness, contiguity, and population equality, while specifically prohibiting considerations of voting history, political party affiliation, or residence of incumbent members. H.R. 3025, 111th Cong. §§ 3, 4 (2009); *see also* S. 2483, 114th Cong. §§ 3, 4 (2016); H.R. 219,

114th Cong. §§ 3, 4 (2015); H.R. 1347, 114th Cong. §§ 3, 4 (2015); H.R. 2173, 114th Cong. §§ 201-04 (2015); H.R. 2655, 114th Cong. § 6 (2015); H.R. 223, 113th Cong. §§ 3, 4 (2013); H.R. 2978, 113th Cong. §§ 3, 4 (2013); H.R. 453, 112th Cong. §§ 3, 4 (2011). H.R. 3846, introduced in 2012, in turn, took a different approach and would have established a national bi-partisan commission, consisting of members appointed by House leadership, which would have produced a redistricting plan for each State. H.R. 3846, 112th Cong. §§ 101–07 (2012).

Just in the last Congress, legislators proposed scores of bills that would have limited the use of political considerations in the redistricting process. H.R. 145, H.R. 711, H.R. 712, H.R. 1102, H.R. 2981, and H.R. 3537 each would have required States to redistrict through independent elections commissions. S. 1880, 115th Cong. §§ 3102, 3201–04 (2017); H.R. 145, 115th Cong. § 5 (2017); H.R. 711, 115th Cong. §§ 3, 4 (2017); H.R. 712, 115th Cong. §§ 3, 4 (2017); H.R. 1102, 115th Cong. §§ 201–04 (2017); H.R. 2981, 115th Cong. § 6 (2017); H.R. 3537, 115th Cong. §§ 1003–10 (2017). Several bills would have limited mid-decennial congressional redistricting. *See* H.R. 5785, 115th Cong. § 8011 (2018); S. 1880, 115th Cong. § 3101 (2017); H.R. 151, 115th Cong. § 2 (2017); H.R. 3537, 115th Cong. § 3002 (2017). H.R. 3057 would have mandated ranked choice voting, permitted the use of multi-member districts, required independent redistricting commissions, and limited mid-decennial redistricting. *See* H.R. 3057, 115th Cong. §§ 101, 321, 301–02, 311–14 (2017). H.R.

3848 would have required independent commissions; it also would have established criteria for the commissions such as compactness and keeping communities of interest together, prohibited consideration of voting history or residence of incumbents, and limited mid-decennial redistricting. *See* H.R. 3848, 115th Cong. §§ 3101–02, 3201–04 (2017); *see also* S. 1880, 115th Cong. §§ 3101–02, 3201–04 (2017). And S. 3123 quoted the *Vieth* plurality's invocation of the Elections Clause, as well as Congress' prior actions in this area in the 19th century, and would have required the adoption of independent commissions that could not take into account political registration, voting history, election results, or the place of residence of incumbents, and would have prohibited any "congressional districting plan that has the purpose or will have the effect of unduly favoring or disfavoring any political party." S. 3123, 115th Cong. §§ 2–4 (2017).

A collection of initiatives now appears to have the full-throated backing of one of this Nation's two major political parties. On January 3, 2019, Representative John Sarbanes introduced H.R. 1, the new House majority's signature bill, which proposed significant regulation of the States' congressional redistricting process. H.R. 1, 116th Cong. (2019). Two hundred and twenty-seven representatives are co-sponsors of H.R. 1, and Representative Sarbanes has promoted the bill as an initiative to "end[] partisan gerrymandering to prevent politicians from picking their voters." Press Release, Representative John Sarbanes, Sarbanes, House Democrats Introduce Once-In-A-Generation Package

of Democracy Reforms (Jan. 4, 2019). Speaker of the House Nancy Pelosi has championed the bill as a signature initiative. *See* Press Release, Speaker Nancy Pelosi, Pelosi Remarks at Press Event on Introduction of H.R. 1, For the People Act (Jan. 4, 2019). As relevant here, H.R. 1 requires independent redistricting commissions, identifies criteria that commissions can and cannot use (including prohibiting the consideration of political affiliation or voting history), and restricts mid-decennial redistricting. H.R. 1 at §§ 2401, 2402, 2411–14; *see also* H.R. 36, 116th Cong. (2019); H.R. 44, 116th Cong. § 2 (2019); H.R. 124, 116th Cong. § 3, 4 (2019); H.R. 130, 116th Cong. §§ 3, 4 (2019); H.R. 131, 116th Cong. §§ 1 *et seq.* (2019); H.R. 163, 116th Cong. § 2 (2019).

B. The States

1. The States have broad constitutional authority to regulate redistricting, especially when Congress chooses not to act. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, provides the States with "comprehensive" authority over the congressional election process, and the States are empowered to control the role that politics plays in the process, absent contrary congressional action. *See Smiley*, 285 U.S. at 366. As this Court has explained, "[d]rawing lines for congressional districts is . . . 'primarily the duty and responsibility of the State.'" *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012)); *accord Growe v. Emison*, 507 U.S. 25, 34 (1993) (the Elections Clause "leaves with the States primary

responsibility for apportionment of their federal congressional . . . districts"). And while arguably not directly relevant to the present case about congressional districts, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–05 (1995); *but see id.* at 846–57 (Thomas, J., dissenting), the Tenth Amendment reservation of power to the States recognizes—at a minimum—the States' sovereign authority and responsibility to regulate redistricting beyond congressional lines, including at the state legislative level. As this Court has explained, "'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Shelby Cnty.*, 570 U.S. at 543 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991)).

Whether emanating from the Elections Clause or the Tenth Amendment, State regulation of redistricting allows numerous sovereigns to develop innovative solutions to the uniquely challenging issue of political considerations in this area. As "'laboratories for devising solutions to difficult legal problems,'" States can confront and resolve the complex questions arising in the redistricting process. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)).

2. Using their vast constitutional authority, many States have adopted, and are considering adopting, a range of measures "designed to insulate the [redistricting] process from politics." *Vieth*, 541 U.S. at 277 n.4 (plurality op.).

Most States have adopted at least some of the traditional redistricting standards as mandatory redistricting requirements, compelling that districts be drawn in a compact and contiguous manner, with respect given to geographic boundaries and/or political subdivisions. *See* Nat'l Conf. of State Legislatures, Redistricting Criteria (2019), *available at* http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx (last visited Feb. 9, 2019); Royce Crocker, CONG. RESEARCH SERV., R42831, *Congressional Redistricting* at 9–10. Such rules are aimed—at least in part—at curbing politically-friendly line drawing. *See supra* at 7–8; *accord Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring).

Several States have specifically forbidden partisan favoritism in the redistricting process. In 2010, Florida voters amended the Florida constitution to provide that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent. . . ." FLA. CONST. art. III, § 20(a); *see generally League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015). In 2018, Missouri amended its state constitution to mandate that its state legislative districts be designed to achieve "both partisan fairness and competitiveness." MO. CONST. art. III, § 3. Iowa law similarly prohibits the legislature from drawing a congressional district "for the purpose of favoring a political party, incumbent legislator or member of Congress. . . ." IOWA CODE § 42.4(5). Delaware likewise requires its General Assembly to create each congressional district (to the

extent more than one district exists in the State) to not "unduly favor any person or political party." DEL. CODE ANN. tit. XXIX, §§ 804(4), 805.

Numerous States have adopted redistricting commissions, of various types and authorities. *See Ariz. State Legislature*, 135 S. Ct. at 2662; *Vieth*, 541 U.S. at 362–63 (Breyer, J., dissenting). Several States employ advisory redistricting commissions, consisting of legislators or non-legislators (or a mix thereof), which create and recommend redistricting plans to the State legislature. *See* C. Daniel Chill, *Political Gerrymandering: Was Elbridge Gerry Right?*, 33 TOURO L. REV. 795, 818–19 (2017). Five States use advisory commissions: Maine, New York, Rhode Island, Utah, and Virginia. *See* Nat'l Conf. of State Legislatures, Redistricting Commissions: Congressional Plans (2019), *available at* http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx (last visited Feb. 9, 2019). Other States have turned over primary responsibility for drawing redistricting plans to commissions. Several of these States, including Hawaii, Idaho, Montana, New Jersey, and Washington, allow legislative leaders to appoint members to the redistricting commissions. *See id.*; *see also Political Gerrymandering*, 33 TOURO L. REV. 795, 816–17. More recently, Arizona and California have established independent redistricting commissions, the members of which are nominated or selected by non-legislative entities, to create redistricting plans. *See* ARIZ. CONST. art

IV, pt. 2, § 1; CAL. GOV'T CODE § 8252.[†] Last year, citizens in Colorado and Michigan approved constitutional amendments to create a species of such independent commissions in their States. *See* COLO. CONST. art. V, § 44; MICH. CONST. art. IV, § 6. Connecticut, Indiana, and Ohio employ backup commissions to draw district lines if the State legislature fails to enact a redistricting plan. *See* Nat'l Conf. of State Legislatures, Redistricting Commissions: Congressional Plans. And Iowa has undertaken its own redistricting process, whereby non-partisan legislative staff draw district lines with the help of an advisory commission, whose members are selected by Iowa General Assembly leaders. IOWA CODE §§ 42.5, 42.6; *see also* Nat'l Conf. of State Legislatures, The "Iowa Model" for Redistricting (2018), *available at* http://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx (last visited Feb. 9, 2019). Upon submission of the maps to the Iowa General Assembly, the legislature may vote only for or against the plan; it may not amend the maps substantively. *Id.*

States have weighed other initiatives designed to resolve the appropriate weight that political considerations should play in the redistricting process. For example, Ohioans approved a ballot proposal requiring redistricting plans to be adopted with bipartisan support of the Ohio legislature. OHIO CONST. art. XIX, § 1. In particular, the Ohio constitution now requires that

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[†] This Court recently upheld the constitutionality of one of these commissions against an Election Clause challenge. *See Ariz. State Legislature*, 135 S. Ct. at 2671.

a redistricting plan be adopted by 60% of the Ohio general assembly, with a majority of the two largest political parties voting in favor of the plan. *Id.* Missourians also voted last year to amend the State constitution to establish the post of a non-partisan state demographer tasked with drawing district lines. MO. CONST. art. III, § 3. The demographer is charged with achieving, among other goals, "partisan fairness" in the redistricting process, whereby state house and senate districts are designed based on the votes cast in the previous three elections for president, governor, and United States senator. *Id.*

Action in this area of law continues apace. Focusing exclusively on the commission-based reforms alone, many States are considering, and recently have considered, multiple bills or constitutional amendments in that area. *See, e.g.*, S. 27, 149th Gen. Assemb. (Del. 2017); S. 771, 119th Reg. Sess. (Fla. 2017); H.R. 41, 119th Reg. Sess. (Fla. 2017); S. Res. 6, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); H.R. 3, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); H.R. 515, 29th Leg. (Haw. 2017); H.R.J. Res. Const. Amend. HC0010, 101st Gen. Assemb. (Ill. 2019); H.R.J. Res. Const. Amend. HC0001, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0017, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0021, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0023, 100th Gen. Assemb. (Ill. 2017); S. 37, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S. 105, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); H.R. 1317, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S. 136, 120th Gen. Assemb., 1st

Reg. Sess. (Ind. 2017); H.R. 1014, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); H.R. 1378, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); H.R. Con. Res. 5011, 87th Leg., Reg. Sess. (Kan. 2017); H.R. 386, 2017 Reg. Sess. (Ky. 2017); S. 90, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 91, 439th Gen. Assemb., Reg. Sess. (Md. 2019); H.R. 67, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 146, 437th Gen. Assemb., Reg. Sess. (Md. 2017); S. 1023, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 367, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 385, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 962, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 966, 437th Gen. Assemb., Reg. Sess. (Md. 2017); S. 11, 190th Gen. Ct. (Mass. 2017); S. 393, 190th Gen. Ct. (Mass. 2017); H.R. 59, 190th Gen. Ct. (Mass. 2017); Order SD.2198, 190th Gen. Ct. (Mass. 2017); S. 86, 90th Leg. (Minn. 2017); S. 370, 90th Leg. (Minn. 2017); S. 2052, 90th Leg. (Minn. 2017); H.R. 246, 90th Leg. (Minn. 2017); Leg. B. 253, 106th Leg., 1st Sess. (Neb. 2019); Leg. B. 216, 105th Leg., 1st Sess. (Neb. 2017); Leg. B. 653, 105th Leg., 1st Sess. (Neb. 2017); S. 8, 166th Gen. Ct., 1st Sess. (N.H. 2019); H.R. 706, 166th Gen. Ct., 1st Sess. (N.H. 2019); S. 107, 165th Gen. Ct., 1st Sess. (N.H. 2017); H.R. 203, 165th Gen. Ct., 1st Sess. (N.H. 2017); Assemb. Con. Res. 189, 217th Leg. (N.J. 2016); Assemb. Con. Res. 243, 217th Leg. (N.J. 2016); S. Con. Res. 107, 217th Leg. (N.J. 2016); H.R.J. 3, 2017 Reg. Sess. (N.M. 2017); Assemb. B. 262, 242nd Leg. (N.Y. 2019); Assemb. B. 36, 240th Leg. (N.Y. 2017); Assemb. B. 122, 240th Leg. (N.Y. 2017); S. 209, Sess. 2017 (N.C. 2017); H.R. 674, Sess. 2017 (N.C. 2017); H.R. 735, Sess. 2017 (N.C. 2017); S. 2324, 66th Leg. Assemb.

(N.D. 2019); S. Con. Res. 4009, 65th Leg. Assemb. (N.D. 2017); S.J. Res. 3, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017); H.R.J. Res. 1019, 57th Leg., 1st Sess. (Okla. 2019); S.J. Res. 8, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 11, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 10, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 11, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 12, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 13, 79th Leg. Assemb., Reg. Sess. (Or. 2017); H.R.J. Res. 12, 79th Leg. Assemb., Reg. Sess. (Or. 2017); H.R.J. Res. 21, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S. 22, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); S. 243, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); S. 767, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 569, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 722, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 1114, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 5087, 2019-20 Leg. Sess. (R.I. 2019); S. 6, 123rd Sess. (S.C. 2019); S. 135, 123rd Sess. (S.C. 2019); S. 230, 123rd Sess. (S.C. 2019); S. 249, 123rd Sess. (S.C. 2019); S. 254, 123rd Sess. (S.C. 2019); S. 341, 122nd Sess. (S.C. 2017); H. 3339, 122nd Sess. (S.C. 2017); H. 4271, 122nd Sess. (S.C. 2017); S. 832, 110th Gen. Assemb. (Tenn. 2017); H.R. 845, 110th Gen. Assemb. (Tenn. 2017); S. 209, 85th Leg. (Tex. 2017); H.R. 369, 85th Leg. (Tex. 2017); H.R.J. Res. 32, 85th Leg. (Tex. 2017); H.R.J. Res. 118, 85th Leg. (Tex. 2017); H.R. 411, 62nd Leg., Gen. Sess. (Utah 2017); H.R.J. Res. 639, 2019 Sess. (Va. 2019); H.R.J. Res. 651, 2019 Sess. (Va. 2019); S. 1206, 2017 Sess. (Va. 2017); S.J. Res. 260, 2017 Sess. (Va. 2017); H.R. 2280, 2017 Sess. (Va. 2017); H.R.J. Res. 651, 2017 Sess. (Va. 2017); H.R. 2445, 84th

Leg., 1st Reg. Sess. (W. Va. 2019); H.R.J. Res. 1, 83rd Leg., 1st Reg. Sess. (W. Va. 2017); Assemb. B. 44, 103rd Leg., Reg. Sess. (Wis. 2017).

Numerous States also currently are debating proposed legislation that would ban favoritism to a political party in redistricting. *See, e.g.*, H.R.J. Res. Const. Amend. HC0010, 101st Gen. Assemb. (Ill. 2019); S. 90, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 91, 439th Gen. Assemb., Reg. Sess. (Md. 2019); H.R. 537, 439th Gen. Assemb., Reg. Sess. (Md. 2019); Legis. B. 253, 106th Leg., 1st Sess. (Neb. 2019); Const. Amend. Con. Res. 9, 166th Gen. Ct., 1st Sess. (N.H. 2019); S. 8, 166th Gen. Ct., 1st Sess. (N.H. 2019); H.R. 706, 166th Gen. Ct., 1st Sess. (N.H. 2019); Assemb. B. 262, 242nd Leg. (N.Y. 2019); H.R. 5087, 2019-20 Leg. Sess. (R.I. 2019); S. 6, 123rd Sess. (S.C. 2019); S. 135, 123rd Sess. (S.C. 2019); S. 230, 123rd Sess. (S.C. 2019); S. 249, 123rd Sess. (S.C. 2019); S. 254, 123rd Sess. (S.C. 2019); H.R.J. Res. 25, 86th Leg. (Tex. 2019); S.J. Res. 25, 2019 Sess. (Va. 2019); S.J. Res. 51, 2019 Sess. (Va. 2019); H.R.J. Res. 582, 2019 Sess. (Va. 2019); H.R.J. Res. 639, 2019 Sess. (Va. 2019); H.R. 1396, 66th Leg., Reg. Sess. (Wash. 2019); H.R. 2445, 84th Leg., 1st Reg. Sess. (W. Va. 2019).

In sum, the States actively are debating, and often adopting, various measures designed to control political considerations during the redistricting process. The States, like Congress, are well equipped to carry out their constitutional authority to resolve the complex questions raised by this difficult issue.

II. That Plaintiffs Have Failed For Decades To Identify Any Judicially Administrable Standards In This Area Of Law Vindicates The Framers' Decision To Leave This Issue To Congress And The States

The assertion that only federal courts can "address the problem" of too much politics in redistricting, *Gill*, 138 S. Ct. at 1929, fails for an additional reason: experience has taught that courts are not, in fact, institutionally capable of "solv[ing] this problem." As this court explained just last Term in *Gill*, the difficulties of developing judicial standards that "finally solve the problem of partisan gerrymandering [] has confounded th[is] Court for decades." *Id.* at 1933. Fifteen years before that, in *Vieth*, a plurality of this Court concluded that this historical failure to identify judicially administrable standards meant that it was time to declare political gerrymandering claims nonjusticiable. 541 U.S. at 281–301 (plurality op.). Justice Kennedy agreed that there were "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run," but he wanted to give more time to see if plaintiffs could, in fact, identify a "limited and precise," historically-grounded standard. *Id.* at 306–09; *accord LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). Now, fifteen years and many more cases have passed, and yet no plaintiff has come remotely close to identifying any administrable, constitutionally-grounded standard in this area of law, and not for want of trying.

The shortfalls that have plagued every partisan gerrymandering test that plaintiffs have proposed to this Court for decades continue in this case. Both sets of Plaintiffs here pepper their jurisdiction-stage briefs with citations to an ever-growing grab bag of constitutional amendments and inapposite doctrines (First Amendment, Fourteenth Amendment, Article I, minority vote dilution, campaign finance, patronage hiring, *Anderson-Burdick*, viewpoint discrimination, Voting Rights Act, on and on, *see* Mot. to Aff. of League of Women Voters of N.C. ("League Mot. to Aff.") 26, 27, 32; Mot. to Aff. by the Common Cause Appellees ("Common Cause Mot. to Aff.") 33–39), and different glosses on familiar, unhelpful elements (did politicians simply have political intent, or predominant political intent? *See* League Mot. to Aff. 33–34; Common Cause Mot. to Aff. 29–30). This is just noise, meant to distract from the fact that Plaintiffs have nothing new to offer. As discussed below, the tests that political gerrymandering plaintiffs have proposed to this Court for decades have been built around one of two central frameworks, neither of which can serve as the basis for a judicially administrable, constitutionally-grounded doctrine: (A) a map is unlawful if it deviates too far from a "proportionate" statewide vote-to-seat ratio as between the two major parties; and (B) a map is unlawful if its drawers sought too much political advantage. Unsurprisingly, these two failed approaches make up the core of the respective submissions of the two plaintiff groups in this case. And these two approaches continue to fail, regardless of how many inapposite

constitutional provisions or judicial doctrines plaintiffs nominally invoke in support.

A. Tests Built Around An Insufficiently "Proportionate" Statewide Vote-To-Seat Ratio

1. In most of the political gerrymandering cases that have come to this Court over the last several decades, plaintiffs have constructed their core theory around the thesis that a political party may not draw a map that intentionally produces an insufficiently proportionate statewide vote-to-seat ratio as between the two major parties. In *Bandemer*, for example, the core of the plaintiffs' complaint was that "Democratic candidates for the State House of Representatives had received 51.9% of the votes cast statewide and Republican candidates 48.1%; yet, out of the 100 seats to be filled, Republican candidates won 57 and Democrats 43." 478 U.S. at 134 (plurality op.). Similarly, in *Vieth*, the plaintiffs' outcome-determinative effects inquiry turned on whether a map's "pack[ing]" and "crack[ing]" of voters "thwart[ed] the plaintiffs' ability to translate a *majority of votes into a majority of seats*." 541 U.S. at 286–87 (plurality op.) (emphasis added) (citation omitted). To be sure, the *Bandemer* plaintiffs and the *Vieth* plaintiffs also would have required proof of partisan intent, *see id.*; *Bandemer*, 478 U.S. at 129 (plurality op.); but as the *Bandemer* plurality explained: "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political

consequences of the reapportionment were intended," *id.*

Gill v. Whitford was much the same, with the plaintiffs proposing a test that ultimately turned on insufficiently proportionate statewide vote-to-seat ratio. As this Court properly explained in *Gill*, the core of the plaintiffs' complaint was that the redistricting map at issue "unfairly favor[s] Republican voters and candidates, and that it does so by 'cracking' and 'packing' Democratic voters around Wisconsin." 138 S. Ct. at 1924 (alteration in original) (citation omitted). The plaintiffs contended that this unfairness led Democrats to "waste" more votes on a statewide basis than did Republicans, thus creating too large an "efficiency gap" between the two parties. *Id.* at 1933. In other words, Republicans were over-represented in terms of a statewide vote-to-seat ratio, while Democrats were under-represented. *Id.* The *Gill* plaintiffs (like the *Vieth* and *Bandemer* plaintiffs) would have included other considerations—partisan intent and "justification"—in their proposed tests, but those considerations were mere make-weights. Partisan intent would, of course, do little when a map is drawn by a single political party, for just the reason explained by the *Bandemer* plurality. *See supra* at 24–25. As for "justification," plaintiffs defined this element as analyzing whether it was possible to draw "alternative" maps that were more favorable to the minority party, on a statewide basis. Br. of Appellees 33, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). As the *Gill* plaintiffs seemingly conceded, this additional step has no

real practical effect because "[d]ue to the near-infinite number of possible district configurations, it is generally possible for plans both to be [more] symmetric and to satisfy all other criteria." *Id.* at 55.

The League Plaintiffs in this case have taken the same basic approach as the *Bandemer*, *Vieth* and *Gill* plaintiffs. The League Plaintiffs have proposed a two-step analysis that, just like the tests discussed above, ultimately boils down to an inquiry into whether the major parties had a sufficiently proportionate statewide vote-to-seat ratio. The first step simply repeats the pro-forma elements that will not screen out any map drawn by a legislature controlled by one political party: partisan intent, cracking and packing of voters (the typical techniques of partisan districting), and no more favorable alternative map being possible. League Mot. to Aff. 2. The real action would take place at step two, where the court would ask whether the plan is "balanced in its treatment of the two major parties" in terms of statewide vote-to-seat ratios. *Id.* at 2–3. And if any doubt remained that the League Plaintiffs were recycling the prior approaches, they put that to rest by explaining that, under their test, their evidence of intent, combined with the fact that the map yielded a "ten-three Republican edge in the face of an evenly divided electorate," is "*enough to decide this case*" in their favor. *Id.* at 19 (emphasis added).

2. Building a political gerrymandering doctrine around the question of whether the map produces an insufficient proportionate statewide vote-to-seat ratio is a non-starter because, among other insuperable

problems, the argument necessarily rests upon the non-existent "right" to proportional representation.

This Court has held repeatedly that proportional representation, "*however phrased*," *Mobile v. Bolden*, 446 U.S. 55, 79 (1980) (emphasis added), is not a lawful basis for a constitutional test, including in the political gerrymandering context. As the *Vieth* plurality explained, in words that apply just as aptly to the submissions of the plaintiffs in *Bandemer*, *Vieth* itself, *Gill*, and the League Plaintiffs, "[d]eny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle." *Vieth*, 541 U.S. at 288 (plurality op.). Justice Kennedy agreed, making this the conclusion of the Court's majority, *id.* at 308 (Kennedy, J., concurring in judgment), adding that the principle that the *Vieth* plaintiffs articulated is based upon a "precept" for which there is "no authority," *id.* The *Bandemer* plurality made much the same point, explaining that this Court's caselaw "clearly foreclose[s] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 153, 156, 160 (1971)). The Justices joining Justice O'Connor agreed, thereby making this a Court majority on this point as well. *See* 478 U.S. at 145 (O'Connor, J., concurring in the judgment); *accord* The Federalist

No. 35 (Alexander Hamilton) ("It is said to be necessary, that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free.").

That plaintiffs sometimes seek to recast their statewide disproportional vote-to-seat ratio argument under the nomenclature of "partisan symmetry" does nothing to salvage their approach. Partisan symmetry is just a different "phras[ing]," *Mobile*, 446 U.S. at 79, of the non-existent right to proportional representation. Symmetry tests hypothesize how the two major parties would do, on a state-wide vote-to-seat ratio, "should their respective shares of the vote reverse." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). According to the partisan symmetry approach, each major party should perform as proportionally well under a districting plan as the other major party does when receiving the same number of votes. But, of course, partisan symmetry rests upon the same fundamental flaw that infected the plaintiffs' arguments in cases like *Vieth*, where the complaint was that one of the two major political parties did not win a state-wide majority of seats, despite receiving a majority of the votes. *See supra* at 24, 27. As a matter of the most basic arithmetic, if one party received the majority vote but *less* than a majority of seats, the other party would get *more* than a majority of the seats with the same statewide vote share, thus always violating the symmetry principle.

Or, as the Chief Justice put it at the *Gill* oral argument, "if you need a convenient label for [the partisan symmetry] approach, you can call it proportional representation, which has never been accepted as a political principle in the history of this country." Tr. of Oral Arg. 40–41, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

B. Tests Built Around Impermissible Partisan Intent

1. A couple of plaintiffs have attempted to escape the proportional representation trap by advocating for a test based around intent to gain political advantage, without any statewide vote-to-seat ratio inquiry. First came *LULAC*, where the plaintiffs presented a test built around a "sole-intent standard," where a showing of exclusive intent to seek partisan advantage would be enough to render a districting plan unconstitutional, at least in some instances. 548 U.S. at 418 (opinion of Kennedy, J.). The plaintiffs in *Benisek*, in the case that this Court decided last Term, similarly urged an intent-focused approach, arguing that if the plaintiff could show retaliatory intent, the map would be unlawful upon a mere showing of "more-than-de-minimis" impact on voters. Br. of Appellants 35–36, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333).

The Common Cause Plaintiffs here urge much the same intent-focused inquiry. Under their approach, if the plaintiff could show "invidious" intent—that is, intent to gain political advantage—a map is unlawful so

long as it has only a "slight" political effect. Common Cause Mot. to A.f. 28-29, 35.

2. This intent-focused approach is foreclosed by binding caselaw. As noted above, in *LULAC*, this Court faced an argument that the sole justification for the legislature's redistricting was partisan gain, and that this rendered the map unconstitutional. *See* 548 U.S. at 418 (opinion of Kennedy, J.). As Justice Kennedy made clear in explaining why even a *sole* intent for partisan gain was insufficient, "a successful claim"—if a justiciable doctrine is to be discovered—must "show a burden . . . on the complainants' representational rights." *Id.*; *accord id.* at 493–94 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511 (Scalia, J., concurring in the judgment in part and dissenting in part). After all, the intent-focused test would, in effect, make considerations of political advantage as forbidden as considerations of race. But as a majority of this Court concluded in *Vieth*, "[r]ace is an impermissible classification," while "[p]olitics is quite a different matter." 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *accord id.* at 286 (plurality op.).

Even beyond this binding precedent, an intent-focused test is a nonstarter because it would be wildly overbroad, "commit[ing] federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). As the Justices of this Court have recognized, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the

likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality op.). Even those Justices who have advocated for the creation of a political gerrymandering doctrine have understood that an intent-focused inquiry is unavailing: "In substantiating claims of political gerrymandering under a plan devised by a single major party, proving intent should not be hard . . . politicians not being politically disinterested or characteristically naïve." *Vieth*, 541 U.S. at 350 (Souter, J., dissenting); *accord id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164–65 (Powell, J., concurring in part and dissenting in part). A political gerrymandering doctrine focused on partisan intent would not be "limited and precise," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), to put it mildly.

* * *

In all, the failure of plaintiffs for decades to propose anything better than the failed approaches already rejected in *Bandemer*, *Vieth* and *LULAC* vindicates the Framers' decision to leave this sensitive policy issue to Congress and the States.

CONCLUSION

This Court should overturn the district court's judgment.

Respectfully submitted,

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AND MARYLAND

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; LATINOJUSTICE PRLDEF; ASIAN AMERICANS ADVANCING JUSTICE; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF APPELLEES

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March 8, 2019

287244

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INTEREST OF *AMICI CURIAE*[1]

Amici, listed individually in the Appendix to this brief, are among the country's leading civil rights organizations. They have a significant interest in ensuring the full, proper, and continued enforcement of the United States Constitution and the federal, state, and local statutes guaranteeing full and equal political participation, including the Voting Rights Act of 1965.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[E]lected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). The same is true with respect to the pursuit of partisan advantage. Both Democratic and Republican legislatures have used the power of the state to enact extreme partisan gerrymanders, retaining or enhancing their own grip on power and methodically subordinating voters who support an opposing party.

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[1] Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission.

Minority communities have often been pawns deployed or sacrificed in the pursuit of this partisan entrenchment.

There is no active claim that the maps presently before the Court built their partisan advantage on the backs of minority voters. But the North Carolina plan at issue here is the successor to a map that impermissibly packed minority voters to achieve similar partisan gains, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Rucho* J.S. App. 155, 180-81. Jurisdictions in both Maryland and North Carolina—among many others—have in the past used racial discrimination, provable and less provable, as a tool to achieve partisan ends. If the Court withdraws the judiciary from policing the boundaries of partisan excess manifested by the record in these cases, brazen partisan misconduct will follow here and in other jurisdictions with unified partisan control of the redistricting process. History teaches that minority voters will inevitably be caught again in the crossfire.

Amici hope to assist this Court in considering the ramifications of the doctrine and practice of partisan gerrymandering on minority voters. In particular, as *amici* explain, a partisan gerrymandering claim requiring proof of invidious intent—driven by the desire to subordinate some voters based on their party affiliation and the desire to entrench an opposing party in power—will help to establish an administrable standard that guards against excessive partisanship in the redistricting process without undermining critical protections for minority voters.

When this Court as a whole last meaningfully considered the merits of a cause of action for partisan gerrymandering, all nine Justices recognized that "an excessive injection of politics" in the redistricting process is incompatible with the Constitution. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality); *id.* at 312, 316-17 (Kennedy, J., concurring in the judgment); *id.* at 318, 326 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., and Ginsburg, J., dissenting); *id.* at 355, 360 (Breyer, J., dissenting). No consensus emerged, however, with respect to identifying when the role of politics in redistricting becomes excessive.

As Appellees make clear, such standards exist, and can be fully compatible with federal law protecting minority representation and political participation. This Court should establish a standard for adjudicating claims of partisan gerrymandering that ensures that such claims succeed only when plaintiffs prove invidious discrimination distinct from legitimate political choices. In the instant cases, each three-judge court found that the political party controlling state government intended to lock in partisan dominance of the state's congressional delegation, not through the persuasive force of its policies, but by manipulating district lines to entrench the power of certain voters and subordinate others based on their partisan political affiliation. *See Rucho* J.S. App. 155, 222, 286-88, 306; *Benisek* J.S. App. 12a, 16a, 23a-24a, 48a, 51a. Indeed, in each case at issue here, the intent to use government authority to subordinate opposition voters on the basis of their political affiliation was plain—and at times, both public and proud. *See Rucho* J.S. App. 156-57, 185; *Benisek* J.S. App. 23a-24a. It is entirely consistent

with the Court's prior jurisprudence to find that such extreme conduct entails impermissible discrimination, and requires no more than the deployment of familiar evidentiary tools. And as the Court's experience already demonstrates, such a holding would not likely subject federal courts to a flood of insubstantial claims.

Indeed, a viable cause of action addressing egregious partisan gerrymandering may assist the courts. Causes of action in which race and racial discrimination are central to the legal doctrine are essential in addressing some of the deepest and most pernicious forms of discrimination. That includes legislation abusing race as a proxy for party, or otherwise targeting minorities for disfavored treatment based on other underlying motives, including the pursuit of partisan gain. But when both race and party play a role in legislators' pursuit of impermissible advantage, real partisan harms may accompany very real racial harms; in these instances, a claim to root out unconstitutional partisan excesses, alongside doctrine tailored to address racial discrimination, would ensure the presence of a distinct, properly tailored tool to address each distinct injury. And at times, we have also observed that litigants whose primary concerns are partisan will occasionally attempt to misuse unwarranted race-based voting claims for their own ends. A properly structured cause of action for partisan gerrymandering can help courts better distinguish and channel claims down the appropriate litigation paths, avoiding unwelcome doctrinal distortion and providing full redress for invidious discrimination of all forms.

ARGUMENT

A. A Cause of Action for Partisan Gerrymandering Is Justiciable and Requires Proof of Invidious Discrimination Against Voters Based on Their Political Party Affiliation

This Court has previously determined claims of unconstitutional partisan gerrymandering to be justiciable. *See, e.g., League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 414 (2006); *Davis v. Bandemer*, 478 U.S. 109, 125 (1986).

Among the questions presented in this case, however, are issues concerning the particular standard or standards for adjudicating claims of partisan gerrymandering under various constitutional theories. Each three-judge court correctly determined that invidious intent was an essential element of such a standard no matter the constitutional clause involved, and found facts supporting proof of invidious intent. *Rucho* J.S. App. 141-42, 155-87, 227-74, 280-88, 305-13; *Benisek* J.S. App. 42a-43a, 51a, 59a, 61a, 76a n.3. A justiciable standard for claims that partisan gerrymandering violates the Constitution—drawn from any of several textual predicates, and whatever its other elements—ought to require proof of invidious intent to subordinate voters, driven by a focus on their partisan affiliation and with the goal of entrenching an opposing political party's power. And this Court need not determine the outer bounds of such a requirement to recognize that neither three-judge court clearly erred in finding the record in these cases sufficient to support a finding of constitutionally invidious action.

Requiring proof of this sort of invidious intent to subordinate is consistent with this Court's doctrine. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court found no constitutional concern with a plan intended to allocate political power to parties in accordance with each party's voting strength. But the Court also noted that an otherwise acceptable redistricting plan would be vulnerable under the Fourteenth Amendment if it is invidiously discriminatory: intended to "minimize or cancel out the voting strength of racial or *political* elements of the voting population." *Id.* at 751 (internal quotation marks and citations omitted) (emphasis added).

This Court has also clearly held that the First Amendment prohibits the government from deploying state power with an invidious intent to harm on the basis of partisan affiliation. A public employer may demote an employee for many reasons that do not offend the Constitution. But the First Amendment normally prevents a public employer from demoting an employee out of a desire to punish the employee's support for a political candidate. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417-18 (2016). That is, "the government's reason for demoting [the employee] is what counts here." *Id.* at 1418. *See also Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (three-judge court) ("Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's

redistricting legislation—a discernable and manageable standard.").

The manifestation of invidious intent also played a central role in last year's oral argument in *Gill v. Whitford*. Justice Kennedy repeatedly asked whether a law facially proclaiming the use of all legitimate redistricting factors to favor one party (and disfavor another) would be constitutional—a hypothetical Justice Alito described as incorporating a "perfectly manageable standard." *See* Transcript of Oral Argument at 19-20, 26-27, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). The question sets aside methods of proof, and highlights instead the legal crux of the matter: a driving insistence on using state authority to entrench the political power of a group of voters favored based on their partisan preferences, and to similarly subordinate a group singled out as disfavored based on different partisan preferences. The attorney representing Wisconsin's legislature correctly acknowledged that such a statute would violate both the Equal Protection Clause and the First Amendment. *Id.* at 27; *see also* Transcript of Oral Argument at 46-47, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333) (revealing Justice Kennedy's return to the same question, with a similar answer).

To be sure, the evidence of unconstitutional conduct will not always be as clear as in Justice Kennedy's hypothetical. Some violations will be plainly marked and some will be perpetrated under pretext, to be smoked out via familiar judicial tools, *cf., e.g., Vill. of Arlington Heights v. Metro. Hous. Dev'p Corp.*, 429 U.S. 252, 266 (1977). The fact that

some plaintiffs will fail to muster the necessary evidence to prevail is not reason to deny the existence of a cause of action. Justice Kennedy's questions reveal that there is a fundamental and widely acknowledged harm at the heart of these cases.

A gerrymandering cause of action that requires proof of invidious intent to subordinate voters driven by a desire to harm them for their partisan affiliation does not risk undue interference with the legitimate political process. As this Court has recognized, redistricting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality); *see also Gaffney*, 412 U.S. at 752-73. But this does not mean that redistricting is, or need be, root-and-branch an attempt to subordinate voters on the basis of their political affiliation. There is a distinction between proper political contestation and improper partisan subordination of voters because of their preferred group affiliation. The vast majority of legislation involves choices that are inherently political—for example, how much revenue to allocate to different government programs, or what should be eligible for tax deductions. These are charged political questions that present opportunities for partisan posturing, but they do not necessarily involve a conscious effort to subordinate voters because they are Republicans or Democrats. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2013-18 (2018).

Beyond the requirements of federal and state law, including those that protect minority voters from discrimination, there are many political and practical choices in the drawing of any redistricting map. In

most states, these include choices about whether to follow certain county, city, or precinct lines but not others, or certain roads, rivers, or rail lines but not others; about the degree to which lines should follow geometric patterns or patterns of residential development; about allowing certain communities to congregate within one district or to span district lines; and about the degree to which a district should have a distinct character or span multiple competing interests, and which of those interests should dominate. They include choices about whether to protect the relationship of incumbents to their constituents, by consistently maintaining the cores of prior districts (as distinct from selectively protecting incumbents from their constituents by siphoning off opposing partisans). *See LULAC*, 548 U.S. at 440-41; *White v. Weiser*, 412 U.S. 783, 791 (1973). They include choices about whether to resolve each of these decisions in the same way throughout a jurisdiction, or whether to resolve them differently, with different priorities, in different portions of the jurisdiction. All of these may properly be political and practical choices. Prohibiting state action driven by the invidious intent to subordinate on the basis of partisan affiliation leaves each of these legitimate political choices intact. *See* Levitt, *supra*, at 2025-27.

A state actor's invidious intent to methodically subordinate voters on the basis of their partisan affiliation is also distinct from the natural desire of legislators chosen in partisan elections to seek legitimate partisan advantage. The appropriate means by which a legislator gains partisan advantage is through policy action that increases the legislator's appeal to voters with partisan policy preferences.

Such conduct is quite distinct from state action driven by a design to lock in a legislator's electoral success not by appealing to voters, but by targeting presumed opposing voters for systematic subordination through changes to the electoral landscape itself. *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428-29 (1996) (recognizing constitutional limits on government restrictions of speech because that speech may threaten incumbent self-interest).

Finally, focusing on the invidious intent to subordinate does not demand a process blind to partisan inputs or partisan outcomes. Neither a legislator's knowledge that certain communities are more likely to vote for Democratic or Republican candidates, nor that given districts are more likely to lean Democratic or Republican, is itself indicative of the intent to entrench power at opponents' expense. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 352, 368 (2017); *cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). And this Court has long recognized the proper distinction between a legislature's permissible consideration of community characteristics and the impermissible intent to subordinate community voting power because of those characteristics. *See LULAC*, 548 U.S. at 513-14 (Scalia, J., concurring in the judgment in part and dissenting in part).

Both state and federal courts have been able to identify legally cognizable invidious intent, distinct from the standard rough-and-tumble of other political

choices. In *Larios v. Cox*, a three-judge court determined that population disparities that would not otherwise have raised prima facie constitutional concern were constitutionally invalid because they were driven by invidious partisan intent to subordinate. 300 F. Supp. 2d 1320, 1329-30, 1334 (N.D. Ga. 2004) (three-judge court). This Court summarily affirmed that decision. 542 U.S. 947 (2004). Similarly, the Fourth Circuit recently invalidated a county redistricting plan that would otherwise have passed muster, based on proof that the districts' population deviations were driven by the invidious partisan intent of the North Carolina state legislature. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 345-46, 351 (4th Cir. 2016); *see also City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 937, 939, 943 (M.D.N.C. 2017) (North Carolina state legislature); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1050 (S.D. Ill. 2001) (Madison County, Illinois, county board). Florida and Pennsylvania state courts have also examined redistricting plans for invidious partisan intent under their respective state constitutions. *See* FLA. CONST. art. III, § 16(c); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 598, 617-19, 641-45, 648-51, 654, 659-62, 669-73, 676-78, 679-80 (Fla. 2012); *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So.3d 872, 881-82, 887-91 (Fla. 2012); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 378-86, 391-93, 402-13 (Fla. 2015); *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 271-74, 279-80, 284 (Fla. 2015); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 817-21 (Pa. 2018). And, of course, the three-judge courts in

the instant actions were able to distinguish invidious partisan intent to subordinate from the many other legitimate political and practical choices involved in drawing the particular districts at issue. *Rucho* J.S. App. 155-87, 227-74; *Benisek* J.S. App. 55a-56a; *see also Whitford v. Gill*, 218 F. Supp. 3d 837, 883-98 (W.D. Wis. 2016) (three-judge court), *vacated on other grounds*, 138 S. Ct. 1916 (2018) (Wisconsin state legislative map).

In other cases, the evidence has not supported the allegations of invidious unconstitutional action in the redistricting process. For instance, this Court affirmed the rejection of a claim premised on invidious partisanship in the redistricting process, based not on the impossibility of making such a determination, but on the insufficiency of proof offered by the plaintiffs. *Harris v. Ariz. Ind. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). And in the instant North Carolina case, the three-judge court rejected a district-specific showing of invidious intent with respect to District 5. *Rucho* J.S. App. 243.

All of these courts used familiar tools to test for invidious partisan intent in the redistricting process, seeking "an understanding of official objective emerg[ing] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). Following this Court's direction for assessing official purpose in a variety of contexts, each tribunal conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266. Particularly when a redistricting plan

proved to be a significant outlier, its excessive partisan impact occasionally provided "an important starting point," *Feeney*, 442 U.S. at 279 (quoting *Vill. of Arlington Heights*, 429 U.S. at 266), for such an analysis. However, recognizing that legitimate redistricting factors will inevitably yield a partisan impact, no court relied on an assessment of impact alone. Instead, these courts further examined the redistricting context, including but not limited to: statements by mapmakers themselves, the conduct of the legislative session, the progression of draft maps up to the final product, and the map's fit with traditional redistricting principles. *See Raleigh Wake Citizens Ass'n*, 827 F.3d at 346; *City of Greensboro*, 251 F. Supp. 3d at 943-49; *League of Women Voters of Fla.*, 172 So.3d at 380-86, 390-91; *Hulme*, 188 F. Supp. 2d at 1050-51. Moreover, these courts also considered whether this evidence of invidious intent was effectively rebutted by evidence revealing that the district boundaries were, in fact, materially driven not by invidious partisan intent to subordinate but by legitimate legislative motives. *Id.*

Courts do not lightly make such determinations. Nor do plaintiffs lightly bring such cases. Appellants suggest—as defendants in such circumstances often do—that once the judicial doors are opened they will be torn off in a flood of frivolous litigation. *Rucho* App. Br. 39. Experience indicates otherwise. Since at least 2004, federal courts have been available to hear claims that invidious partisanship impermissibly motivated minor variations in district population. Since 2004, there have been thousands of state and local legislative maps, pre-existing and newly drawn, with a minor

population variance. But *Larios* has been cited only seven times by federal appellate courts substantively reviewing allegations of improper political motivation in the redistricting process.

Still, even if the marginal case posed concerns, the records here stand far from the marginal case. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), just last Term, may provide an apt analogy. *Lozman* concerned the arrest of a civic gadfly at a city council meeting, allegedly pursuant to a premeditated city policy to intimidate him in retaliation for his activism. *Id.* at 1954. The legality of the arrest turned on proof of impermissible motive, and the court expressly noted the "risk that the courts will be flooded with dubious retaliatory arrest suits." *Id.* at 1953. But in the face of objective evidence of a potentially premeditated plan, this Court decided the case before it and left the floodgate concerns for the future. *Id.* at 1954. "[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." *Id.*

There will likely be no official policy to subordinate voters on the basis of partisan affiliation clearer than the policy firmly established here — and openly acknowledged by the governing political parties in North Carolina and Maryland. Each three-judge court found that plaintiffs proved not merely that the legislature had partisan information or was aware of a partisan impact, but that it drew the map in question specifically "because of" its ability to entrench one party in power and subordinate voters affiliated with an opposing party. *Rucho* J.S. App.

155; *Benisek* J.S. App. 48a-51a; *see also Feeney*, 442 U.S. at 279. In North Carolina, this purpose was officially declared in the formal criteria established by the state, and proudly promoted in the public hearings of the legislature's redistricting committee. *Rucho* J.S. App. 156-57, 183. The public record established by the North Carolina legislature is, in effect, Justice Kennedy's hypothetical question from the oral arguments in *Gill* and *Benisek* come to life. Likewise, in Maryland, legislators acknowledged in talking points and floor speeches their drive to accomplish similar partisan entrenchment with respect to the district at issue. *Benisek* J.S. App. 23a-24a.

The three-judge courts also found that in each state, the mapmakers' intent was clear not only from express statements, but also from other familiar evidentiary sources—such as the redistricting process itself, the information relied upon in drawing the map, and empirical evidence of the strong partisan advantage present in the final maps approved by the legislatures. In North Carolina, the Republican Party held exclusive control of the map drawing process, working with a consultant to finalize the map *before* the bipartisan redistricting committee had even met or adopted governing redistricting criteria and before public hearings were held. *Rucho* J.S. App. 156. No public input was considered as a part of the map drawing process; however, mapmakers relied strongly on past election results in their analysis to develop a map that "would favor Republicans for the remainder of the decade." *Id.* at 158. Indeed, in a 50-50 state, the map was designed to elect 10 Republicans and 3 Democrats, only because (as the legislative leadership bragged) they did "not believe it[would be] possible to

draw a map with 11 Republicans and 2 Democrats," *id.* at 183—and the map achieved its primary goal in a manner that left it an "extreme statistical outlier," *id.* at 159-172.

Likewise, in Maryland, the court found that "with respect to the mapmakers' intent, the process described in the record admits of no doubt." *Benisek* J.S. App. 48a. Although the Redistricting Advisory Committee held public hearings and was ostensibly tasked with recommending a map, privately, Democratic representatives retained a consulting firm to draw proposed maps with the exclusive goals of maximizing Democratic incumbent protection and enlarging Democratic congressional power. *Id.* at 14a. Maryland Democratic officials were guided by "a narrow focus on diluting the votes of Republicans." *Id.* at 48a. Accordingly, the mapmakers relied on a custom-tailored partisan index to ensure that a generic Democratic candidate would win the Sixth District, and rejected alternative maps that placed the outcome in greater doubt. *Id.* at 15a-17a. As a result, according to analysis by the Cook Political Report, as compared to the preexisting map, under the new redistricting plan, the Sixth District "experienced the single largest [partisan] swing of any district in the Nation." *Id.* at 24a-25a. The map was approved by the Advisory Committee and subsequently, the General Assembly, both without a single Republican vote. *Id.* at 20a, 23a.

Amici recognize that neither the North Carolina and Maryland legislatures' partisan excesses nor their candor may presently or in the future reflect the norm. Absent this Court's

affirmation of the three-judge courts' decisions, however, it is difficult to understand why they would not become the new status quo, demonstrating to citizens that expressions of political affiliation are not constitutionally protected but available grounds for punishment by the state. Surely, this Court is capable of policing the worst excesses of partisan discrimination to preserve the ability of voters to express their political views through the ballot box without fear of reprisals from the governing political party.

Indeed, intervention here is vital even if it yields malfeasance less explicit in the future. (If less explicit malfeasance is likely to also be a bit less excessive, that would be a welcome consequence on its own.) Invidious intent cannot be assumed, *see Feeney*, 442 U.S. at 278-79, but must instead be proven. The standard is a demanding one, and necessarily means that a doctrinal requirement to prove the invidious intent to subordinate voters based on their partisan preference will inevitably leave some invidious partisanship unaddressed. *Cf. McCreary Cnty.*, 545 U.S. at 863 (recognizing that some legitimate intent cases may founder on the absence of proof). That litigation reality, however, does not detract from the value of the ability to confront and correct invidious discrimination that *can* be proven, including that which is open and notorious on its face. *Cf. Batson v. Kentucky*, 476 U.S. 79, 102, 105-08 (1986) (Marshall, J., concurring) (endorsing doctrine to confront racially discriminatory peremptory challenges, while acknowledging that illegitimate peremptory challenges beyond the doctrine's reach are inevitable).

Even though a doctrinal requirement to prove invidious partisan intent leaves some invidious partisanship unaddressed, the requirement is necessary to a manageable constitutional claim. *See, e.g.*, *Bandemer*, 478 U.S. at 127; Kagan, *supra*, at 509-11. Consistent with this premise, no party in the instant cases has requested, no three-judge court has proposed, and this Court should not adopt, any single quantitative metric as irrebuttable proof of an unconstitutional partisan gerrymander. This brief takes no position on the comparative merits or limitations of any particular quantitative measure in providing evidence of constitutional irregularity, or even whether such measures, however helpful in other cases, are necessary given the records at hand. Modest "scores" using any of these measures may flag plans produced by legislatures heeding only traditional redistricting principles without improper motivation, and therefore constitutionally unremarkable. Extreme "scores," on any of several of these quantitative measures, may indicate partisan results sufficiently anomalous to constitute, *inter alia*, circumstantial evidence of invidious partisan intent to subordinate. But as the three-judge courts in these cases emphasized, a jurisdiction should always have the opportunity to demonstrate that even an extreme quantitative score was actually caused by legislative focus on constitutionally legitimate factors, including

traditional redistricting principles.[2] *See, e.g.*, *Rucho* J.S. App. 215-22; *Benisek* J.S. App. 41a-43a.

B. A Properly Structured Claim for Partisan Gerrymandering Is Consistent with the Voting Rights Act

A properly structured partisan gerrymandering claim—one that requires proof of invidious intent to subordinate voters driven by their partisan affiliation—is entirely consistent with the Voting Rights Act of 1965 ("VRA"). Of course, compliance with the VRA does not insulate an unconstitutional partisan gerrymander from judicial scrutiny. Legislatures might produce maps that comply with the VRA along the way to implementing an unlawful plan premised on invidious partisan intent, just as legislatures might produce plans that are fair along partisan lines even as they violate the VRA (or Fourteenth and Fifteenth Amendments) by discriminating based on race. Neither is lawful. But compliance with the VRA and the absence of invidious

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[2] As this Court recently emphasized in a different redistricting context, this inquiry into legislative intent turns on "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *cf. McCreary Cnty.*, 545 U.S. at 864 (refusing to credit a hypothetically permissible purpose that is merely a sham). Particularly in the arena of invidious discrimination, jurisdictions should not be permitted to rescue actual manifestations of unlawful intent to subordinate with hypothetical interests invented for litigation purposes.

partisan intent are not in any way inherently in conflict.

Section 2 of the VRA, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* § 10301(a).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. *See Thornburg v. Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); *see also* 52 U.S.C. § 10301(a)-(b); S. Rep. No. 417, 97th Cong., 2d Sess. (1982). In the redistricting context, a jurisdiction may comply with the prohibition on discriminatory intent by drawing district lines without the intent to harm voters based on their race or ethnicity. It is obvious that a jurisdiction can satisfy this standard without drawing lines intended to subordinate voters on the basis of their partisan political affiliation.

Similarly, a jurisdiction may comply with the VRA's prohibition on discriminatory results without setting out to subordinate voters on the basis of their political affiliation. Based on local demographic, historical, and political contexts, jurisdictions may have an obligation under Section 2 to draw districts preserving minority voters' equal "opportunity . . . to elect representatives of their choice." 52 U.S.C. § 10301(b). Where a compact and sizable minority

community is politically cohesive, and where voting is sufficiently polarized that the surrounding electorate would otherwise usually prevent the minority community from electing a candidate of choice, jurisdictions have an obligation to ensure that districts, in the totality of circumstances, do not create a discriminatory abridgement of electoral opportunity. *Gingles*, 478 U.S. at 44-45, 50-51.

Compliance with Section 2 of the VRA will thus often require attention to, *inter alia*, the voting and electoral patterns in a local community. *Id.* at 45 (recognizing that "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process"); *id.* at 79 (noting that this determination "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms"); *see also Goosby v. Town of Hempstead*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997) (using a myriad of factors identified by a bipartisan Congress, "district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used").

The VRA does not, however, require districts drawn with the intent to entrench or subordinate Democrats, Republicans, or members of any other political party. And a district that is drawn favoring Democrats or favoring Republicans but that does not provide a minority community the equitable "opportunity . . . to elect representatives of *their* choice," 52 U.S.C. § 10301(b), fails to satisfy the jurisdiction's VRA obligations. The VRA is rigorously

focused on the distinct preferences of minority communities facing discrimination, not on generic partisan results. *Cf., e.g., Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("[T]he Act's guarantee of equal opportunity is not met when, in the words of Judge Richard Arnold, '[c]andidates favored by blacks can win, but only if the candidates are white.'") (quoting *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court)).

This means that while the VRA requires attention to local voting patterns, it does not require districts drawn for voters because of their partisan affiliation. *A fortiori*, it in no way requires an invidious intent to subordinate voters based on their partisan affiliation. Indeed, many courts, including this Court, have required jurisdictions to comply with their obligations under the VRA, without ever intimating that doing so would require invidious partisan intent. And just recently, in a case involving population disparities, this Court unanimously affirmed the rejection of a claim of invidious partisan intent when the facts instead supported the conclusion that the disparities were driven by good-faith efforts to comply with the VRA. *Harris*, 136 S. Ct. at 1309-10. That is, this Court recognized that legitimate VRA compliance did not—and does not—produce unconstitutionally invidious partisanship.

Beyond the VRA, other legitimate redistricting considerations, including traditional redistricting principles, may similarly further the concerns of minority voters without running afoul of a properly structured partisan gerrymandering claim. For example, in some circumstances, the political

interests of minority voters may be served by efforts to keep that community of interest intact within a district, even where there is no federal mandate to do so. Keeping that community intact raises no inference that a legislature intends to subordinate voters based on their partisan affiliation.

Similarly, in some circumstances, the political interests of minority voters may be served by preserving the core of an existing district, and hence the relationship of a population with a longstanding incumbent. Doing so raises no inference that a legislature intends to subordinate voters based on their partisan affiliation. A robust requirement of invidious intent ensures that legitimate compliance with traditional redistricting principles, including those that advance the interests of minority voters, is not inadvertently conflated with illegitimate partisanship.

C. A Properly Structured Claim for Partisan Gerrymandering Will Help Avoid Detrimental Distortion in Cases Brought Under Doctrines Involving Race

Cases involving claims of racial discrimination under the VRA and the Fourteenth and Fifteenth Amendments play an essential role in remedying the deepest and most pernicious forms of discrimination in voting. *See, e.g.*, *LULAC*, 548 U.S. at 438-42 (finding vote dilution in violation of Section 2 of the VRA with respect to Congressional District 23 in Texas); *Gingles*, 478 U.S. at 34, 80 (finding vote dilution in violation of Section 2 of the VRA with respect to state legislative districts in North

Carolina); *Rodgers v. Lodge*, 458 U.S. 613 (1982) (finding vote dilution in violation of Fourteenth and Fifteenth Amendments with respect to county commission in Georgia); *White v. Regester*, 412 U.S. 755, 765-70 (1973) (finding vote dilution in violation of the Fourteenth Amendment with respect to state house districts in Texas); *cf. Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016) (three-judge court) (finding unconstitutional racial gerrymander with respect to state legislative districts in North Carolina), *aff'd*, 137 S. Ct. 2211 (2017).

No doubt they will continue to do so. As this Court has recognized, "racial discrimination and racially polarized voting are not ancient history," and "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality); *see also Shelby Cnty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that.").

Racial discrimination, of course, is morally, historically, and legally distinct from partisan subordination. Partisan impulses have, however, repeatedly provided disturbing incentives for officials of both major parties to draw districts that disadvantage minority voters. The absence of a meaningful partisan gerrymandering doctrine has not only fostered this abuse, but also led to further detrimental impacts for voters and for the law. Jurisdictions in race-based redistricting cases have inappropriately and sometimes successfully claimed invidious partisan purpose as a defense. And

claimants with partisan motives may bring inappropriate race-based cases that distort the jurisprudence of racial harm. The distinct harms of partisan and racial discrimination in redistricting merit two distinct causes of action, for the benefit of the law and the courts, and voters of all kinds.

History shows that in the absence of a firm understanding of the illegality of invidious partisan gerrymandering, *both* major political parties—Democratic and Republican—have drawn electoral districts in pursuit of their excessive partisan interests in ways that have harmed minority voters.

Following the 1970 Census, for example, Texas Democrats drew multimember districts in Dallas and Bexar counties that were "unconstitutional in that they dilute the votes of racial minorities." *Graves v. Barnes*, 343 F. Supp. 704, 708-709, 724-34 (W.D. Tex. 1972) (three-judge court). A three-judge district court did not reach the partisan gerrymandering claim brought by Republican voters and officials because the claim of racial vote dilution delivered the requested relief. *Id.* at 735. This Court unanimously affirmed that finding of unconstitutional vote dilution. *Regester*, 412 U.S. at 765-70.

Similarly, in Mississippi, following the 1980 Census, Black voters challenged the state's congressional redistricting plan, drawn by Democrats, which "divided the concentration of black majority counties located in the northwest or 'Delta' portion of the state among three districts." *Jordan v. Winter*, 604 F. Supp. 807, 809 (N.D. Miss. 1984) (three-judge court), *aff'd sub nom.*, *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). The districts

were drawn to protect three incumbent Democrats from Republican challengers (and thus maintain the Democrats' control of the state's congressional delegation), and Republican officials in Mississippi "lobb[ied] the Justice Department on behalf of Mississippi black[voters] and Republicans to reject the legislature's redistricting plan." Art Harris, *Blacks, Unlikely Allies Battle Miss. Redistricting*, Wash. Post, June 1, 1982. The Department of Justice interposed an objection under Section 5 of the VRA, and a three-judge district court then held that a subsequent iteration of the redistricting plan continued to discriminate against Black voters in violation of Section 2 of the VRA. *Jordan*, 604 F. Supp. at 809, 813-15.

As noted above, the Democratic Party is not alone in pursuing redistricting plans that seek excessive partisan advantage at the expense of minority voters. In 2003, after Texas Republicans "gained control" of "both houses of the [state] legislature," they drew a new congressional redistricting plan with "the dual goal of increasing Republican seats in general and protecting [Republican Henry] Bonilla's incumbency." *LULAC*, 548 U.S. at 423-24. In doing so, however, the legislature diluted Latino voting strength in Congressional District 23, in violation of Section 2 of the VRA. *Id.* at 438-42. As this Court observed, "[t]he State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district." *Id.* at 441. "This b[ore] the mark of intentional discrimination that could give rise to an equal

protection violation." *Id.* at 440. In 2011, the Republican legislature again redrew the lines, including District 23. "As it did in 2003, the Legislature [ ] reconfigured the district to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district." *Perez v. Abbott*, 253 F. Supp. 3d 864, 884 (W.D. Tex. 2017) (three-judge court). Indeed, a three-judge court described the map as a whole as follows:

> It is undisputed that Defendants engaged in extreme partisan gerrymandering in drawing the map, ignoring many if not most traditional redistricting principles in their attempt to protect Republican incumbents, unseat [a Democratic incumbent], gain additional Republican seats, and otherwise gain partisan advantage. Defendants do not really dispute the fact that minority populations are divided or "cracked" in the plan . . . .

Id. at 945. Ultimately, the court found that the state's treatment of minority voters in 2011 amounted to multiple violations of Section 2 of the VRA and the Constitution. *Id.* at 908, 938, 962.

And the North Carolina map now before the Court is the successor plan to a 2011 map that, in the words of its own author, sought to "create as many districts as possible" that Republicans would win and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Rucho* J.S. App. 180. As part of its means to this end, the legislature chose an

equally impermissible path: intentionally and unjustifiably overpacking minority voters in two specific districts.[3] *Harris*, 137 S. Ct. at 1469-78.

In cases of this type, jurisdictions often seek to defend themselves by asserting that the complaints turn more substantially on partisanship than they do on race. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 567, 586 (N.D. Ill. 2011) (three-judge court); *Harris*, 137 S. Ct. at 1473, 1476. The absence of meaningful partisan gerrymandering doctrine allows such arguments to flourish.

In statutory vote dilution cases, such a defense has no purchase. *See, e.g.*, *Gingles*, 478 U.S. at 63-67, 74 (plurality); *id.* at 100 (O'Connor, J., concurring in the judgment); *Goosby v. Town of Hempstead*, 180 F.3d 476, 492-94, 495-96 (2d Cir. 1999) (rejecting the argument that partisan explanations for otherwise proven racial vote dilution can defeat a VRA claim).

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[3] It is not inconsistent to understand that North Carolina pursued invidious partisan advantage and that it did so through the predominant and unjustified use of race. The particular reason why specific individuals were moved within or without certain identified districts was predominantly based on their race and without adequate legitimate justification. *Harris*, 137 S. Ct. at 1469-78. And the underlying reason to move these individuals based on their race was the drive to entrench Republicans and subordinate Democrats. *Rucho* J.S. App. 180. The legislature employed an impermissible means to obtain an unconstitutional objective. *See Harris*, 137 S. Ct. at 1473 n.7; *infra* at 28-29.

Similarly, in constitutional claims, where the evidence establishes that voters have been targeted based on their race or ethnicity, as a proxy for party, such a defense is irrelevant. Courts have repeatedly affirmed that the unjustified targeting of minority voters for injury based on their race is unlawful, whether they are targeted based on animus or as the means to achieve ultimate partisan ends. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 241 n.30 (5th Cir. 2016) (en banc) (Haynes, J.) (noting that "[i]ntentions to achieve partisan gain and to racially discriminate are not mutually exclusive" and that accordingly, "acting to preserve legislative power in a partisan manner can also be impermissibly discriminatory"), *cert. denied*, 137 S. Ct. 612 (2017); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (noting that "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"), *cert. denied*, 137 S. Ct. 1399 (2017); *Garza*, 918 F.2d at 778 & n. 1 (Kozinski, J., concurring and dissenting in part) (explaining that incumbents may pursue intentional racial discrimination for political gain without displaying racial animus); *One Wis. Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 924-25 (W.D. Wis. 2016) (holding that a voting measure in Wisconsin "was motivated in part by the intent to discriminate against voters on the basis of race" and that "suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve [a] political objective"), *appeal docketed*, No. 16-3091 (7th Cir. Aug. 3, 2016); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (finding, in the circumstances of that case, that "there is little

point . . . in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus"); *cf. Harris*, 137 S. Ct. at 1473 n.7 (noting, in the context of racial gerrymander claims, that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests").

However, as this Court and other federal courts have recognized, race and party are, in certain contexts, closely intertwined. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Harris*, 137 S. Ct. at 1474 (noting evidence that in North Carolina, "racial identification is highly correlated with political affiliation" (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001))); *United States v. Charleston Cnty.*, 365 F.3d 341, 352 (4th Cir. 2004) (Wilkinson, J.) (noting evidence that in South Carolina, party affiliation and race were "inextricably intertwined"); *Perez*, 253 F. Supp. 3d at 945 (noting evidence that "race and political party affiliation are strongly correlated in Texas").[4] Particularly in those circumstances, defendants may attempt to shield themselves from claims of racial discrimination by claiming partisan

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[4] Of course, even where such correlation exists, it in no way renders race and party legally equivalent or fungible. As described above, targeting minority voters for injury has long been recognized as unlawful, period, whether as a proxy for party or not. And minority voters continue to face unlawful discrimination within closed party primaries, where opposition on the basis of party is not at issue. *See, e.g.*, *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037, 1044 (11th Cir. 1984).

intent—and where the evidence is insufficient to distinguish the two, an egregious gerrymander may inflict its damage without evidence sufficient to prove that voters were specifically targeted because of their race or ethnicity. *See, e.g.*, *Perez*, 253 F. Supp. 3d at 969-72. Confessing to one misdeed may supply a narrow defense to another, but it should not yield blanket exculpation. Where the intent to entrench favored partisans and subordinate opposing voters based on their partisanship works its own material harm, doctrines designed to combat racial injustice should not provide the exclusive source of relief. In these circumstances, the recognition of a properly structured claim for partisan gerrymandering could not only lessen the need for courts to disentangle race and party, but also better ensure that the fundamental rights of all voters are fully protected. *See, e.g.*, Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 871, 904 (2016) (noting that "racial, partisan, and administrative motives have blurred" and that "if the Court decides to adjudicate partisan gerrymandering claims, it would obviate much of the quagmire . . . on how racial motivations may be disentangled from partisan ones").

Finally, in the absence of a legal standard for claims of partisan gerrymandering, some partisan actors—both Democrats and Republicans—have also attempted to bring unwarranted race-based claims to address partisan excesses. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630-31 (2002) ("One of the perverse consequences of the absence of any real constitutional vigilance over partisan

gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the . . . category of race.").

As demonstrated above, some circumstances raise both partisan and racial harm. But some do not. Litigation that stems from partisan and not racial discrimination but is brought under race-based causes of action raises the risk that courts would tailor facts or doctrine (*i.e.*, to try to fit a square peg into a round hole) in ways that are potentially detrimental to the development of the law. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 569 (2004) (noting "the spillover effects" of litigation brought to "attack political gerrymanders" under "doctrinal rubrics, such as section 2 of the [VRA] or the *Shaw* cases," and suggesting that "the cost of repackaging essentially partisan claims of excessive partisanship under one of these labels is something that needs to be considered"). Injury based on race and injury based on partisan affiliation are of different legal, moral, and historical character, and should be neither confused nor conflated. The notion that partisan claims may occasionally be merely masquerading as race-based causes of action may warp the law and generate skepticism around true race-based harms.

Legal doctrines focused on addressing racial discrimination should remain dedicated to that goal, without being subverted to contend with litigation incentives more suitable for claims in which the principal alleged injury is partisan. The recognition of a distinct litigation framework including a properly

structured claim for partisan gerrymandering would allow such cases to be channeled toward the most appropriate doctrinal paths and to avoid any negative spillover effect.

CONCLUSION

For the foregoing reasons, the judgments of the three-judge courts should be affirmed.

March 8, 2019

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APPENDIX

APPENDIX

List of Amici Curiae

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan law organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in numerous precedent-setting litigation relating to minority political representation and voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating minority voting rights. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991);

Thornburg v. Gingles, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

LatinoJustice PRLDEF ("LJP") champions an equitable society by using the power of the law together with advocacy and education. Since its founding as the Puerto Rican Legal Defense and Education Fund, LJP has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. LJP has engaged in and supported law reform civil rights litigation across the country combatting discriminatory policies in numerous areas and has worked to secure the voting rights and political participation of Latino voters since 1972 when it initiated a series of suits to create bilingual voting systems throughout the United States. LJP has been involved in state and federal litigation regarding Latino political representation and voting rights, including constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating voting rights. *See, e.g.*, *Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014); *Favors v. Cuomo* (*Favors I*), 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974).

Asian Americans Advancing Justice ("Advancing Justice") is a national affiliation of five independent nonprofit organizations that actively works to advocate for the civil and human rights of Asian Americans and other underserved communities to promote a fair and equitable society for all. The Advancing Justice affiliation is comprised of our nation's oldest Asian American legal advocacy center located in San Francisco (Advancing Justice – Asian Law Caucus), our nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders located in Los Angeles (Advancing Justice – Los Angeles), the largest national Asian American policy advocacy organization located in Washington D.C. (Advancing Justice – AAJC), the leading Midwest Asian American advocacy organization (Advancing Justice – Chicago), and the Atlanta-based Asian American advocacy organization that serves one of the largest and most rapidly growing Asian American communities in the South (Advancing Justice – Atlanta). Collectively, Advancing Justice has a long-standing history of serving the interests of immigrant and language minority communities, and has operated a voting rights program for the last several decades that ensures equal access to the voting process, language assistance in voting for limited-English proficient voters, and fair redistricting that empowers Asian American communities through engagement and representation of Asian Americans during redistricting efforts at all levels.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the

civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965. AALDEF has litigated cases around the country under the language access provisions of the Voting Rights Act, and seeks to protect the voting rights of language minority, limited English proficient and Asian American voters. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans. *See, e.g.*, *Favors v. Cuomo* (*Favors I*), 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Diaz v. Silver*, 978 F.Supp. 96 (E.D.N.Y. 1997); *OCA-Greater Houston v. Texas*, No. 16-51126 (5th Cir. 2017); *Alliance of South Asian American Labor v. The Board of Elections in the City of New York*, Civ. No. 1:13-CV-03732 (E.D.N.Y. 2013); *Chinatown Voter Education Alliance v. Ravitz*, Civ. No. 06-0913 (S.D.N.Y. 2006).

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of people who are lesbian, gay, bisexual, or transgender ("LGBT"), or living with HIV—many of whom are members of racial and ethnic minorities—through impact litigation, education, and public policy advocacy. Lambda Legal works to challenge the

intersectional harms caused by invidious discrimination based on sexual orientation, gender identity, race, and ethnicity. It has participated in this Court and lower courts in numerous cases addressing First Amendment, Equal Protection, voting rights, and other civil rights principles affecting LGBT individuals and members of additional minority groups. For example, Lambda Legal was party counsel in *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 135 S. Ct. 2594 (2015); and participated as amicus in *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) and *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a 50-state Congressional and state legislative redistricting effort set to begin next year, in 2020.

The NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, §4 of the Constitution, it is the state legislatures, subject to Congressional supervision, that are entrusted with the responsibility of redrawing the states' Congressional districts. Every citizen should have an equal voice, and the Voting Rights Act and other federal laws must be followed. These federal mandates protect the constitutional rights of individuals, not political parties or other groups.

Second, the NRRT believes redistricting should be clean, a requirement best fulfilled by the traditional redistricting criteria our state legislatures have applied for centuries as the country grew from coast to coast. This means that districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of

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1. Counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

disparate populations to the extent possible. Clean districts are consistent with the principle that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of proportional representation. Article I, §4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, the state legislatures and Congress.

Third, the NRRT believes that redistricting should make sense to voters. All Americans should be able to look at their district and understand why it was drawn the way it was. Districts do not need to be bizarrely shaped.

SUMMARY OF THE ARGUMENT

Appellees and the lower court adopted the rhetoric of individual rights to overturn a North Carolina redistricting plan that comports with traditional redistricting criteria. Their proposed standard purports to overcome the last remaining obstacle to finally declare partisan gerrymanders unconstitutional. But upon closer examination, the "individual right" to be free of political gerrymandering—or as Appellees would have it, the right to be free from packing and cracking—is in reality nothing more than a political party's group right to proportional representation. As Chief Justice Roberts remarked at oral argument in last Term's partisan-gerrymandering cases, so-called "partisan symmetry" is nothing more than a "convenient label" for "proportional representation, which has never been accepted as a political principle in the history of this country." Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 41.

Still, it is worth considering the claims of individual right on their own terms, from the perspective of an individual voter, to see whether individuals lose something palpable when they are "packed" or "cracked." As it turns out, casting a claim of political gerrymandering through the prism of each individual voter's experience yields a kaleidoscope of complication. Voters may well be packed and cracked, reside in uncompetitive districts, and, based on myriad factors, may greatly vary in the representational "weight" they carry with their legislators. Yet none of these substantial variations in voters' political influence, many of which might trace to state action, or might have no connection to state action at all, has ever been deemed an equal protection violation. Additionally, the baseline from which Appellees measure their allegedly individual injuries depends on their political group's claimed right of proportionality. And even that right is defined by extrapolating the results of previous statewide votes. Cracking and packing, then, does not truly represent individual injury. Instead, it ultimately measures injury to a party that roughly coincides with the party's failure to achieve statewide proportional representation.

Should that right to proportional representation nonetheless be adopted? As amicus curiae shows below, this Court should adhere to its longstanding refusal to cross that threshold. Proportional representation is a concept foreign to our republican system of government and anathema to our Founders. Further, experience in Missouri and other states shows that the principle of proportional representation is logically and legally at war with traditional community-based representation; the two cannot co-exist.

In addition to being alien to our system of government, a statutory or constitutional "group right" to proportional representation is unworkable. A proportional representation system overlooks the reality that, as this Court has held, voters can—and often do—move from one party to the other. Voter choices fluctuate, and party affiliation is not enough to tie the interests of a group to the personal interests of voters for preferred candidates. Simply put, the votes of yesterday do not ensure the victories of tomorrow. Finally, if there is to be a nationwide shift to prioritizing proportionality as between the two parties, that decision is for the state legislatures and Congress—not for the courts.

ARGUMENT

I. INDIVIDUAL RIGHTS TO BE FREE OF A POLITICAL GERRYMANDER DO NOT EXIST, AND UPON CLOSER EXAMINATION ARE JUST A RHETORICAL REFORMULATION OF POLITICAL PARTIES' CLAIMED RIGHTS TO PROPORTIONAL REPRESENTATION

Appellees claim to have surmounted what they see as the last remaining hurdle for political gerrymandering plaintiffs after *Gill v. Whitford*, 138 S.Ct. 1916 (2018). Not only has North Carolina packed and cracked voters who say they will always vote for Democrats, Appellees claim to be voters who will be *un*packed or *un*cracked—or at least less packed or cracked—by a remedial map. Believing they have thus solved the problem of standing, Appellees proceed to show how their claims satisfy modified intent-and-effect tests under either or both of the Equal Protection Clause or First Amendment.

Not so fast. That any number of intent-and-effect-based tests can be modified to fit on the chassis of a political gerrymandering claim does not mean that there exists, in the first place, an individual right to be free of political gerrymandering. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76, 100 S. Ct. 1490, 1504, 64 L. Ed. 2d 47 (1980) ("But plainly '[i]t is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,'") (internal citations omitted) (abrogated by statute on other grounds). Step zero must be the identification of the right.

Appellees do, in fact, identify the right they seek to vindicate, but only indirectly, in the "effect" prongs of their proposed tests. The effect of gerrymandering at the level of an individual voter is said to be a loss of "weight" arising from "cracking" or "packing": having one's vote grouped, respectively, with either too few or too many others who voted identically. Yet as shown below, neither cracking nor packing represents a true individual injury. Instead, these phenomena work an injury only when considered from the perspective of a major political party, and are judicially remediable only to the extent the party itself has a constitutional right to proportional representation.

A. Intentional Cracking and Packing Does not Cause a Palpable Injury at the Level of the Individual Voter

Appellees' proposed right to be free from political gerrymandering can be restated under their dilution theory as a right not to live in a district in which their currently chosen political party (assuming they have one) has been cracked or packed. Common Cause Motion

to Aff. at 18. But how is an individual voter harmed by a packed or cracked district? Appellees claim to have an answer. They know they cannot sustain a claim if their packing or cracking injury is merely the defeat of their preferred candidates. Instead, Appellees now cast their cracking or packing injuries as a loss of "weight" of their individual votes. *Id.*

Although it may not be initially apparent, "weight" in this new context does not mean the same thing as "weight" in the one-person, one-vote context. That is clearest when we consider what it means to "lose" that "weight" in each distinct context.

1. In malapportionment cases, "weight" means the ratio between a person's vote and the number of representatives elected. When districts are malapportioned, we know precisely what an individual voter has lost. It is certain that each and every voter in a less populous district has a greater opportunity to elect a legislator than each and every voter in a more populous district. The votes of those living in overpopulated districts are underweighted, or diluted, by the precise ratio of their district's overpopulation. Significantly, the individual injury is complete without any further contingency. The voter's party—if he or she currently identifies with one—is utterly irrelevant. Nor does it matter whether each voter's preferred candidates will end up winning or losing. At the very outset, as soon as the districts are drawn, it is certain that the vote will mean less.

2. "Weight" measures a different quality in a political gerrymandering claim. It does not, as in a malapportionment claim, measure each voter's

opportunity to cast a ballot that counts equally for or against the election of a legislator. "Weight" cannot be the quality of having an equal probability of having one's preferred candidate actually elected (which would require strict partisan parity in a two-candidate race). It cannot be the quality of having a chance to elect one's preferred candidate that is equal to the proportional strength of one's party. *See Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality op.) ("...the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."). Nor is "weight" a measure of the backward-looking reformulation of the "equal chance to win" right. *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 419, 126 S. Ct. 2594, 2610, 165 L. Ed. 2d 609 (2006) ("To be sure, there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best.").

Finally, Appellees do not seem to claim a right to cast votes that are potentially equally outcome-decisive. This would seemingly require maximizing partisan-competitive districts in which every voter had an equal chance of casting the deciding vote, and as the court below recognized, "the Supreme Court has never held that the Constitution entitles voters to competitive districts." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 664 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679 (2018).

3. If none of these *ex ante* or *post hoc* conceptions of "weight" apply, only one option can remain: "weight" for gerrymandering purposes seemingly attempts to

measure the average influence a voter might expect to wield with the winning candidate once the preferences of all voters are aggregated and the election results are known. This is the "loss," then, that an individual voter would need to suffer in fact. And indeed, both the League Appellees (Motion to Affirm at 32) and the decision of the court below (279 F. Supp. 3d at 656) admit that the "effect" test is ultimately premised on whether, as a result of new districts, the legislator is "nonresponsive" or "will not feel a need to be responsive" to "constituents." *See also LULAC*, 548 U.S. at 418 (partisan gerrymandering plaintiffs would need to "show a burden, as measured by a reliable standard, on the complainants' representational rights.").

This becomes clearer when considering the positions of hypothetical cracked and packed voters whose votes have allegedly "lost weight." At least the Common Cause Appellees admit, as they must, that under their theory, a voter living in a cracked district suffers a constitutionally cognizable dilution injury even if, in an uncracked district, her preferred candidate would still have lost. Common Cause at 18. The lost weight could only consist of the individual voter's hypothetical loss of influence with the winning candidate. This, in turn, requires courts to assume that the winner will always be less responsive to the voices of the voters who make up a political minority that is smaller than the still-minor group they would have formed in an uncracked district.

Now posit the case of the voter living in a packed district whose candidate would have won anyway in an unpacked district. This, too, is a case of "lost weight" for at least the Common Cause Appellees. Again, from an

individual voter's perspective, it could only consist of the voter's hypothetical loss of influence over his preferred—and winning—candidate. In this scenario, Appellees would apparently ask courts to assume one of two things. Either the winner is less responsive to the voices of the voters making up his winning coalition than he would have been in a closer election, believing that some of the bandwagon can be lost without penalty. Alternatively, the "unpacked" voter might have moved elsewhere. He could have become more essential to a winning candidate in another more competitive district, or could have shored up an already-losing district to form part of a more-substantial minority that might have bargained for more of the opposing-party-winner's attention.

4. In any scenario, numerous assumptions about voter and officeholder behavior and beliefs are clearly necessary to measure a voter's "weight" with the winning candidate, and then decide whether it has actually been "lost" in a way that yields individual injury. This problem is not new. At least as early as *Whitcomb*, this Court struggled to give form to a claim of lost "voting strength" by a distinct racial community who voted Democratic and were included within a large multimember district covering Marion County, Indiana. *Whitcomb v. Chavis*, 403 U.S. 124, 153-154 (1971).

This Court correctly recognized that a constitutional claim, if cognizable, would somehow have to be grounded in the poor performance of Marion County's delegation in representing the discrete racial community. *Id.* at 154-155. It was skeptical that this was or could be shown, as the quality of legislators' performance arguably varied by issue. *Id.* at 155. Additionally, the Court recognized that

the discrete community retained a claim at least to the "partial allegiance" of Marion County's delegation, just as did other Marion County subgroups whose preferred candidates had also lost; merely being "outvoted" was not tantamount to a lack of representation. *Id.*

This Court's skepticism regarding the link between disproportionate representation and an actual injury did not subside after *Whitcomb*. "An individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *See Bandemer*, 478 U.S. at 132. *Bandemer* "refuse[d] to presume," without "actual proof to the contrary, that the candidate elected will entirely ignore the interests of the voters." Thus, "without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group." *Id.*

But the plot thickens even beyond the considerations outlined in *Whitcomb* and *Bandemer*: in the real world, the determinants for the post-election "weight" of an individual voter—*i.e.*, the quality that Appellees say gerrymandering diminishes on an individual level—are considerably more complex.

First, common experience tells us that an individual's representational "weight" with the winning candidate is a function of the effectiveness of the voter's association with like-minded voters. This association includes those who may not have voted consistent with the voter in the past election, or who may not even reside within the district.

Voter coalitions form around issues and splinter in ways that do not follow the fault line between our two big-tent parties. Individual voters and their representatives can and do change their minds. And to a great degree, all of this depends on the quantity and quality of voters' interactions with their elected representatives.

Common experience tells us, too, that even without the daily complexities of politics, there are large background variances in representational "weight." Some voters suffer from chronically low representational "weight" simply because they have chosen to live among concentrations of their fellow citizens who are agreeable in every way except party affiliation. Other voters enjoy high representational weight because they live in areas where their preferred candidate usually wins—but not by much—so that, as the voters who theoretically supply the margin of victory, their voices carry great weight.

Further, in contrast to the weight accorded individual votes in properly apportioned districts, this sort of representational "weight," to the extent it is knowable, does not have the quality of something for which a baseline can be identified, and then equalized as between individuals. The average individual in a longstanding political minority geographically ensconced among a political majority will simply not enjoy the same representational weight as the individual voters in the surrounding majority, even without a gerrymander. And all else equal, legislators will not likely accord equal political weight to the wishes of all voters even within their winning majorities. Instead, the voters most likely to desert the coalition may well find themselves with more leverage and, therefore, greater political weight.

Finally, even *bipartisan* political gerrymanders done in the name of party-to-party fairness—*i.e.*, proportionality—will necessarily privilege some voters over others from a representational standpoint if the Court were to accept this theory of representation. *See Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). Voters may well be packed and cracked, creating uncompetitive districts and wide variation in individual voters' "weight," all to serve the parties' goal of statewide proportionality. Yet none of these myriad differences in voter political influence, many of which (as in *Gaffney*) trace to state action, has ever been deemed an equal protection violation.

5. In sum, casting a claim of political gerrymandering through the prism of each individual voter's experience yields a kaleidoscope of complication. Myriad inquiries into the political relationship between and among individual voters and their legislators become necessary. "If there are less appropriate subjects for federal judicial inquiry, they do not readily come to mind." *Whitcomb*, 403 U.S. at 170 (Harlan, separate opinion).

This is not simply a problem of indeterminate social science or a failure of proof that political scientists are on the cusp of curing. Instead, "weight" represents an unknowable quality that is more dependent on the vicissitudes of individual-group politics than on any action of the state. Attempting to maintain some tenuous link to *Whitcomb's* offspring, *Bandemer*, the Appellees and the district court still recite "responsiveness" to "constituents" as part of the effects prong of their proffered dilution test. Yet the absence of facts on this point in the massive record below shows that the concept of responsiveness—always of suspect usefulness—has devolved into a vestigial

utterance. Litigants and courts have long since stopped trying to isolate the quality of representative-constituent "weight," let alone measuring its loss as an injury-in-fact.

Because this "loss of weight" is the only remaining conceivable outcome of packing and cracking at the level of an individual voter, it follows that cracking and packing does not injure the individual right to vote.

B. Cracking and Packing Ultimately Measures Injury to a Party that Roughly Coincides with the Party's Failure to Achieve Statewide Proportional Representation

As shown above, partisan cracking and packing cannot coherently be described as an injury to an individual voter. But when viewed from the perspective of a political party itself, the presence of injury is more palpable. Indeed, over 30 years ago, the first and last decision of this Court in which a majority could be mustered to hold that a partisan gerrymandering claim could be justiciable recognized in a flash of clarity that "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Bandemer*, 478 U.S. at 124.

1. That gerrymandering exists exclusively as a group injury makes sense on several levels. If one takes Appellees' simplified version of American politics as they present it—with two entirely homogenous and unified parties—the concept of vote "weight" depends entirely on the voter and candidate adhering rigidly to one party (and its entire platform of issues and candidate endorsements) or the other. There is no "weight" to gain or lose without

the assumption of the party. Otherwise, there is no basis whatsoever—let alone the "actual proof" demanded by *Whitcomb* and *Bandemer*—for assuming that when a voter's preferred candidate loses, a representational injury will occur.

2. Even more important, the baseline from which Appellees measure their allegedly individual injuries depends on their political group's claimed right of proportionality. If the representational "weight" of a vote is what matters, one must be able to define the baseline value to determine what weight has been "lost" under a given plan of apportionment. *See Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, concurring in judgment, explaining that "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea of how hard it 'should' be... under an acceptable system.").

What is Appellees' baseline? Recall Appellees' admission that a voter in a cracked district may have injury-in-fact if, in an uncracked plan, her candidate would still lose. The injury was presumably the difference between the challenged plan and the "uncracked plan." *Significantly, however, the individual baseline is set by reference to the party's statewide proportional "claim."* That is, it is compared against the proposed alternative map that is alleged to yield more seats for the challenging party and its political allies. Assuming experts are used, the "uncracked plan" is necessarily a plan in which each party's wasted (cracked or packed votes) are as equal as practical. The efficiency gap and other measures are simply ways of moving parties toward statewide proportionality. That is precisely what Justice O'Connor

predicted in her *Bandemer* concurrence: a "group right" that will eventually be whittled down to "some loose form of proportionality." *Bandemer*, 478 U.S. at 157.

Is it really necessary, however, for Appellees to base their supposedly individual injury claims on the party's statewide proportional "claim?" As a practical matter, the answer is yes. Suppose that some other baseline were used to measure the voter's loss-of-weight injury: for each voter, it should be possible to prepare a district to yield his or her "greatest representational weight." This would attempt to ensure that the voter was in the smallest consistently winning coalition in a district where he or she could live, or if that were not possible, in the largest losing coalition (assuming it is possible to decide the point at which being increasingly tightly packed into a winning district becomes less preferable than being slightly cracked in a just-barely-losing district).

First, note that it will probably be the case in this scenario that any such individual-voter-tailored remedy will egregiously lessen the representational weight of many other voters near and far, both within and without his or her party. Indeed, each of these voters would also have his or her own baseline. How would each voter's supposed interest in obtaining his or her best individualized "weight" be accommodated, particularly where the transparent intent of any remedial plan would be to minimize the weight of the voter's political opponents? These conflicts may be unresolvable.

Second, note that each individual baseline is bound to differ from the party's statewide proportion-maximizing baseline. Sometimes that difference could be pronounced.

That is because a party seeking to maximize the "efficiency" by which it converts votes into seats will need to minimize wasted votes. In some cases, this may require minimizing the number of voters in districts the party cannot win, even though from the individual perspectives of that party's voters who live in the core of the district and will have to be included, their own representational weight would be greater if they had more allies with whom to collectively garner the political attention of their opposite-party representative. *See, e.g., Bandemer*, 478 U.S. at 154 (O'Connor, concurring in the judgment).

4. In short, Appellees' claims are invariably those of one party—the Democrats—even though individual plaintiffs have been found to fill most of the challenged districts. The Appellees rely on plans—baselines from which they stake their claims that the status quo constitutes a partisan gerrymander—that tend toward a proportional representation for the party itself, and not necessarily to maximizing the asserted interest of the individuals in representational weight. *See, e.g., Bandemer*, 478 U.S. at 154 (O'Connor, concurring in the judgment, explaining how a bipartisan gerrymander intended to achieve party proportionality can harm the rights of independent voters and minority party voters in overwhelmingly adverse districts).

Not only should this be unsurprising, it is inevitable. That is because, as shown above, representational weight as an individual right quickly becomes an incoherent concept upon close scrutiny. On the other hand, party proportionality is a concrete concept, is the only coherent baseline, can be measured mathematically, and is achievable by the only person-in-interest that consistently has the means to plan and litigate: the political party (or,

if the right is recognized, any other mass political group with a claim to effective representation).

There is simply no way around it: Appellees' claims only cohere, and are only measured by Appellants and measurable by a court, as group claims for proportional political representation.

C. Failing to Recognize The "Loss of Weight" as a True Injury for Political Purposes Leaves this Court's Minority Vote Dilution Precedent Undisturbed.

Some may object that if the "loss of weight" from cracking and packing does not constitute injury-in-fact, then minority vote dilution—which has long been analyzed through the same lens—may soon go without remedy. But this Court has long recognized that political and racial classifications are not treated the same way:

> Our Constitution has a special thrust when it come to voting; the Fifteenth Amendment says the right of citizens to vote shall not be 'abridged' on account of 'race, color, or previous condition of servitude.'

Whitcomb, 403 U.S. at 180 (Douglas, dissenting in part and concurring in the result in part).

The Fourteenth and Fifteenth Amendments simply give federal courts "greater warrant" to "intervene for protection against racial discrimination. *Bandemer*, 478 U.S. at 151 (O'Connor, concurring in judgment). Race is "an immutable characteristic." *Bandemer*, 478 U.S. at 156 (O'Connor, concurring in judgment). Where an

individual immutably belongs to a racial minority group "vulnerable to exclusion from the political process," and proof of past and present experience proves that there is a link between *group* voting strength and the individual right to participate in the political process, group-based analysis that is untenable on the basis of politics may well support a dilution claim on the basis of race.[2] *Id.* at 152.

This proof of a link between individual rights and group membership, fortified with express constitutional authority by way of the Civil War Amendments and enforced by the Voting Rights Act, sets minority vote dilution claims apart from partisan gerrymandering theories. If this Court now makes clear that it will not recognize *political* groups' rights masquerading as individual voter dilution claims, it will leave the law prohibiting minority vote dilution undisturbed.

II. A SYSTEM OF PROPORTIONAL REPRESENTATION IS FOREIGN TO OUR SYSTEM OF GOVERNMENT AND CANNOT COEXIST WITH TRADITIONAL DISTRICTING PRINCIPLES

A. Systems of Proportional Party Representation Have No Place in Our Constitutional Order

1. Whether conveniently labeled "partisan symmetry," the "efficiency gap theory," or something else, systems

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2. Section 2 of the Voting Rights Act has been construed to provide statutory authority for voter dilution claims based on race. *See* 52 U.S.C.A. § 10301(a). *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).

of proportional representation are altogether foreign to our system of republican government. In Federalist No. 35, Alexander Hamilton reasoned that proportional representation of "each class" was neither practicable nor necessary, noting that, "[t]he idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution, that each different occupation should send one or more members, the thing would never take place in practice." The Federalist No. 35. Indeed, the Framers understood the dangers of employing mathematical calculations to create a proportional representation system of government, *see* The Federalist No. 55 (James Madison) ("Nothing can be more fallacious than to found our political calculations on arithmetical principles.").

The reasoning of the Framers applies not only to the federal system but also to the makeup of state legislatures. In our system of government, "[t]he roots of Anglo-American political representation lie in the representation of communities, not individuals ...." James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. Rev. 1237, 1243-45 (2002). Accordingly, the American electoral system is based on the notion that individual voters within a district elect their representatives, without having their community adjusted by political scientists or mathematicians attempting to level the playing field by factoring in statewide partisan vote shares.

Indeed, "[b]y the time of the Revolution, the founding generation fully accepted this account of representation. The idea that the political interests of communal groups

of individuals correlated strongly with territory served, for example, as an axiom in Madison's famous defense of the large republic in *The Federalist No. 10*." James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L.J. 881, 935-36 (2006). "The idea that territorially defined local communities may reliably serve as proxies for the shared, collective interests of the individuals who inhabit them has remained a fixture in American political thought ever since." *Id.*

2. Building on those principles, this Court repeatedly has held that the Constitution does not require states to provide proportional representation in legislatures, "however phrased," *Mobile*, 446 U.S at 79, to political, social, or other interest groups, *id.*, at 75-76, ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. ... [P]olitical groups [do not] themselves have an independent constitutional claim to representation ...."); *LULAC*, 548 U.S at 419. A group is not constitutionally entitled to a districting scheme that will afford it "legislative seats in proportion to its voting potential." *White v. Regester*, 412 U.S. 755, 765-66 (1973).

Simply put, "[w]hatever appeal [proportional representation] may have as a matter of political theory, it is not the law." *Mobile*, 446 U.S. at 75. Such "entitlement... simply is not to be found in the Constitution of the United States." *Id.* at 76.

Even in the recent fractured opinions on the subject, a majority of justices of this Court have rejected the notion that the Constitution requires proportional representation.

In *Bandemer*, this Court emphasized that the Constitution requires neither "proportional representation [nor] that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130. In *Vieth v. Jubelirer*, the Court again rejected the notion that the Constitution requires proportional representation. 541 U.S. 267, 288 (2004) (plurality op.). And, despite *Vieth*'s repudiation of *Bandemer*, it nevertheless reaffirmed that the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth*, 541 U.S. at 288.

B. Experience in Missouri and Elsewhere Shows That Party-Proportional Representation is at War With Traditional Districting Principles

1. Proponents of judicial policing of party-proportional representation sometimes appear to suggest that proportionality need not supplant traditional redistricting principles. And if the peculiar record in this case were representative of the rest of the country, that argument may initially appear to have force. After all, Appellees' experts worked from what they claimed were thousands of randomly-generated maps that followed traditional redistricting principles, and then from among those, criticized the challenged 10-3 Republican-favoring map as far outside a purported norm in which Republicans might win just 7 seats. *See, e.g.*, Dist Ct. Op. 155-161. The

implication is that courts can have both: perhaps hundreds or thousands of maps will be consistent with traditional criteria, and of those, a significant portion will still give the Democratic and Republican parties the overall share of seats they are "entitled to" under various party-proportion measuring tests.

But in reality, at least some Appellees ask for a principle that is far more sweeping. Once intent is shown, they would have courts sustain a challenge as soon as "cracking" or "packing" is shown—in other words, so long as there is any "injury in fact" as they have defined it. Common Cause Motion to Aff. at 37. Recall that this includes even cracked plaintiffs whose candidate would still lose, or packed plaintiffs whose candidates would still win. Thus, it is not hard to conceive district-level challenges even to a North Carolina map that had been drawn with just a 7-6 Republican advantage, so long as Democrats could conceive of another 7-6 Republican map which increases their chances of capturing seats—a factor which they can and will re-name as the "uncracking" of "unpacking" of individual voters. The only role for traditional factors would be the state's assumption of the burden of "justifying" the cracking and packing using those factors—a showing that could easily be brushed aside if plaintiffs could rebut by proving that other traditional factors did not require the challenged plan.

In practice, then, judicial recognition of such a zero-tolerance partisan proportionality principle will force political parity to bubble to the top of the redistricting cocktail, while traditional redistricting principles will sink to the bottom. This gradual "paling" of non-proportional factors is almost inevitable, as Justice O'Connor noticed long ago in her *Bandemer* concurrence. 478 U.S. at 157.

As a theoretical matter, it makes sense that one set of criteria is at war with, and must prevail over, the other. As explained in subsection A, traditional redistricting criteria are largely based upon the underlying assumption that legislators provide representation to people in a district, who, fractured though they may be based on different points of view, share local communities, a local history, a local economy, and local political subdivisions. In contrast, partisan proportionality assumes that legislators represent parties, the members of whom are scattered throughout a state. "Districts" only have meaning as ratios of party members who mathematically will or will not assure the party of the correct aggregate representation. The two models of representation are diametrically opposed, then, in their fundamental organizing principles as well as under the legal tests Appellees would ask this Court to adopt.

2. Should there be any doubt about what lies ahead, the Ghost of Redistricting Future could direct this Court on a tour of Missouri's new state legislative apportionment process. Approved by voters who were primarily sold on lowered contribution limits and limits on lobbyist gifts, the new plan mandates that Missouri apply the concepts of wasted votes and "efficiency gap" analysis used by Professor Jackman below and in the *Gill* case.

Specifically, Missouri defined two goals: "partisan fairness" and "competitiveness." Mo. Const. art. III, § 3(1)(b). In a moment of candor, the former term is defined as the group right "that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency." *Id.* Next, "competitiveness" turns out not to mean

that districts will be competitive, but instead, that the "efficiency" achieved by the plan remains durable: "parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences." *Id.*

Missouri next requires the calculation of an index of recent party performance. *Id.* Using this index, the plan is to minimize the gap in each of the two parties' percentage of "wasted votes," which are defined as votes cast for a losing candidate or for a winning candidate "in excess of the fifty percent threshold needed for victory." Mo. Const. art. III, § 3(1)(b). Crucially, the plan does not pass muster merely by satisfying a threshold efficiency gap of seven or twelve percent, as Professor Jackman proposed in the district court and in *Gill*. Instead, the plan is required to make the gap "as close to zero as practicable."

Further, the resulting plan must be durable. It must survive a series of stress tests in which the partisan split in the statewide vote shifts by various percentages in favor of each party. Each time, the plan must "ensure" that the efficiency gap remains "as close to zero as practicable."

Missouri's Constitution had long recognized the paramount importance of traditional criteria such as contiguity, compactness of districts, and preservation of local communities. Each of those factors were expressly subordinated to the new party-based right to proportional representation. Contiguity was made "subject to the requirements of subdivision... (1)(b)," the efficiency gap test. Mo. Const. art. III, § (1)(c). Preservation of local subdivision boundaries, in turn, was made subject to both the efficiency gap test and contiguity. Art. III, §(1)(d). And

all of these factors were made to "take precedence over compactness where a conflict arises between compactness and these standards." Art. III, §(1)(e).

In short, the drafters of Missouri's constitutional version of the "efficiency gap" method of party-proportional representation expressly recognized that: (1) this is truly a group, not an individual, right; and (2) that achieving their party-proportional goal required the complete subordination of traditional redistricting criteria. Voters living in the shadow of the St. Louis Arch may then constitutionally share a Missouri Senate district with Bootheel voters, unconnected by any contiguous territory. Lacking a local constituency, to whom will the district's senator look? Under the new rationale of the Missouri Constitution, she will have to look to her party. Because Missouri will now balance the "wasted votes" of her excess majority (and of the losing candidate) across the state, other districts may well share similar characteristics. Those senators, too, will look to their parties or to other influences, as their "districts" will simply be a mirage, a legal fiction created to sustain a party's group right. This Court can now part ways with the Ghost of Redistricting Future, but for Missouri, this is reality.

3. Missouri's new procedure does raise a final test for Appellees. Were this Court to recognize an "individual right" to avoid the loss of representational weight (*see* Section I, *supra*), could Missouri's new explicitly-recognized group right work its own invidious partisan-based discrimination? As explained above, individual voters will likely experience substantial gains and losses in the "weight" of their own votes once their interests are subordinated to the overall electoral success of the "party"

they are predicted to support. This loss is the "injury-in-fact" that Appellees claim meets the effects prong of their equal protection test. Common Cause Appellees Mot. to Affirm at 37.

Next, depending on the precise content of the "intent" part of the test, a plan like Missouri's that explicitly seeks to aid the statewide party at the expense of localized pockets of that party's voters could be deemed to discriminate against the localized pocket or wing of the party that is deliberately "submerged" as a necessary set of "wasted" votes.

Finally, could a party's state-recognized "group right" to a form of proportional representation act as justification for this loss? With little discussion, this Court in *Gaffney* declined to intervene in Connecticut's statewide bipartisan gerrymander even though it denied certain district minorities any chance to elect representatives of their choice. 412 U.S. at 754. But would this reasoning be consistent with a newly-recognized individual right to representational weight? If not, then a true individual right of the type that Appellees claim to support would be flatly at odds with the more candidly-named "group right" to "partisan fairness" that true believers inserted into Missouri's Constitution. In fact, as shown above in Section I, Appellees' claimed individual right does not exist, and is a mere rhetorical recasting of the group right that Missouri has recognized, but that this Court has held time and again does not exist.

4. Missouri's experience, then, lifts the veil on the claimed individual right to an equally-weighted vote. It is not only a group right in disguise, it is at war with

traditional redistricting principles because it is based on legislators' representation of parties rather than communities. This back-door attempt at proportional representation is foreign to our republican form of government and demonstrates the danger of embracing Appellees' theory.

III. A CONSTITUTIONAL "GROUP RIGHT" TO PROPORTIONAL REPRESENTATION IS UNWORKABLE

1. In addition to being alien to our system of government, a statutory or constitutional "group right" to proportional representation is unworkable. As the Court's most recent decision in *Gill v. Whitford* demonstrates, a partisan gerrymandering claim is really "about group political interests, not individual rights." 138 S.Ct. at 1933. However construed, this focus on group interests impliedly—and wrongly—assumes that individuals exercise their right to vote as members of a party rather than as citizens. As Chief Justice Roberts recognized during oral argument in *Gill*, voters in United States elections cast their votes for a wide variety of reasons separate from party affiliation. *See* Tr. at 34 ("Sometimes people vote for a wide variety of reasons. Maybe the candidate, although he's of a different party, is a friend, is a neighbor. Maybe they think it's a good idea to have the representatives from their district to balance out what they view would be necessary -- likely candidates from other districts.").

2. Appellees' proposed standard purports to mix all voters across a state and assume they would consistently vote for candidates from a political party regardless of the

district where they live, the candidates running, the issues, the party platform, and any other election-specific reasons. It assumes that voters are unchanging in the candidates they support and only support candidates of a certain party. But individual voters are not monolithic, faceless automatons who merely pull the lever for a particular party year after year and disregard the candidates and issues. To the contrary, voters choose to split tickets, some citizens identify as independents, districts change over time, candidates' views can vary widely even under the same party banner, and each election presents different issues. As this Court has held, "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." *Vieth*, 541 U.S. at 287.

A proportional representation system overlooks the reality that "voters can—and often do—move from one party to the other." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring). This is because "[p]arty affiliation is not set in stone or in a voter's genes..." *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting) ("The assumption underlying Plaintiffs' entire case is that party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election."). Yet for every election, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change - everything changes." *Vieth*, 541 U..S. at 289. Unlike the immutable characteristic of race, voter choices fluctuate, and party affiliation is not enough to tie

the interests of a group to the personal interests of voters for preferred candidates. Simply defining the group to be afforded the right to proportional representation depends on the impossible task of predicting voter behavior over the life of a districting plan. The votes of yesterday do not ensure the victories of tomorrow.

This is not the only uncertainty. In addition to the two major parties, there are innumerable smaller interest and affinity groups that make up those parties, yet it is unclear in appellees' party-based entitlement plan how those other groups would be treated in a system of proportional representation. Why should parties be privileged over other ideologically-comprised groups who organize members for elections? Additionally, different candidates and issues will be presented in each cycle, changing the membership of any conceivable "group" as well as the representational relationship between the group members and the elected official. It is impossible to predict how decisive a vote will be in any future election, or how responsive the resulting winner will be.

3. Appellees would ultimately have this Court embrace a Quantum Theory of Voting. Just as quantum mechanics posits the electron as a sort of probability, crystallizing as a definite particle only by the fleeting observation of an outside agent, a "group" –and by extension its associated group right—can spring into existence only when litigants and courts choose to look for it, and by the very act of looking bring it into reality. Quantum Voting will prove unworkable and unmanageable for both legislatures and the courts. In the first place, as explained above, the constitution provides rights for definite individuals; it does not provide clouds of voters with probability-derived

rights to certain numbers of seats. Second, a claim of political gerrymandering based on "partisan symmetry" necessarily abandons the concept of representation of individual communities and replaces it with a theory based on group rights inhering to the benefit of political parties and factions.

Instead, this Court should allow state legislatures to continue to apply the traditional, community-based districting standards that have prevailed since the Founding. Those standards, which include compactness, contiguity, equality of population, and preserving natural government boundaries, are best designed to comport with the Framers' constitutional design and strengthen our system of republican government. Happily, those traditional standards will also keep courts from experimenting with Quantum Voting, identifying groups and their "fair" shares of the legislature.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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No. 18-422

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT RUCHO, *et al.*,
Appellants,
v.

COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of North Carolina

BRIEF FOR THE STATES OF OREGON, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Does a state engage in unconstitutional partisan gerrymandering when it draws congressional districts for the purpose of long-term antimajoritarian partisan entrenchment, the new districts have that effect, and there is no justification for the districts other than maximizing partisan advantage?

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INTEREST OF THE AMICI STATES

This case is about how to strike the right constitutional balance between ensuring fair elections and respecting the normal political process. The amici States are uniquely qualified to assist the Court in striking that balance. We have a strong interest in ensuring that our elections reflect core democratic principles. Many of us are also defendants in redistricting litigation and have an equally strong interest in ensuring that the courts apply reasonable and manageable legal standards in cases like this one.

The States have a wealth of experience with redistricting and, as explained below, have taken a wide variety of approaches to prevent invidious partisan gerrymandering in that process. That is as it should be in our federalist system, and we do not suggest that any one approach to redistricting ought to be enshrined in constitutional law. But we are united in our conclusion that the Constitution sets outer limits on partisan gerrymandering, that those limits are judicially enforceable and do not intrude on the States' legitimate interests, and that on the facts found by the district court here, North Carolina's congressional districting map exceeded the outer limits of what is constitutional.[1]

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[1] Although the district court in this case relied on multiple bases to strike down the districting map, this brief focuses on the arguments under the Equal Protection Clause.

SUMMARY OF ARGUMENT

Deliberately drawing districts for the purpose of keeping one party in power for the long term, and without any neutral justification for the result, has no place in our political system. It discourages voter participation, increases distrust of government, and reduces the responsiveness of elected representatives. Technological advances have made it easier than ever for mapmakers to draw district lines solely to maximize the political power of a particular party.

A purpose-and-effects test is a manageable legal standard that prohibits the most egregious examples of partisan gerrymandering while still respecting the legitimate considerations that inform redistricting decisions. It requires proof of both invidious intent and a partisan-entrenching result that cannot be explained by neutral considerations. A proper understanding of this standard's limits should allay any fear that the standard would invalidate numerous state districting maps. The district court correctly struck down North Carolina's congressional districting map not because it failed one particular metric in a single year, but because it was invidiously intended to entrench a single party in power, it achieved that purpose and likely would continue to do so for the life of the plan, and the admitted goal of partisan entrenchment was the only explanation for the extreme partisan skew of the map.

Indeed, North Carolina's map maximized partisan advantage to a greater extent than 99 percent of all possible districting maps based on neutral criteria.

Although this Court has in the past struggled to identify "[h]ow much political motivation and effect is too much," *Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004) (plurality op.), that question should pose little difficulty where, as here, the evidence effectively amounts to a mathematical demonstration that North Carolina sought and obtained the maximum amount of partisan advantage possible and that all legitimate considerations were subordinated in pursuit of partisan advantage.

A purpose-and-effects test leaves ample room for States to continue to experiment with different approaches to redistricting. Many States have taken steps to limit or prevent partisan abuse of the redistricting process, including having nonpartisan or bipartisan groups draw the maps, banning consideration of partisan affiliation or other data in the map-making process, or requiring supermajority votes. The Constitution does not require any of these approaches, but they show that partisan politics is not an inevitable feature of redistricting.

ARGUMENT

Voting forms the foundation of our representative democracy. It serves as a vehicle for voicing preferences and for holding lawmakers accountable to constituents. No other mode of civic participation conveys the will of the people as well as voting. Extreme partisan gerrymandering threatens the benefits that our polity realizes from voting. The courts can and should play a role in protecting those benefits.

A. Extreme partisan gerrymandering harms the States and their citizens, and technological advances have made it easier to accomplish.

Gerrymandering has played a role in American politics since the early eighteenth century. *Vieth*, 541 U.S. at 274–75 (plurality op.); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1266–67 (2016) (describing historical examples). Both major parties have engaged in partisan gerrymandering. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410–13 (2006) (plurality op.) (describing Texas plans that favored Democrats at one time and Republicans at another).

But what is not a normal or accepted redistricting practice is purposefully entrenching a single political party in power for the long term under any realistic electoral scenario, regardless of whether a majority of voters support that party. Although this Court has not yet announced a standard for assessing the legality of partisan gerrymandering, it has recognized unanimously that extreme partisan gerrymandering violates the Constitution. *See Vieth*, 541 U.S. at 292–93 (plurality op.) ("We do not disagree with [the] judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles"; "[t]he issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred"; "an *excessive* injection of politics is *un*lawful") (emphasis in original); *id.* at 312 (Kennedy, J., concurring in the judg-

ment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated."); *id.* at 326 (Stevens, J., dissenting) ("State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial."); *id.* at 343 (Souter, J., dissenting) ("[I]f unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality."); *id.* at 356 (Breyer, J., dissenting) (describing "a set of circumstances in which the use of purely political districting criteria could conflict with constitutionally mandated democratic requirements"); *see also Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2568 (2015) ("Partisan gerrymanders, this Court has recognized, are incompatible with democratic principles.") (quotation marks and brackets in original omitted). And a majority of this Court has never abandoned the view, established in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), that those constitutional limitations are judicially enforceable. *Vieth*, 541 U.S. at 309–10 (Kennedy, J., concurring in the judgment); *id.* at 326 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 356 (Breyer, J., dissenting).

Extreme partisan manipulation of the redistricting process is problematic because it can effectively insulate a political party from any realistic attempt by the populace to unseat it. Sam Hirsch, *The United*

States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting, 2 Elec. L. J. 179, 202 (2003). In other words, political control may be determined by the mapmakers, not the voters. *Id.*

Enormous improvements in computer technology have revolutionized the way in which districts can be drawn, allowing even more invidious partisan entrenchment. *See* Laura Royden & Michael Li, Brennan Center for Justice, *Extreme Maps* 3 (2017)[2] ("Technology and a growing flood of money into the redistricting process are, by broad consensus, only making the situation" of partisan gerrymandering "worse."); Theodore R. Boehm, *Gerrymandering Revisited—Searching for a Standard*, 5 Ind. J. L. & Soc. Equality 59, 60 (2016) ("[M]odern technology has substantially facilitated a temporary majority's ability to perpetuate its dominance of a legislative body."). Today, mapmakers can draft and change many different proposed maps in rapid succession using electronic databases, computer software, and statistical techniques. Wang, *supra*, at 1267; *see also Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.").

Along with improvements in computer technology, "advances in communication technology have made it

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[2] *Available* at http://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf (last accessed Feb. 11, 2019).

possible to gather fine-grained data to micro-target[] district boundaries." Micah Altman & Michael McDonald, *The Promise & Perils of Computers in Redistricting*, 5 Duke J. Const. L. & Pub. Pol'y 69, 77 (2010). States receive and store vast amounts of highly detailed data to use in redistricting—including data from the Census Bureau about race, ethnicity, age, voting history, health coverage, and work status. Catherine McCully, U.S. Bureau of the Census, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census: The View from the States* 5, 17–18, 22 (2014).[3] Mapmakers can supplement the Census Bureau's population information with election-related data including on partisan affiliation and voting history. Kenneth F. McCue, California Inst. of Tech., *Creating California's Official Redistricting Database* 5–8 (2011).[4]

Mapmakers can use mapping programs to evaluate the effects of drawing a line in one place or the next block over, recalculating how the new districts will affect a plan's adherence to various redistricting criteria. McCully, *supra*, at 8; *see also Brown v. Iowa Legislative Council*, 490 N.W.2d 551, 552–53 (Iowa 1992) (describing how factors can be added or removed in computer generated redistricting maps); Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political*

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[3] *Available at* https://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf (last accessed Feb. 11, 2019).

[4] *Available at* http://statewidedatabase.org/d10/Creating%20CA%20Official%20Redistricting%20Database.pdf (last accessed Feb. 11, 2019).

Participation & Polarized Voting, 17 Urb. Law. 369, 373–77 (1985) (explaining the use of regression analyses and other calculations to predict whether voters belonging to particular racial minority group vote for specific candidates). More detailed data and computer-based district mapping provide the means to create maps that "give undue advantage to whichever political party controls redistricting." Wang, *supra*, at 1269. Thus technological tools enable States to draw and evaluate district boundaries "in exquisite details" and "enhance the possibility that gerrymandered districts may be more durable now than they were even ten years ago." *Id.* at 1267–68.

Durable party entrenchment through extreme gerrymandering causes real, identifiable harms to the democratic system, and to individual voters. It undercuts the fundamental premise that our republican form of government is representative. Moreover, by allowing fewer competitive races, it discourages voter participation, makes the public more distrustful of government, and reduces the responsiveness of elected representatives. Boehm, *supra*, at 62; D. Theodore Rave, *Politicians As Fiduciaries*, 126 Harv. L. Rev. 671, 684–85 (2013); Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 486–87 (2004). And it subverts the very purpose of periodic redistricting, which is to make Congress more responsive—not less responsive—to voters. Ortiz, *supra*, *at* 476–77 ("Nearly every special feature of the House's design" including direct election, regular reapportionment, and frequent elections, "was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.").

Of course, there are entirely legitimate reasons why a State may have noncompetitive elections. Voters may simply prefer the policies of one party over the other overwhelmingly. Or voters with similar political views may tend to cluster in the same areas, meaning that district lines drawn based on reasonable geographic considerations will favor one particular party. Or one party may be poorly organized, leading it to field candidates who have no real chance of garnering majority support. Those circumstances by themselves are not constitutionally problematic. On the contrary, they reflect the ordinary democratic process working as it should to reflect the will of the people.

What are problematic, however, are extreme districting maps that are invidiously intended to, and do, ensure noncompetitive elections *despite* the absence of the kinds of normal political considerations described above. Those maps inflict avoidable harms on the democratic process and on individual voters, and undermine the public's trust in government. The amici States have a strong interest in preventing those harms.

B. A purpose-and-effects test is manageable and adequately accounts for the States' legitimate interests.

Any test for unconstitutional partisan gerrymandering should require proof of both invidious intent *and* the actual effect of extreme partisan entrenchment that is likely to endure through multiple election cycles and is inexplicable by neutral considera-

tions. The map at issue here fails that test, and the district court's judgment therefore should be affirmed. Properly applied, however, a purpose-and-effects test should not call into question the vast majority of state districting maps. Even a map under which one party achieved an entrenched, long-lasting partisan advantage would be constitutional unless the map was adopted with invidious intent and the effect could not be explained by neutral factors. Amici anticipate that such cases will be rare, and that under a purpose-and-effects test, the States will continue to enjoy broad latitude in conducting redistricting.

1. Invidious intent is required and is satisfied when a map is chosen for the purpose of entrenching a party against any realistic majoritarian challenge.

Under a purpose-and-effects test, it is not enough for a plaintiff to show that a State's districting map has the *effect* of entrenching one political party in power. Rather, the plaintiff must also show that this was the *purpose* of adopting the map.

Invidious intent is a necessary component of the constitutional standard. This Court's equal protection jurisprudence holds that a law's "disproportionate impact," standing alone, is insufficient to show a constitutional violation. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Instead, "a purpose to discriminate" must be established. *Id.* (quoting *Akins v. Texas*, 325 U.S. 398, 403-04 (1945)); *cf. Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 & n.1 (2017) (explaining the

required "legislative intent" showing for a claim of racial gerrymandering under the Equal Protection Clause).

And not just any consideration of voters' political affiliation will establish *invidious* intent. In *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), for example, this Court drew a distinction between the use of political affiliation in the redistricting process to "provide a rough sort of proportional representation in the legislative halls of the State," and its use "to minimize or eliminate the political strength of any group or party," suggesting that the former was permissible and that the latter was not.

When it comes to proof of invidious partisan intent, however, this case is not a close one. There is no serious dispute that the map at issue here was adopted with the express purpose of maximizing Republicans' partisan advantage to the greatest extent possible. Representative Lewis, one of the co-chairs of North Carolina's Joint Select Committee on Congressional Redistricting, made no secret that the goal of the map was to manipulate elections to elect candidates from his favored party regardless of what the majority of voters wanted in any given election: he stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." Pet. App. 24. He stated further that the map was drawn "to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it[would be] possible to draw a map with 11 Republicans and 2 Democrats." Pet. App. 22. And if those statements leave

any doubt as to the purpose of the map, Representative Lewis also "acknowledg[ed] freely that this would be a political gerrymander," which Representative Lewis believed was "not against the law." *Id.*; *see also* Pet. App. 11, 17 (the "primar[y] goal" of co-chairs Lewis and Rucho was "create as many districts as possible" in which Republicans would likely win elections, and "partisanship considerations were the principal factor governing [the] placement of district lines within split counties").

In carrying out that goal, co-chairs Rucho and Lewis commissioned Dr. Thomas Hofeller to draw the 2016 Plan. Dr. Hofeller used past election data to draw a map that systematically "cracked" and "packed" Democratic voters to maximize Republican voting strength and minimize Democratic voting strength. *See* Pet. App. 12-13 ("All told, Dr. Hofeller testified that he redrew Districts 2, 3, 6, 7, 8, 9, 11, and 13 to increase Republic voting strength in those districts, and, to do so, he concentrated Democratic voters in Districts 1, 4, and 12."). Subsequent analyses of the map—which the district court credited—revealed that it "creates 3 to 4 more Republican seats than what is generally achievable" using neutral map-drawing criteria, and that is ultimately is more advantageous to Republicans than *99 percent* of all such districting plans. Pet. App. 210-11. Those analyses rest on precisely the same premise that guided Dr. Hofeller in creating the map itself—*i.e.*, the premise that "past voting behavior" as reflected in "past election results" is "the best predictor" of future election outcomes. App. 11; *see also* App. 175–77 (so noting, and explaining the difficulty in reconciling de-

fendants' argument that voter behavior should not be inferred from party affiliation with defendants' use of precisely that assumption in creating the map for the express purpose of maximizing partisan advantage in future elections).

Because it incorporates a requirement of invidious intent, a purpose-and-effects test should leave States with plenty of leeway to experiment with different approaches to redistricting. So long as a districting plan is not adopted for the specific purpose of entrenching a single party in power, there is no constitutional violation. No sophisticated statistical analysis of a state's maps is required.

2. The test also demands long-term partisan-entrenching effects that cannot be justified by other legitimate considerations.

A purpose-and-effects test also requires proof that the districting map was likely to have its intended effect: that it would ensure that one party remained in power under any likely electoral scenario regardless of shifts in voter allegiance. The court also would have to find that this effect could not be explained by any legitimate, neutral considerations, such as the State's political geography or its efforts to comply with the Voting Rights Act. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (identifying as legitimate considerations "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives").

This attention to effects is also an appropriate part of the constitutional standard. As in other kinds of cases, a plaintiff must show "a burden, as measured by a reliable standard, on the complainants' representational rights." *League of United Latin Am. Citizens*, 548 U.S. at 418 (plurality op.). Thus, a districting map is not an unconstitutional partisan gerrymander unless it in fact achieves extreme, long-term partisan entrenchment.

This means that States have ample room to try different approaches to redistricting without running afoul of the Constitution. Here too, the technologies that make it easier to engage in invidious partisan gerrymandering also give the States the tools to avoid liability. States can and do use computer programs to draw multiple maps that satisfy various legitimate criteria, make detailed predictions about electoral results under a range of possible scenarios, and determine whether any particular map gives one party or the other an unfair advantage.

And even if the map a State chooses does appear to give advantage to a party, sophisticated software can help the State determine if the advantage is caused by political geography or some other legitimate consideration. In other words, it can show if the predicted effects of the map on partisan entrenchment can be explained by neutral factors, in which case the map should pass constitutional scrutiny. *Cf. Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring in the judgment) (noting that "new technologies may . . . make more evident the precise nature of the burdens

gerrymanders impose on the representational rights of voters and parties").

Most importantly, if this Court endorses particular metrics as relevant to the effect prong of the test, States will be able to model those metrics and ensure that their maps stay within the bounds this Court sets. Of course, no single metric is likely to satisfy the effects prong by itself. As the district court explained, no one is asking the judiciary to enshrine any particular statistical measure of partisanship into the Constitution. Instead, metrics such as the efficiency gap showing that a map is an extreme partisan outlier merely "provide *evidence* that" it violates constitutional standards. Pet. App. 122. Thus, if a State's election results in a single year yielded a high efficiency gap, that alone would not likely satisfy the effects prong. And even if it did, the map still would be upheld if the effect could be explained by something other than intentional partisan entrenchment, such as that members of one party tend to cluster more in particular parts of the State than do members of the other party, or that the State has large numbers of uncontested elections. Regardless, the same metrics that might be used as evidence in litigation can also be used prophylactically by States to ward off constitutional challenges.

In this case, the district court analyzed the effects of congressional districting map with proper deference to legitimate state interests. It found that the map, by cracking and packing voters in particular districts based on their likely support of Democratic candidates, entrenched Republican representatives in

office. Pet. App. 187. And the district court further found that that discriminatory effect is likely to persist in subsequent elections. *Id.* at 190. Those findings of the district court are amply supported by the evidence of actual election results and expert analyses of those election results. *Id.* at 187–214 (discussing statewide evidence of discriminatory effects); *id.* at 223–74 (discussing district-specific evidence of discriminatory effects). The statistical analyses showed that the partisan entrenchment achieved by the map would last at least through the life of the plan, even if a majority of voters supported non-Republican candidates at historic levels. *Id.* at 190–97. The court also found that the map's party-entrenching effects could not be explained by any legitimate state concerns or neutral factors bearing on the apportionment process, including North Carolina's natural political geography. *Id.* at 215–22.

Thus, the district court correctly held that the map was unconstitutional.

3. The test is not likely to invalidate many districting maps, especially in view of the steps many States have taken to prevent extreme partisan gerrymandering.

Properly applied, a purpose-and-effects standard will invalidate only the most extreme maps, like North Carolina's 2016 congressional districting map, where all legitimate considerations are subordinated to the single goal of long-term partisan entrenchment against any realistic majoritarian challenge. Those maps lie well outside our nation's historical tradi-

tions, and we expect that they will be rare—especially if this Court affirms here and thus makes it clear that there are constitutional limits on partisan entrenchment.

More generally, however, exclusive or near-exclusive focus on partisan ends is not an inevitable feature of redistricting. About half of the States have taken formal steps that reduce or eliminate the influence of partisan considerations on redistricting. This shows that partisan politics is not a necessary component of the redistricting process.

For example, many States require (or will soon require) congressional or state legislative districting maps to be drawn by a nonpartisan or bipartisan commission. *See, e.g.*, Alaska Const., art. 6, § 8; Ariz. Const., art. IV, pt. 2, § 1(3), 1(14); Cal. Const., art. XXI, § 1; Colo. Const. art. 5, §§ 44–48.4; Haw. Const., art. IV, §§ 2, 9; Idaho Const. art. III, § 2; Mich. Const., art. IV, § 6; Mo. Const. art. III, § 7; Mont. Const., art. V, § 14; N.J. Const., art. II, § 2, ¶ 1; N.J. Const., art. IV, § 3, ¶ 1; N.Y. Const., art. III, § 5-b; Ohio Const. art. XI, § 1; Ohio Rev. Code Ann. § 3521.01; Pa. Const. art. II, § 17; Wash. Const., art. II § 43. Even in a number of States where the legislature retains authority over redistricting, the initial task of recommending a map for legislative approval is delegated to a bipartisan committee or "advisory commission." *See, e.g.*, Conn. Const., art. 3, § 6; Iowa Code Ann. §§ 42.1, 42.5; Me. Const., art. IX, § 24; Mass. Sen. R. 12[5]; Mass. House R. 17 & 18A[6]; R.I. Pub.

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[5] *Available* at https://malegislature.gov/Laws/Rules/Senate (last accessed Feb. 11, 2019).

Laws 2011, ch. 106, § 1; R.I. Pub. Laws 2011, ch. 100, § 1; Vt. Const., ch II, § 73; Vt. Stat. Ann. tit. 17, §§ 1904-07. It is exceptionally unlikely that a districting map drawn through a nonpartisan or bipartisan process would reflect an invidious intent to achieve long-term partisan entrenchment over other, permissible goals.

Some states (including some which employ the nonpartisan or bipartisan commissions discussed above) also have chosen to limit the use of partisan affiliation to draw district lines, as a matter of state law. Some expressly bar state officials from drawing district lines for the purpose of favoring or disfavoring a political party. *See, e.g.*, Cal. Const., art. XXI, § 2(e); Del. Code Ann. tit. 29, § 804(4); Fla. Const., art. III, §§ 20, 21(a); Haw. Rev. Stat. Ann. § 25-2(b)(1); Iowa Code Ann. § 42.4(5); Mont. Code Ann. § 5-1-115(3); N.Y. Const., art. III, § 4(c)(5); Or. Rev. Stat. § 188.010(2); Wash. Const., art. II, § 43(5). Some also prohibit officials from using political data—such as past election results or voters' party registrations—in drawing districts. *See, e.g.*, Iowa Code Ann. § 42.4(5); Mont. Code Ann. § 5-1-115(3); *see also* Neb. Leg. Res. 102 (1st Session 2011). Arizona requires mapmakers to favor competitive districts, and prohibits the use of voting and party registration data from the initial mapping phase. Ariz. Const., art. IV, pt. 2, § 1(14)(F), 1(15). And Idaho prohibits dividing counties for the

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[6] *Available* at https://malegislature.gov/Laws/Rules/House (last accessed Feb. 11, 2019).

purpose of protecting a political party. Idaho Code Ann. § 72-1506.

Finally, States also have adopted procedures that make the adoption of extreme partisan gerrymanders unlikely as a practical matter. For example, some require a two-thirds supermajority to approve redistricting plans, thus making it easier for a minority party to block a plan that is unfair. Conn. Const., art. III, § 6; Me. Const., art. IV, pt. 1, § 3; *cf.* N.Y. Const., art. III, § 4(b)(1)-(3) (supermajority required only if both state legislative houses are controlled by the same party).

None of these particular steps is required as a matter of federal constitutional law. As discussed, in most States the legislature draws the district maps. These deliberative bodies can and routinely do redraw their maps free of any invidious purpose, and without presenting the risk of long-term partisan entrenchment that necessitates a judicial response. A constitutional standard prohibiting the most egregious forms of intentional partisan entrenchment therefore would still afford the States considerable leeway in their redistricting processes. It would also vindicate the core democratic principles enshrined in our Constitution.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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March 8, 2019

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Nos. 18-422, 18-726

In The
Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, et al.,

Appellants,

v.

O. JOHN BENISEK, et al.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF DAVID ORENTLICHER AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

This brief amicus curiae is filed by and on behalf of David Orentlicher, Cobeaga Law Firm Professor at UNLV William S. Boyd School of Law.[2] Prof. Orentlicher teaches and writes about constitutional law and also served for six years as a state representative in the Indiana General Assembly. His recent scholarship has examined the problem of ideological partiality in the judiciary, and he submits this brief in the hope that its discussion of due process and ideological balance will be of value to the Court.

SUMMARY OF ARGUMENT

While this brief takes no position on the merits of the cases, it does present a position on the manner in which the cases should be decided. The Due Process Clause promises litigants that they will receive an impartial hearing before a neutral court. And a neutral court decides cases without any personal, political, or

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Reimbursement for printing expenses may be sought from funds made available by UNLV William S. Boyd School of Law to faculty for their professional activities.

[2] Institutional affiliation is provided for identification purposes only. This brief does not purport to present the institutional views, if any, of amicus' university.

other partiality. However, like other appellate courts, this Court brings an ideological leaning to its work. This compromises the due process principle of fairness which is critical to the resolution of any legal matter and especially matters such as political gerrymandering that go to the heart of our representative system of government. Accordingly, principles of due process require the Court to ensure that it decides these cases in an ideologically-balanced way.[3]

ARGUMENT

I. IDEOLOGICAL BALANCE AND DUE PROCESS

When the Constitution provides its fundamental guarantee of due process, it promises individuals that they will receive an impartial hearing before a neutral court.[4] And a neutral court decides cases without any personal, political, or other partiality.[5]

But this Court and other appellate courts typically are not neutral courts. They generally have either a conservative or liberal majority of Justices or judges,

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[3] Much of the argument in this brief is drawn from David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. Cal. L. Rev. Postscript PS29 (2018).

[4] Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 Wm. & Mary L. Rev. 1, 34, 36–37 (2014).

[5] Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 499–509 (2013).

and overall, that makes for either a conservative or liberal predilection. When a court has a liberal majority, parties promoting a conservative viewpoint will be disadvantaged. Similarly, when a court has a conservative majority, parties promoting a liberal viewpoint will be disadvantaged.

To be sure, if judging entailed a purely objective application of legal rules and principles to the facts, a jurist's ideology would not matter. But as empirical evidence demonstrates, a jurist's ideology does matter.[6] Some Justices and judges take more conservative positions, while others take more liberal positions.[7] A conservative majority will render different decisions on campaign finance, environmental regulation, or religious freedom than will a liberal majority. When this Court's decisions reflect the philosophical leanings of the Justices, and decisions can be determined by a majority on one side of the ideological spectrum, our judicial system denies an impartial hearing to parties on the other side of the ideological spectrum. And that is fundamentally unfair in a constitutional system that promises litigants due process in court.

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[6] Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 103 (2013).

[7] Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. Rev. 1483, 1491 (2007). Amicus recognizes that things are more nuanced. From case to case, a judge or Justice will sometimes take more conservative positions and other times more liberal positions. Nevertheless, for many cases, either a conservative or liberal majority will prevail.

Because it is unfair for litigants to have their cases decided by an ideologically-skewed court, due process requires reforms to ensure that decisions by this Court reflect both sides of the ideological spectrum. Scholars and others have proposed a number of approaches to bring ideological balance to this Court, including changes in the judicial appointment process. The simplest path to ideological balance would be for the Court to follow the example of the jury, and render its decisions unanimously. That way, Justices on both sides of the ideological spectrum would have to support the Court's opinions.[8]

The example of juries fits well. Amicus believes that to be impartial, this Court should issue decisions that reflect the views of Justices from both sides of the ideological spectrum. Similarly, in defining the meaning of an impartial jury, this Court has required that jurors be drawn from a fair cross-section of the community.[9] As this Court also has noted, the due process standards for jury size and jury unanimity reflect the goal of group deliberation undertaken by a jury that is representative of the community.[10]

This Court itself has observed a norm of consensual decision-making for most of its history. Until 1941,

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[8] Many European high courts also decide their cases on the basis of consensus. European Parliament, *Dissenting Opinions in the Supreme Courts of the Member States* (2012), http://www.europarl.europa.eu/sdocument/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

[9] *Taylor v. Louisiana*, 419 U.S. 522, 526–27 (1975).

[10] *Williams v. Florida*, 399 U.S. 78, 100 (1970).

Justices typically spoke unanimously.[11] Only about 8% of cases included a dissenting opinion. Now, one or more Justices dissent in about 60% of rulings.[12] Amicus agrees with the Chief Justice that greater consensus on the court is desirable[13] and that this Court functions best "when it can deliver one clear and focused opinion."[14] More importantly, decision-making by consensus would bring this Court into conformity with the constitutional requirement of due process.[15]

Due process is important not only for the litigants before a court but also for the public generally. This is especially the case when this Court decides issues of great moment and that go to the heart of our representative system of government, such as the question of political gerrymandering in these cases. For such issues, it is critical that the public feel that the Court reaches its decisions fairly.

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[11] Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769, 771 (2015).

[12] *Id.* at 776–77.

[13] Hope Yen, *Roberts Seeks Greater Consensus on Court*, Wash. Post (May 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html.

[14] Geoffrey R. Stone, *Chief Justice Roberts and the Role of the Supreme Court*, Huffington Post (May 25, 2011), https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html.

[15] Concerns about ideological balance also arise with intermediate courts of appeal so they also should adopt unanimous decision-making. While a panel of three judges often can have either three conservative or liberal members, ideological balance can be readily achieved when cases are heard *en banc*.

But concerns about the role of judicial ideology have markedly increased in recent years. A majority of Americans once expressed strong confidence in this Court. According to a July 2018 Gallup poll, only 37% do now.[16] Ensuring ideological balance would do much to restore public faith in the Court's decision-making process. As a corollary, it also would do much to defuse the highly contentious nature of judicial appointments. If people on both sides of the ideological spectrum knew their views would be reflected in Court decisions, they would not have to fight over appointments to the Court.

In addition to ensuring a fairer process, decision-making by consensus provides other important benefits. For example, it generates a more effective decision-making process. Studies on group decision-making demonstrate that better outcomes result when the decisions incorporate a range of perspectives.[17] In addition, unanimous decision-making ensures greater stability in the law. When this Court can decide cases by a majority vote, changes in the composition of the Court can lead to major changes in the Court's

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[16] Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, Gallup (July 2, 2018), https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx.

[17] Alan Blinder, *The Quiet Revolution: Central Banking Goes Modern* 43 (2004); Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 2–3 (2007); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proc. Nat'l Acad. Sci. 16385 (2004).

jurisprudence. With unanimous decision-making, legal doctrine will develop along a steadier path.

II. IDEOLOGICAL BALANCE AND ORIGINAL INTENT

What would the Framers think about this? On one hand, they did not include in Article III of the Constitution a requirement for ideological balance on the Supreme Court. On the other hand, they did not reject ideological balance. Moreover, they recognized the need to amend the Constitution with a Bill of Rights that includes the Due Process Clause's guarantee of impartial courts.

The Framers' intent is consistent with this brief's due process analysis. With ideological balance, this Court would be more faithful to the Framers' design for our constitutional system. The Founding Fathers worried greatly about "factions" pursuing their self-interest to the detriment of the overall public good. Accordingly, the constitutional drafters devised a system that they thought would contain the influence of factions.[18] With regard to the judicial branch, the Framers did not expect—nor did they want—a Supreme Court that would reflect the views of only one side of the ideological spectrum. Indeed, when Alexander Hamilton explained the Constitution's appointment provisions in *The Federalist Papers*, he emphasized the need to

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[18] *The Federalist No. 10* (James Madison).

avoid nominations that reflect partiality instead of the overall public interest.[19]

The Due Process Clause and original intent both support ideological balance on this Court. As discussed in the next section, the Court's precedents are consistent with such a requirement.

III. IDEOLOGICAL BALANCE AND SUPREME COURT PRECEDENT

In previous cases, this Court has observed that constitutional concerns are not raised when a judge favors one or another ideological view.[20] Anyone with the appropriate training and experience for the judiciary will have opinions on important legal issues. According to the Court, due process prohibits partiality toward a party to a proceeding, not partiality toward a legal view that the party might advocate.[21]

But there are important reasons to distinguish Court discussions of the issue. First, the question whether an appellate court must exhibit overall ideological balance has not been decided by this Court. Rather, the Court has considered the question of partiality for individual judges. Moreover, it has done so in cases addressing other issues of judicial neutrality.

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[19] *The Federalist No. 76* (Alexander Hamilton) (discussing the appointment provisions generally).

[20] The opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), provides a nice summary of this Court's discussions of the topic.

[21] *Id.* at 777–78.

In *Republican Party of Minnesota v. White*, for example, the issue before this Court was whether a state could prohibit judicial candidates from announcing their positions on issues that might come before them if elected.[22] In another case, *Tumey v. Ohio*, the issue before this Court was whether judges could have a financial stake in the outcome of their decisions.[23]

Second, this Court's reasoning is consistent with a due process argument in favor of a Court that decides cases in an ideologically-balanced way. In *Republican Party of Minnesota*, the Justices discussed the kinds of partialities that should disqualify a judge, and this Court wrote that a judge's ideological predilection is not disqualifying in the way that a personal financial interest is disqualifying. It took that view in *Republican Party of Minnesota* and earlier cases because anyone who has the experience and training that would be desirable in a judge will inevitably develop an ideological leaning.[24] And as discussed, there are benefits to having a bench of Justices with a range of ideological perspectives. But the fact that we have individual Justices with ideological leanings does not prevent us from ensuring an overall ideological balance on the Court. Under a fair reading of the Constitution, litigants

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[22] *Id.* at 768. This Court held that the prohibition violated the First Amendment. *Id.* at 788.

[23] *Tumey v. Ohio*, 273 U.S. 510, 514–15 (1927). The Court held that the judges' financial interests violated due process. *Id.* at 534.

[24] *Republican Party of Minnesota*, 536 U.S. at 777–78.

ought to be able to ensure that their cases are decided in an ideologically-balanced way.

In addition, it is difficult to identify a good reason for permitting this Court's holdings to be decided by a majority on one side or the other of the ideological spectrum. While we can point to the principle of majority rule to justify conservative or liberal control in the executive or legislative branches, popular majorities do not deserve special recognition in a judicial branch that should be guided by legal principle rather than prevailing sentiment.

IV. POTENTIAL CONCERNS WITH A REQUIREMENT OF IDEOLOGICAL BALANCE

In general, concerns about cost, efficiency, and fairness have limited policies to address judicial partiality.[25] For example, one solution is recusal of the partial judge. But if reasons for recusal are not strictly limited, litigants might clog the courts with baseless recusal motions,[26] and lawyers might exploit the rules to game the system in favor of their clients.[27] Members of this Court also have worried about strict recusal rules because there is no one who can step in for a disqualified Justice.[28]

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[25] Geyh, *supra* note 5, at 514–15.

[26] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890–91, 899–900 (2009) (Roberts, C.J., dissenting).

[27] *Id.* at 903 (Scalia, J., dissenting).

[28] Gabriel Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 Pepp. L. Rev. 1109, 1136–38 (2011).

A requirement of unanimity avoids the concerns raised by judicial disqualification. It promotes impartiality not by removing partial Justices, but by counterbalancing their partialities. Moreover, it can be adopted by the Court on its own without the need for legislative or executive action.

Still, one might worry that a unanimity requirement would lead this Court to deadlock with some frequency and leave too many issues to be decided by the lower courts. However, a few considerations indicate that it is unlikely to do so. First, this Court has an obligation to resolve critical legal questions, and we can expect Justices to fulfill the duties of their position.

Second, decision-makers adjust their behavior to their decision-making rules. When a simple majority can prevail, people may look for simple majority positions. On the other hand, when unanimity is required, people look for positions that can generate consensus.

Empirical evidence supports this analysis. High courts operate successfully with a requirement of consensus in other countries.[29] So do juries in this country. Criminal court juries typically have twelve members, and they have to reach unanimous decisions.[30] Hung juries occur, but not very often.[31] Moreover, juries reach

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[29] European Parliament, *supra* note 8, at 17-20.

[30] State juries in Oregon are the lone exception, where a supermajority of ten out of twelve is required for most cases. Or. Const. art. I, § 11; Or. Rev. Stat. § 136.450.

[31] Studies suggest an average hung jury rate of around 6% nationwide. Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?: Executive Summary* 2 (2002).

their unanimous decisions in a setting that allows for less compromise than does a decision by a judicial bench. A criminal jury must acquit or convict.[32]

To be sure, this Court has not always required unanimous jury verdicts under the Due Process Clause, but it also has rejected non-unanimous jury verdicts when the jury size shrinks.[33] A Supreme Court with twelve members might satisfy due process with a supermajority vote of ten, but with only nine members, unanimity would be needed on many occasions to ensure ideological balance.

Of course, requirements of jury unanimity reflect the gravity of the decisions at stake. Whether a jury convicts or acquits has enormous consequences for the defendant. Just as much is at stake with this Court. Its decisions can have the same consequences for defendants when it hears criminal appeals. Other constitutional decisions also can have profound consequences for the parties and the public generally. And even with civil juries, while it is more common among the states to require supermajority rather than unanimous verdicts, unanimity is required under the federal rules of procedure.[34]

Consensus-based decision-making also works well in non-governmental settings. The American Medical

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[32] In some cases, juries can compromise if they have the option of convicting on a less serious charge.

[33] *Burch v. Louisiana*, 441 U.S. 130 (1979).

[34] Fed. R. Civ. Pro. 48(b). The parties can waive the unanimity requirement. *Id.*

Association's Council on Ethical and Judicial Affairs (CEJA) provides a useful example. CEJA develops guidelines for physicians on the full range of ethical questions in medical practice, including genetic testing, end-of-life decisions, and conflicts of interest. CEJA also hears appeals of disciplinary proceedings against physicians by state and other medical societies. CEJA has nine members who reach all of their decisions by consensus. Under its requirement of unanimity, CEJA has been able to decide its appeals and issue a comprehensive ethics code that includes guidelines on many controversial matters.[35]

One might wonder whether decision-making by consensus really would yield ideological balance. If all Justices were either conservative or liberal, then even unanimous decisions would have an ideological tilt. This is a theoretical rather than practical concern. The Martin-Quinn scores that have measured the ideological leanings of Justices since 1937 have found a mix of conservative and liberal Justices throughout the entire eight-decade period.[36]

If due process requires ideological balance, does it also require other kinds of balance? Concerns about partiality on this Court reflect concerns about ideological differences, which is not surprising. People's views

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[35] AMA Council on Ethical and Judicial Affairs, *Code of Medical Ethics* (2017). Amicus previously served for more than six years as Secretary to CEJA.

[36] Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FiveThirtyEight (Mar. 29, 2012), https://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/.

on policy questions are influenced more by their ideology than their other traits. Thus, for example, female voters care more about the political party than about the sex of candidates for political office and therefore vote their ideology rather than their sex.[37] Moreover, an important virtue of decision-making by consensus is that it ensures not only ideological balance but also balance across a range of attributes that Justices or judges bring with them to the bench.

CONCLUSION

As the principle of due process recognizes, it is not only important that a court reach the legally correct decisions, but also that it make its decisions in an impartial way. To ensure impartiality in these, and other, cases, this Court should render decisions that are based on a consensus of all nine Justices and therefore reached in an ideologically-balanced manner.

Respectfully submitted,

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[37] Kathleen Dolan, *Gender Stereotypes, Candidate Evaluations, and Voting for Women Candidates: What Really Matters?*, 67 Pol. Res. Q. 96, 98, 104 (2014).

No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF *AMICI CURIAE* PROFESSORS WESLEY PEGDEN, JONATHAN RODDEN, AND SAMUEL S.-H. WANG IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars in various disciplines who study the effects of legislative line-drawing on elections. Using statistical analyses and computer modeling techniques, *amici* and others in the field have developed and honed a toolkit of quantitative methods that enable courts to reliably measure whether a legislative map is extreme relative to the great majority of maps that could arise through unbiased means. These quantitative methods permit a robust conclusion that invidious partisan considerations dominated in the districting process. Indeed, as *amici* explain below, there are many quantitative methods to support such a conclusion—and in the present case and other recent cases, they consistently point to the same conclusion.

Works and analyses by *amici* have been cited and relied upon by federal courts, as well as by other *amici* in this case.[2] In addition, Justices of this Court cited briefs submitted by the three *amici* in the opinions in *Gill* v. *Whitford*. See 138 S. Ct. 1916, 1933 (2018) (citing Brief of Heather K. Gerken et al. as *Amici Curiae* in Support of Appellees 27, *Gill*, 138 S. Ct. 1916 (No. 16-1161) (citing Sam Wang, Opinion, *Let Math Save Our Democracy*, N.Y. Times (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html)); *id.* at 1936

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[1] Counsel for all parties have consented to the filing of this brief. In accordance with Supreme Court Rule 37, *amici curiae* state that no counsel for a party authored this brief in whole or part and that no party, counsel for a party, or any other person other than *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] *See, e.g.*, Br. of Bernard Grofman & Ronald Keith Gaddie as *Amici Curiae* in Support of Neither Party 18, 22.

(citing Brief of Political Geography Scholars as *Amici Curiae* in Support of Appellees 12–14, *Gill*, 138 S. Ct. 1916 (No. 16-1161)).

Notably, the methods discussed by *amici* are nonpartisan and will sometimes show that a challenged map was *not* gerrymandered. As detailed below, however, statistical analyses like those developed by *amici* confirm beyond a statistical doubt that North Carolina's map represents an intentional partisan gerrymander. Techniques developed by *amici* and relied upon by the district court below confirm that the district lines now before the Court are extreme outliers, leading to the firm conclusion that invidious partisan bias was a predominant factor in the drawing of North Carolina's legislative map.

Amici include Professors Jonathan Rodden, Wesley Pegden, and Samuel S.-H. Wang. Professor Rodden is a Professor in the Department of Political Science at Stanford University and the Director of the Spatial Social Science Lab at Stanford University. Along with Professor Jowei Chen (who participated as an expert in this case and whose work was extensively relied upon by the district court), Professor Rodden has used computerized modeling and legislative map sampling to assess the causes of electoral bias.[3] In addition,

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[3] Professor Rodden's relevant publications include Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. Pol. Sci. 239 (2013) [hereinafter Chen & Rodden, *Unintentional Gerrymandering*]; Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 331 (2015) [hereinafter Chen & Rodden, *Redistricting Simulations*]; Ernesto Calvo & Jonathan Rodden, *The Achilles Heel of Plurality Systems: Geography and Representation in Multiparty Democracies*, 59 Am. J. Pol. Sci. 789 (2015); and Jonathan Rodden, *The Geographic*

Professor Rodden has developed an analytical approach that relies on statistical characterizations to examine how Democrats and Republicans are distributed throughout States, and that draws on cross-State comparisons to assess the effects of partisan geography on each State's legislative map, including on a district-by-district basis.[4]

Professor Pegden is an Associate Professor in the Department of Mathematical Sciences at Carnegie Mellon University. Professor Pegden and others have developed a method for testing, through computer simulations that examine the effect of billions of minute changes to legislative district lines, whether lines were drawn with a predominant intent of achieving partisan ends.[5]

Professor Wang is a professor of neuroscience and molecular biology at Princeton University, and faculty associate in the Program in Law and Public Affairs. He has developed statistical methods to analyze United States elections, and he is the author of several works

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Distribution of Political Preferences, 13 Ann. Rev. Pol. Sci. 321 (2010).

[4] *See* Nicholas Eubank & Jonathan Rodden, *Who Is My Neighbor? The Spatial Efficiency of Partisanship* (Feb. 21, 2019) (unpublished paper), http://www.nickeubank.com/wp-content/uploads/2018/07/EubankRodden_spatialefficiency.pdf [hereinafter Eubank & Rodden, *Who Is My Neighbor?*]; Nicholas Eubank & Jonathan Rodden, *Political Dislocation: A Voter-Level Measure of Partisan Representation and Gerrymandering*. (March 7, 2019) (unpublished paper), http://www.nickeubank.com/wp-content/uploads/2018/10/EubankRodden_dislocation.pdf [hereinafter Eubank & Rodden, *Political Dislocation*].

[5] Professor Pegden's relevant publications include Maria Chikina, Alan Frieze & Wesley Pegden, *Assessing Significance in a Markov Chain Without Mixing*, 114 Proc. Nat'l Acad. Sci. U.S. 2860 (2017).

on statistical methods to detect partisan bias in redistricting.[6]

SUMMARY OF ARGUMENT

This Court and its Justices have repeatedly condemned "partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)—as "[incompatible] with democratic principles," *id.* (alteration in original) (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)). But the Court has over the years questioned whether there exist "'judicially manageable standards for resolving purely political gerrymandering claims.'" *Gill*, 138 S. Ct. at 1927 (quoting *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment)). As Justice Kennedy predicted in *Vieth*, however, "new technologies" have produced "new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties." 541 U.S. at 312–13 (Kennedy, J., concurring in the judgment) (plurality opinion).

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[6] Professor Wang's relevant publications include Samuel S.-H. Wang, Brian A. Remlinger & Ben Williams, *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 Election L.J. 302 (2018) [hereinafter Wang et al., *Antidote for Gobbledygook*]; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263 (2016); Sam Wang, Opinion, *Let Math Save Our Democracy*, N.Y. Times (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html.

This Brief discusses and categorizes some of the technologies and methods of analysis that now exist, and explains how they "facilitate court efforts to identify and remedy the burdens" of partisan gerrymandering. *Id.* at 313. Many measurement tools have been developed to assess quantitatively whether a legislative map is extreme—*i.e.*, outside the range of what could plausibly result through unbiased means. By demonstrating that a legislative map is more extreme than all or the great majority of possibilities that could be generated by a fair process, these tools permit a court to reliably identify and assess the effects of partisan gerrymandering.

Broadly, the tests can be divided into two categories: (1) those that identify inequality of opportunity, *i.e.*, a map drawn with the predominant intent to deprive a group of the ability to elect representatives; and (2) those that identify inequality of outcome, *i.e.*, a map with pronounced effects, in the form of durable distortion in the amount of representation. See Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 305–06. In each case, the measures examine the difference between the challenged map and what would occur under a districting process in which partisan interests are not the overriding consideration. In short, as described in this *amicus* brief, courts have a toolkit of objective, quantitative tools from which to draw in identifying and assessing the effects of partisan gerrymandering undertaken for the invidious purpose of subjugating a rival political party and its supporters.

The existence of multiple quantitative tools for assessing partisan gerrymanders enhances confidence in the accuracy of the results. Significantly, experience shows that the existing forms of analysis produce consistent, replicable results—confirming their

reliability. Indeed, in the significant gerrymandering cases that have come to this Court in recent years, every kind of quantitative evidence put forth has led to the same conclusion. As Justice Sotomayor observed during argument in *Gill*, for example, "every single social science metric" addressed in that case "points in the same direction." Transcript of Oral Argument at 16, *Gill*, 136 S. Ct. 1916 (No. 16-1161). So too here. Quantitative analysis of North Carolina's legislative map—including the analysis relied upon by the district court, as well as analysis in academic publications—consistently shows an extreme legislative map, intentionally drawn to subjugate the Democratic Party and its voters. See pp. 20–24, *infra*.[7] Moreover, as in *Gill*, Appellants offer no competing quantitative analysis suggesting that the North Carolina map is anything but a partisan gerrymander. See Br. for Appellants 41–46.

The suite of tools available for measuring partisan gerrymanders also means that it is possible to engage in reliable quantitative analysis of gerrymanders in a wide variety of situations. For example, as detailed below, some tests are appropriate for measuring gerrymanders on a statewide level, and some can be used to assess the impact of a legislative map in individual districts. Some tools are effective for measuring partisan gerrymandering in states with one heavily dominant political party, such as Maryland, while other tools are useful for assessing

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[7] *See also* Gregory Herschlag et al., *Quantifying Gerrymandering in North Carolina* (Jan. 10, 2018) (unpublished paper), https://arxiv.org/pdf/1801.03783.pdf (applying multiple gerrymandering measures to North Carolina legislative maps and concluding that all show extreme partisan gerrymandering).

closely contested states, such as North Carolina.[8] Multiple forms of analysis can be performed on the same legislative map to provide confirmation of the outcome. The Court is not called to enshrine one single metric. Instead, thanks to advances in the field of rigorous statistical examination of partisan gerrymanders, there now exists a versatile statistical toolkit to address the wide variety of circumstances that may arise in any of the 50 states. Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 302.

The existence of this toolkit puts the lie to Appellants' assertion that "efforts to measure the problem underscore that this whole undertaking is not a judicially manageable task." Br. for Appellants 43. Rather than address the full measure of quantitative analysis that *amici* and others in the field have developed and tested, Appellants single out one form of analysis—the efficiency gap—declare that it has "serious problems," and on that basis ask the Court to disregard the "whole undertaking" of quantitative analysis of legislative maps. *Id.* at 43–44. The Court should not accept Appellants' invitation. Certainly, it should not do so without understanding what measurement tools exist, and how they can be deployed as the lower courts grapple with the problem of partisan redistricting. That is the information that this Brief provides.

ARGUMENT

Although four members of the Court in *Vieth* were willing to abandon the search for a workable, reliable

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[8] For a description and categorization of multiple tests, including an explanation of how to match a test to particular circumstances, *see* Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 308–14 (Apps. A & B).

standard for assessing partisan gerrymanders, five were not. The lack of a standard at that time, Justice Kennedy wrote, "should not be taken to prove that none will emerge in the future." 541 U.S. at 311 (Kennedy, J., concurring in the judgment) (plurality opinion). Technological and analytical advances inevitably would be developed to enable courts to identify partisan gerrymanders in a consistent and objective manner, as Justice Kennedy recognized: "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose," which would "facilitate court efforts to identify and remedy th[ose] burdens." *Id.* at 312–13.

Technology has indeed evolved. In *Gill* v. *Whitford*, Justice Kagan specifically recognized the work of *amici* in establishing whether a voter lives in a district that has been "packed or cracked." 138 S. Ct. at 1936 (Kagan, J., concurring). As Justice Kagan noted, one way a plaintiff may make this necessary showing is by producing an alternative map, or set of such maps, "comparably consistent with traditional districting principles—under which her vote would carry more weight" than under the actual districting map. *Id.* (citing Brief of Political Geography Scholars as *Amici Curiae* in Support of Appellees 12–14, *Gill*, 136 S. Ct. 1916 (No. 16-1161)). Such maps, she stated, "may shed light on vote dilution or its absence." *Id.*

This brief describes the type of work that Justice Kagan focused on in *Gill*—rigorous analytical methods that shed strong light in an area that was previously marked by murkiness. We first discuss the method on which Justice Kagan focused, and which was relied on by the court below in this case: comparison of the legislative map to a large set of computer-generated alternative maps. This analysis allows a reviewing

court to identify the extent to which the partisan advantage built into a specific redistricting plan goes beyond what would be expected if traditional redistricting criteria, along with other legal requirements such as the Voting Rights Act, had been the only considerations. In other words, one important output of this analysis is a measure of the effects that make the existing map an extreme outlier as compared to maps that could have been drawn without nefarious intent.

We next discuss another form of analysis that relies on computer modeling to test the effect of placing a legislative line in a particular place. The existing map can be tested by making many small, random changes to the lines drawn in the map, and examining the effect of those changes. With a neutrally drawn map, random changes should not lead to consistent partisan swings in a particular direction—regardless of the distribution of voters geographically. But if small, random changes to legislative district lines lead to consistent changes in the partisan make-up of districts—changes that are extreme outliers in scale—then a court can reliably conclude that the lines were drawn as they were with the predominant intent of creating a partisan gerrymander.

Finally, we discuss forms of statistical analysis that do not require the construction of alternative districting plans. For example, by making a statistical characterization of a State's partisan geography, and the geographic distribution of the voters for the two parties, it is possible to determine what seat shares would be expected from a neutrally drawn map based on that State's political geography. In the event that a redistricting plan demonstrates an unexpectedly high level of partisan asymmetry, this approach allows courts to evaluate the plausibility of the claim that the

partisan advantage is driven by an especially advantageous geographic distribution of that party's voters. Other statistical techniques—some of which have been used for generations, and some of which, like the efficiency gap, are relatively recent—are informative as to both intent and effect as well.

In short, there is no shortage of tools that permit consistent and reliable measurement of partisan gerrymanders, and that support quantitative analysis of both the intent behind the drawing of legislative lines and the effect of a legislative map on voters. Although space does not permit a comprehensive list, the tools described below can inform the Court's analysis of the judicial manageability of quantifying partisan gerrymanders. Using these tools, the Court can confidently determine, on a district-by-district basis, when an intentional and durable political gerrymander has occurred.

I. PARTISAN GERRYMANDERING CAN BE RELIABLY MEASURED USING A VARIETY OF TOOLS.

Comparison to a Set of Alternative Maps. One well-known means of testing a legislative map for partisan gerrymandering is comparison of the map to a large set—thousands, millions, or more—of computer-generated maps drawn using partisan-neutral criteria. This test, which was applied by experts in this case, examines the effects of legislative line-drawing by comparing actual election results under the as-drawn map to results that would have occurred under a set of alternative maps with neutrally drawn district lines. By comparing an existing map to a set of automatically generated maps, a court can determine whether the as-drawn map is an extreme outlier that cannot be explained by neutral factors, such as the geographical distribution of voters

within a State. If the effects are far more extreme than anything that results in a set of neutrally drawn alternatives, then the intent to engage in invidious partisan gerrymandering can be inferred. As the Fourth Circuit explained, "if a computer randomly draws five hundred redistricting plans following traditional redistricting criteria, and the actual enacted plans fall completely outside the range of what the computer has drawn, one can conclude that the traditional criteria do not explain that enacted plan." *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016).[9]

Numerous scholars have used comparisons of legislative maps to a set of computer-generated alternative maps to assess partisan gerrymandering. See Br. of Dr. Eric Lander as *Amicus Curiae* 31–33 & nn.35–38 (listing "many distinguished computational scientists actively applying" similar methods, and gathering citations). Although different scholars use somewhat different techniques, the process for analyzing a potentially gerrymandered districting map begins with a computer generating a large set of hundreds, thousands, or more simulated districting maps for a State. See, *e.g.*, Chen & Rodden, *Redistricting Simulations*, *supra* note 3, at 335; Herschlag et al., *supra* note 7; Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351 (2016). In drawing the simulated legislative boundaries, the

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[9] This approach was first introduced in state court, by the plaintiffs in *Romo* v. *Detzner*, filed in the Circuit Court of Florida. *See Romo* v. *Detzner*, No. 2012-CA-000412, 2014 WL 3797315 (Fla. Cir. Ct. July 10, 2014). More recently, the Supreme Court of Pennsylvania relied upon this analysis in its decision in *League of Women Voters* v. *Commonwealth*, 178 A.3d 737 (Pa. 2018).

computer can be programmed, as appropriate to the analysis in question, to optimize several traditional districting criteria relevant to the State at issue, such as population equality (to conform to the principle of one person, one vote), preservation of county and municipal boundaries, any Voting Rights Act requirements, and geographic compactness. *E.g.*, Chen & Rodden, *Redistricting Simulations*, *supra* note 3, at 335–38. Then, using actual election results, the partisan effects of these simulated maps are compared to the partisan effects of the actual map. *Id.* at 339–40. If the enacted plan exhibits greater partisan asymmetry than a large majority or all of the simulations, courts can conclude that traditional principles and political geography alone cannot explain the map's disproportionate partisan advantage. See *Raleigh Wake Citizens Ass'n*, 827 F.3d at 344.

The method of comparing a legislative map to a set of alternative maps offers several advantages. First, comparison to alternative maps automatically accounts for a State's political geography. Because the alternative maps are drawn using the actual geographical distribution of voters in the State, the set of alternative maps necessarily reflects any clustering of one party's voters within the State. If, for example, Democratic voters cluster in cities, then the set of alternative maps will produce urban districts in which Democrats are clustered. Thus, the concern raised by Appellants that "false positives" might result in quantitative tests for gerrymandering where "Democratic voters are concentrated in or near urban areas while Republican voters are more evenly distributed" does not apply. Br. for Appellants 44. Indeed, in an early quantitative analysis of legislative maps by *amicus* Professor Rodden along with

Professor Chen, the authors used comparisons of legislative maps to alternative maps to show quantitatively that in many U.S. states, the application of traditional districting principles will naturally produce some level of bias in favor of the Republican Party, solely as a result of voter distribution. Chen & Rodden, *Unintentional Gerrymandering*, *supra* note 3, at 241–42.

Additionally, this method permits analysis of legislative district lines at both the statewide and district level—allowing the court to assess not only whether the statewide map is a partisan gerrymander, but also whether individual districts are packed or cracked. See *Gill*, 138 S. Ct. at 1931 (to have standing to pursue a vote dilution theory, plaintiff must establish that she resides in a packed or cracked district). In a statewide analysis, actual election results under the statewide legislative map are compared to simulated election results under the full set of alternative maps. If the actual election results are far more lopsided than the vast majority of simulated results from alternative maps, then the legislative map is an extreme outlier that cannot be explained by neutral criteria.

This form of analysis can also identify whether individual districts are packed or cracked. To conduct the district-focused analysis, the distribution of each party's voters in each district is calculated over the full set of alternative maps. These numbers are then compared to the partisan makeup of each district in the actual map. If packing occurs to disfavor Democratic voters (for example), then the most heavily Democratic-leaning districts will show an *even greater* Democratic lean in the actual map than in all or the vast majority of alternative maps. The analysis thus demonstrates that Democratic voters are packed into

those districts. If cracking occurs to disfavor Democrats, then those districts in which votes are relatively evenly distributed between parties in the actual map will show a *lower* Democratic make-up in those districts than in all or the vast majority of alternative maps. The analysis thus demonstrates that Democratic voters are cracked out of those districts. A chart illustrating the findings of Professor Jonathan C. Mattingly, one of the experts below, using this form of analysis is reproduced in the Brief for Common Cause Appellees (at 15). As Professor Mattingly showed, comparison of North Carolina's 2016 Plan to a set of 24,000 neutrally drawn maps showed that at least six districts were extreme outliers, and thus shown to be either packed or cracked. *Id.* at 14–16, 31.

Finally, comparison of a legislative map to alternative maps is a familiar and comprehensible approach. It is well within courts' adjudicative capacity to identify the effects of partisan gerrymandering, and to infer that a map is drawn with the predominant intent to favor voters of one party over the other, where the map is an extreme statistical outlier. Indeed, courts need not settle on an "ideal" legislative map or an "appropriate" degree of partisan bias in the drawing of a legislative map to make use of this tool. Instead, when courts are confronted with a legislative map that is an extreme outlier as compared to a universe of neutrally drawn maps, they can simply conclude that "however much you think is too much, this case is too much." Transcript of Oral Argument at 39, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (per curiam) (No. 17-333).

Justice Kagan recognized as much in *Gill*, explaining that the showing that a legislative map disfavors a voter as compared to neutrally drawn maps

"will not be hard to make." 138 S. Ct. at 1936 (Kagan, J., concurring). Nor will it be hard for the voting public to understand: "The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote." *Id.*

Measuring Effects of Slight Changes to District Lines. Another use of computer simulations looks more directly at intent—examining *why* district lines were drawn where they were. This type of analysis looks at small, random changes to existing district lines to determine whether the lines as drawn constitute extreme outliers. If small, random changes produce statistically outsized effects, then it is possible to conclude that the lines were deliberately drawn in a precise location so as to maximize partisan advantage. See Herschlag et al., *supra* note 7, at 7 ("If relatively small changes in a redistricting dramatically change the partisan vote balance in each district then it raises questions how representative the results generated by the redistricting are, and suggests the redistricting was selected or engineered.").

Again, multiple scholars have developed various techniques to conduct this form of analysis.[10] One example is an approach developed by *amicus* Professor Pegden, along with Professors Maria Chikina and Alan Frieze. Chikina et al., *supra* note 5. Instead of generating alternative maps from scratch, their method starts with the actual legislative map and uses a computer to examine the effects of billions of small, random changes to the existing district lines, which

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[10] *See* Chikina et al., *supra* note 5; Herschlag et al., *supra* note 7, at 7; Jonathan C. Mattingly & Christy Vaughn, *Redistricting and the Will of the People* (Oct. 29, 2014) (unpublished paper), https://arxiv.org/abs/1410.8796.

permits them to compare the actual map to *all* possible maps that satisfy traditional redistricting criteria. Professor Mattingly and several colleagues use a different technique to conduct a comparable analysis: they compare the placement of actual district lines to placement of lines in the subset of alternative district maps that are "nearby" (*i.e.*, drawn similarly to) the actual map. Herschlag et al., *supra* note 7, at 7, 20–21.

This form of analysis offers many of the same advantages as comparison to a dataset of alternative maps. Like that technique, examination of small, random changes to district lines naturally accounts for a State's political geography: Because it uses the actual placement of voters in assessing the effects of small, random changes in line-drawing, there is no risk of "false positives" due to geographical distribution of voters. Analyzing small, random changes in addition to a broader alternative-maps analysis also offers a useful confirmation that the set of alternative maps was properly constructed. See Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 310–12.

The small-changes analysis also offers the advantage of being easily described and understood. Indeed, it is another take on the alternative map comparison that Justice Kagan described: Pointing out that the precise placement of district lines was deliberately selected to maximize partisan advantage is another way to demonstrate "through drawing alternative district lines, that partisan-based packing or cracking diluted [a plaintiff's] vote." *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring).

Other Statistical Tools. It is also possible to analyze partisan gerrymandering without reliance on computer modeling—and many scholars do so using techniques new and old. As Professor Wang and others

have described, these statistical measures have a variety of uses and can be deployed as appropriate based on the characteristics of the State under consideration. See generally Wang et al., *Antidote for Gobbledygook*, *supra* note 6 (describing and categorizing "methods for detecting extremes" that "comprise a statistical toolbox to address a wide variety of circumstances").

For example, the "neighborhood" approach developed by Professors Rodden and Nicholas Eubank, assesses the role that a State's political geography plays in determining election outcomes. See Eubank & Rodden, *Who Is My Neighbor?*, *supra* note 4. Instead of simulating a series of alternative maps, this technique uses precinct-level election results to generate a bespoke "neighborhood" for each voter that corresponds to the size of the relevant legislative districts. The partisanship of each voter's nearest neighbors can then be contrasted with that of the enacted district in which the voter is situated. This allows for the identification of "hotspots" where clusters of co-partisans have been excessively "packed" relative to the underlying geography of partisanship, and likewise, areas where neighborhoods of co-partisans have been "cracked" in order to prevent them from forming majorities in the enacted plan. In this way, the representational harm associated with gerrymandering can be assessed at a very disaggregated spatial scale. This analysis can also be scaled up to characterize the level of "packing" and "cracking" in a State, and can facilitate useful cross-state comparisons.

Other longstanding statistical techniques are likewise informative in determining whether a legislative map constitutes an extreme outlier—and thus supports a finding of intent to gerrymander. The

mean-median approach tests for consistent advantage and works well to assess gerrymandering in closely divided states, such as North Carolina. See Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 309–10. Where both parties are treated similarly, the mean vote share for each party across all districts should be similar to the median vote share. Where the mean-median difference is large, however, then one party has gained a consistent advantage at the district level. *Id.* The chi-squared test—another longstanding statistical test—can be used in states heavily dominated by one political party, such as Maryland. *Id.* at 310. The test examines whether results are unexpectedly uniform (which indicates that the dominant party has deliberately drawn lines so as to ensure reliable wins in every district) or more heterogeneous, as would be expected from a map drawn with nonpartisan intent. *Id.*

The efficiency gap also provides a simple and intuitive calculation for measuring the effects of a legislative map without computer modeling. The efficiency gap examines how many votes were cast for either party and the seats that were won as a consequence—and measures the portion of votes that each party has "wasted."[11] Although both parties necessarily waste some votes, an extreme efficiency gap indicates severe partisan asymmetry. When applied in states like North Carolina, Wisconsin, and Pennsylvania, inferences drawn from the efficiency gap are quite similar to those drawn from the mean-median approach and several others. Appellants criticize the efficiency gap for not taking account of political geography, see Br. for Appellants 44, but this

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[11] *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

is a question that the efficiency gap simply is not designed to measure. To the contrary, that test's creators emphasize that any presumption of gerrymandering from a high efficiency gap can be rebutted by a showing that "the state's underlying political geography" explains the outcome. Stephanopoulos & McGhee, *supra* note 11, at 837–38. When used in conjunction with other measures that permit the assessment of the effects of political geography, the efficiency gap offers a concise measurement that summarizes the degree of partisan asymmetry in a single number.

As Professor Wang and his colleagues have described, together, these measures offer courts a toolkit for assessing both whether a map creates inequality of electoral opportunity, and whether it creates a durable, inequitable outcome. Wang et al., *Antidote for Gobbledygook*, *supra* note 6, at 305–06. They permit courts—in a rigorous, objective, and replicable manner—to assess whether partisan asymmetry in an electoral map results from partisan geography or malicious cartography, and provide powerful evidence of intentional gerrymandering. Just as a plumb or a spirit level may both be used by a carpenter to diagnose a crooked table, these tests likewise all have a place in the court's toolkit. This Court need not settle on one test for partisan gerrymandering—but instead can take comfort that lower courts have multiple reliable, quantitative tools with which to identify extreme outliers, and thereby confront the problem of partisan gerrymandering.

II. RELIABLE QUANTITATIVE ANALYSIS IN THE CASE BELOW CONFIRMS THAT NORTH CAROLINA'S LEGISLATIVE MAP IS A PARTISAN GERRYMANDER.

As Appellees explain, the factual history of North Carolina's 2016 Plan makes clear that it was expressly intended to achieve a quota of ten Republican and three Democratic districts, despite a near-equal split among the State's voters. The map-drawer drew the map in order to adhere to this partisan goal, packing Democrats into three blue districts and cracking the remaining across ten red districts. Br. for Common Cause Appellees 5–8; Br. for Appellees League of Women Voters of North Carolina 7–8; App. to Jurisdictional Statement ("App.") 17, 158–159.

The effects of this plan were obvious and immediate. In the 2016 election (the first after the Plan went into effect), Republicans prevailed in all ten "cracked" districts and Democrats prevailed in the three "packed" districts. App. 26. Republicans received just 53% of the statewide vote but won 77% of the total seats. *Id.* There was not a single district with a competitive race. App. 190. The Plan's effects were obvious again in the 2018 elections: Despite Republican candidates receiving only 50.3% of the vote, they again won 10 seats (77%). Suppl. Br. of the Common Cause Appellees 4. In the twelve contested races, Democrats won the majority of the total vote (50.9%) but won only 3 of 12 seats, or 25%. *Id.*

Appellees sued in 2016, alleging that the Plan was an unconstitutional gerrymander, and a three-judge panel of the Middle District of North Carolina held that it was. On remand following *Gill*, the majority held that 12 of the Plan's 13 districts violate the Equal Protection Clause, the First Amendment and Sections 2 and 4 of Article I.

In addition to finding that the Plan was intended to "dictate [federal] electoral outcomes," App. 303, the court found that the Plan's dilutionary effects were not "justified by a legitimate state districting interest or neutral explanation." App. 215. In addressing one of Appellants' justifications for the 2016 Plan's discriminatory effect—"North Carolina's political geography, which reflects the 'natural packing' of Democratic voters" —the court found that Appellants failed to provide "any contrary empirical analysis showing that the state's political geography does, in fact, explain the 2016 Plan's discriminatory effects." App. 215–218.

The three-judge court's finding on justification was correct. It is true, as Appellants argued below and they and their *amici* continue to argue now, that in some states, the concentration of Democrats in urban areas can, under some conditions, create natural Republican advantage based on political geography. See Br. for Appellants 44; Br. for *Amici Curiae* Wisconsin State Senate & Wisconsin State Assembly Supp. Appellants 10. But political geography falls far short of explaining the highly disproportionate election results under the Plan. The techniques described above allow this conclusion to be drawn beyond any statistical doubt. And the district court did just that, relying on quantitative analyses offered by Professors Chen and Mattingly to conclude that the 2016 Plan "is an extreme statistical outlier in terms of its partisanship." App. 170 (quoting Trial Tr. I, at 213:22–23).

The Briefs for Appellees thoroughly describe the robust, quantitative analyses that Professors Chen and Mattingly offered in the case below. Br. for Common Cause Appellees 13–17; Br. for Appellees League of Women Voters of North Carolina 18–19.

Those analyses conclusively and consistently demonstrated that the effect of North Carolina's 2016 Plan was to severely and durably disadvantage the Democratic Party and Democratic voters in North Carolina. In this case, therefore—just as in *Gill*—the analytical methods for measuring the effect of political geography uniformly support one conclusion: that the 2016 Plan is an intentional partisan gerrymander.

Nor can hand-waving statements about political geography in general explain the 2016 Plan's elector bias, as Appellants and their *amici* contend. See Br. for Appellants 44; Br. for *Amici Curiae* Wisconsin State Senate & Wisconsin State Assembly Supp. Appellants 10–15. The techniques described in Part I enable a determination of whether partisan asymmetry is explained by the neutral factor of political geography. The computer-based techniques described in Part I test—indeed, show to a statistical certainty—whether the partisan distribution of seats under an enacted redistricting plan is explained by a particular State's natural political geography or instead was obtained through a process of intentional partisan gerrymandering to purposely amplify those natural factors to gain an invidious advantage. The district court expressly relied on such locally-specific evidence.

Compared with the robustness of this evidence, generic arguments that fail to evaluate the effects of North Carolina's specific political geography are not informative. Appellants' vague statement that Democrats are "concentrated" while Republicans are "evenly distributed" does not tell the Court (a) whether the voter distribution is sufficiently disparate to create a pro-Republican bias, (b) if so, the degree of any pro-Republican bias, or (c) most importantly, whether any naturally occurring pro-Republican bias is of sufficient

scope to explain the electoral bias represented in North Carolina's legislative map.[12] Br. for Appellants 44. The techniques described above, however, do.

Each of the techniques described above is, taken alone, powerful evidence of the invidious intent behind North Carolina's districting map. Taken together, these techniques uniformly and unambiguously support the same conclusion: that North Carolina's legislative map is an extreme outlier. The additional evidence of legislative intent to gain partisan advantage marshaled by Appellees leads ineluctably to the same result. This Court can thus conclude with great confidence that, as the district court held, North Carolina's Plan is an invidious partisan gerrymander.

Given the wealth of evidentiary support for the lower court's decision, there is no merit to Appellants' contention that this challenge to North Carolina's map has an adverse impact on "the integrity and independence of the courts." Br. for Appellants 38. In fact, the opposite is true. What was required of the lower court here was to apply constitutional standards to factual findings that were well supported by undisputed evidence. And that is what the court did.

Contrary to Appellants' contention, the district court's decision marks a clear example of the *exercise* of judicial independence and integrity. Indeed, it is shying away from the conclusion compelled by reliable,

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[12] Appellants' vague statements about the concentration of Democrats in cities are based on a misunderstanding of the academic literature. The concentration of Democrats in cities is not a sufficient condition to produce bias in favor of Republicans. The arrangement of electoral districts around those patterns is a crucial factor, as are the size and structure of the cities, nature of suburbanization, and the presence of rural Democrats. *See* Eubank & Rodden, *Who Is My Neighbor?*, *supra* note 4; Eubank & Rodden, *Political Dislocation*, *supra* note 4.

consistent quantitative analysis—that North Carolina's 2016 Plan is an invidious partisan gerrymander—that would adversely impact the integrity and independence of the judiciary. This Court should not accept Appellants' invitation to do so.

CONCLUSION

As Justice Kennedy suggested at the time of *Vieth*, there now exists a kit of "new technologies" and analytical tools that "make more evident the precise nature" of gerrymandering. *Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring in the judgment). This Brief identifies several such methods, all of which have the ability to demonstrate that North Carolina's districting map was a partisan gerrymander, specifically designed to "burden[] . . . [the] representational rights" of North Carolina Democrats. *Id.* The Court should affirm.

Respectfully submitted,

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Nos. 18-422, 18-726

In The
Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of North Carolina

LINDA H. LAMONE, et al.,

Appellants,

v.

O. JOHN BENISEK, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

BRIEF OF *AMICI CURIAE* POLITICAL SCIENCE PROFESSORS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST[1]

Amici curiae are all nationally recognized university research scholars and political scientists whose studies on electoral behavior, voter identity, and redistricting in the United States have been published in leading scholarly journals and books. *See infra* Appendix at 1a.

Amici have extensive professional knowledge and experience that will be relevant and helpful to the Court. They are among the leading scholars to study the predictability of voter behavior and the tools mapmakers use to harness data relating to voter behavior and characteristics when preparing redistricting plans. *Amici* are well positioned to explain how gerrymandering affected this decade's elections, including the 2018 midterms, and predict how recent developments in the capabilities of mapmaking software and data analysis tools are likely to influence the 2020 redistricting cycle and beyond.

SUMMARY OF ARGUMENT

In 1986, Justice O'Connor observed that "political gerrymandering is a self-limiting enterprise" because

[1] No counsel for any party authored this brief in whole or in part. No person other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pietro Signoracci, Michael Pernick, Amitav Chakraborty, and Brittney Xu of Paul, Weiss, Rifkind, Wharton, and Garrison LLP contributed to the preparation of this brief. The parties have filed blanket consents.

a "swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). In other words, Justice O'Connor assumed that a "wave" election—an election in which one party wins the popular vote share by a significant margin over the other—would remedy partisan gerrymanders without judicial intervention. "There is no proof before us," Justice O'Connor observed, "that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves." *Id.*

When Justice O'Connor made this observation, Pac-Man was still a popular video game. Microsoft had just released its first Windows operating system. Bill Gates and Steve Jobs were unknown to the general public. And politicians did not have the sophisticated software, processing power, or data to exploit voter behavior that they have today. They lacked the tools to create durable partisan gerrymanders—one in which the gerrymandering party retains maximal control of the legislature for multiple election cycles spanning the entire decennial period following its implementation of the gerrymander.

The tools have arrived. Partisans are using exponentially greater computing power, sophisticated data analytics and data sets, and social science to create maps that are incompatible with democracy. Nevertheless, appellants urge this Court to repose its faith in "politically accountable" state legislatures. *Rucho* v. *Common Cause*, Appellants' Br. at 2, 21, 34, 36. Their

argument assumes that sooner or later a swing in the popular vote will produce a legislature that is accountable to the people. *Amici* here urge the Court to reject that assumption. Even if it were correct in the past, it is unwarranted today and for the foreseeable future. Today's partisan gerrymanders are technologically-designed to survive swings in the popular vote. As a result, voters in gerrymandered districts cannot cure them.

The 2018 midterm election results provide powerful new evidence demonstrating that modern partisan gerrymanders are durable and, as a result, state legislatures are not politically accountable. Significant swings in the popular vote in 2018 did not lead to electoral change in States with partisan gerrymanders, demonstrating a lack of responsiveness to voter preferences. Notwithstanding a significant surge in popular support—nationwide and in many States with gerrymandered maps—Democratic candidates were generally unable to gain seats in congressional and state legislative chambers with Republican gerrymanders. Similarly, in recent election cycles, Democratic gerrymanders were able to resist voter preferences for Republican candidates. Voters in gerrymandered districts need this Court's intervention to vindicate their constitutional rights. They cannot do so by voting when a state legislature has drawn their district to dilute their vote and render it ineffective.

Mapmakers today are able to devise gerrymanders that withstand partisan waves as a result of an explosion in granular voter data—now widely

available—that allow mapmakers to predict partisan behavior with a high degree of accuracy, coupled with advancements in map-drawing software that allow mapmakers to entrench maximal partisan bias.[2] As a result of these technological advances, modern gerrymanders are able to withstand wave elections such as the 2018 midterms, and gerrymandering techniques that were only theoretical in the 2010 redistricting cycle will become commonplace in the 2020 redistricting cycle and beyond.

Courts can and should provide redress for injuries caused by partisan gerrymandering. The same tools that enable politicians and their consultants to draw such precise and durable maps also enable courts to determine whether a partisan gerrymander is unconstitutional. Just as social science and technology have facilitated and will facilitate partisan gerrymandering, those same fields provide tools that can be used to identify and remedy such gerrymandering when it occurs.

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[2] An electoral map exhibits partisan bias or partisan asymmetry when one party wins a larger number of legislative seats with x% of votes that the other party would win if it had received the same percentage of votes under the same map. *See* Jonathan N. Katz, Gary King, & Elizabeth Rosenblatt, *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, Dec. 2, 2018 (working paper), http://j.mp/2BkgYTP; Andrew Gelman & Gary King, *A unified model for evaluating electoral systems and redistricting plans*, 38 Am. J. of Pol. Sci. 514-54 (1994).

ARGUMENT

I. EVIDENCE FROM THE 2018 ELECTIONS SHOWS THAT PARTISAN GERRYMANDERS ARE NO LONGER SELF-LIMITING

Before partisans had access to powerful computers, huge data sets, individual-level data, advanced software, and the latest social science, their gerrymandering efforts were sometimes prone to failure. In past years, an overly-ambitious gerrymander could fail to preserve legislative control for the majority line-drawing party if it misjudged the probable margin of victory or defeat in each district. *Davis*, 478 U.S. at 152 (O'Connor, J., concurring); *see also* Note, *Political Gerrymandering 2000-2008: "A Self-Limiting Enterprise"?*, 122 Harv. L. Rev. 1467, 1468-69 (2009) (evaluating partisan gerrymanders for years 2000-2008). These relatively unsophisticated redistricting efforts may be labeled as "dummymanders" today. *See* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium* 183-84 (Peter Galderisi ed., 2005). But yesterday's dummymanders have given way to today's unerringly effective partisan gerrymanders.

After the 2010 Census, partisans used sophisticated technology and newly-available data to redraw congressional and state legislative districts en masse. As a whole, the new maps displayed a sharp increase in partisan bias when compared to the prior cycle's maps, and have been unresponsive to voter preferences

throughout the course of the decade.[3] Anthony J. McGann et al., *Gerrymandering in America* 56-97 (2016). *Amici* made this observation to the Court last term, and the 2018 results confirm their analysis. *See* Brief for Political Science Professors as *Amici Curiae*, *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018). This problem of responsiveness has affected voters affiliated with both parties over the course of the decade.

In the 2018 midterm election, the surge in voter enthusiasm and turnout for Democratic candidates did not translate into Democratic electoral gains in States with extreme partisan gerrymanders.[4] In many States across the country, voter preferences for Democrats resulted in Democratic electoral gains in statewide elections but few gains in district-level elections under

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[3] Responsiveness "measures the degree to which the makeup of a legislative chamber will change when voter preferences change." Charles S. Bullock III, *Redistricting: The Most Political Activity in America* 110 (2010). When a map is responsive, a party will win more seats as it wins a larger share of votes. *Id.* Classic partisan redistricting techniques, such as packing or cracking voters of the opposing party, reduce responsiveness by ensuring that control of the district will not change, even if substantial numbers of voters change partisan preferences in an election year. *Id.* at 21.

[4] More than 49.3% of the voting-eligible population cast ballots in the 2018 midterm elections. *November General Election Turnout Rates*, United States Election Project, http://bit.ly/2tNijOt (last updated Dec. 14, 2018). An estimated 116 million Americans turned out to vote, marking the first time ever that midterm election turnout exceeded 100 million voters. Camila Domonoske, *A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High*, NPR, Nov. 8, 2018, https://n.pr/2GZB9JI.

gerrymandered congressional or state legislative maps.

A. Gerrymandered Districts Diluted Votes in the 2018 "Wave" Elections

In 2018, congressional Democrats won the national popular vote margin by 8.6 percentage points over Republicans. *See* Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5. Notwithstanding the 2018 Democratic wave, the election results in many districts were unresponsive to voter preferences. Under responsive maps, higher vote shares in favor of candidates of one party translate into gains in seat shares for that party.[5] But in 2018, as the percentage of the vote for Democratic candidates rose, the seat distribution under gerrymandered maps largely remained static. In fact, under many of these gerrymandered maps, despite significant fluctuations in party vote share since 2010, seat shares have not changed. The election results in Wisconsin, Ohio, Michigan, and North Carolina provide evidence of this phenomenon, while the results in Pennsylvania, in which

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[5] Estimates indicate that a national 1-point change in the vote for a party should result in about a 2-point change in the percentage of seats for that party. Michael P. McDonald, *Seats to Votes Ratios in the United States* (2009) (unpublished paper) (on file with the Jack W. Peltason Center for the Study of Democracy at the University of California, Irvine), http://bit.ly/2EhMB0B; *see also* Laura Royden, Michael Li & Yurij Rudensky, Brennan Ctr. for Justice, *Extreme Gerrymandering & the 2018 Midterm* 6 (2018), http://bit.ly/2Su4NJq.

non-politicians redrew gerrymandered lines, provide a counter-example.

Wisconsin. In Wisconsin, Democrats received 205,000 more votes than Republican candidates, but won only 36 of the 99 available seats in the State Assembly. *See 2018 Fall Election Results*, Wis. Elections Comm'n, Nov. 6, 2018, http://bit.ly/2St3hXI. Republicans have held nearly two-thirds of state legislative seats in Wisconsin since the 2011 passage of Act 43, Wisconsin's redistricting plan. Democrats have held only about one third of assembly seats since 2011—between 35 and 39 seats out of 99—despite receiving statewide vote shares between 48% and 53%. *See Gill* v. *Whitford*, 138 S. Ct. 1916, 1923 (2018); *2016 Fall Election Results*, Wis. Elections Comm'n, Nov. 8, 2016, http://bit.ly/2Eprcmf; Phillip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, Wash. Post, Dec. 4, 2018, https://wapo.st/2Sq5Ppz.

While Democrats were unable to make material gains in the gerrymandered State Assembly in 2018, Democratic candidates in statewide elections for Governor and Attorney General defeated Republican incumbents, and a Democratic Senator and Secretary of State were reelected. Bump, *supra*. For the first time since 1982, Democrats in Wisconsin swept all five statewide contests for executive offices. John Nichols, *The States That Elected Trump Have Turned Against Him*, The Nation, Nov. 8, 2018, http://bit.ly/2Xquf6j. Yet

at the same time Democrats gained only one seat in the gerrymandered State Assembly. Bump, *supra*.[6]

Ohio. In Ohio, Democrats won only four of 16 congressional seats despite receiving nearly 50% of the vote. Rich Exner, *A record turnout, big night for the GOP and gerrymandering's impact: Numbers takeaways from Ohio election 2018*, Cleveland.com, Nov. 7, 2018, http://bit.ly/2Srcmk4.

This result is all the more striking given that in 2018, Democrats had improved their performance over the 2016 election cycle by approximately five percentage points, but won only the same four seats that they won in 2016. In fact, notwithstanding the Democratic wave in 2018, the results under the Ohio congressional districts has remained unchanged in every election this decade—the State's congressional gerrymander has proved to be durable enough to absorb the electoral shifts and preserve the seat share of the mapmakers' preferred party.[7] In 2018, the four Ohio districts packed with Democratic voters voted for Democrats by a combined 71% to 29%, while Republicans cracked the

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[6] In Wisconsin's neighboring State of Minnesota, by contrast, where Democrats won statewide races and the popular vote statewide, the Democratic Party won 77 seats in the Minnesota House to the Republicans' 57 seats. *See* Briana Bierbach, *DFL Retakes Minnesota House; MN Senate Stays with GOP*, MPR News, Nov. 6, 2018, http://bit.ly/2XpFImr.

[7] Indeed, Democrats are not even expected to compete for a fifth congressional seat unless their statewide vote share reaches 52.78%, representing a 28.64% jump from the minimum of 26.07% required to gain four seats. Royden, Li & Rudensky, *supra*.

remaining Democratic voters and won their 12 seats by a combined 59% to 40%. Exner, *supra*.

Michigan. In Michigan, Democrats won a majority in vote share in the State Senate, but won only 16 seats, compared to 22 for Republicans. David A. Lieb, *Election Shows How Gerrymandering is Difficult to Overcome*, U.S. News & World Report, Nov. 17, 2018, http://bit.ly/2BRSDVh; Jonathan Oosting, *Why Democrats Won More Votes, But GOP Won More Legislative Seats in Michigan*, Detroit News, Nov. 20, 2018, http://bit.ly/2GMEL2z. In statewide races—thereby unaffected by gerrymandering—Democratic candidates won the previously Republican-held offices of Governor, Secretary of State, and Attorney General, and Democratic Senator Debbie Stabenow was reelected. *See 2018 Michigan Election Results*, Mich. Dep't of State, Nov. 26, 2018, http://bit.ly/2018MichiganElections.

Biased Michigan results have remained durable throughout the decade. The 2018 midterm election marked the third straight election in which the two parties had near-equal splits of vote share, but the party responsible for the gerrymander retained control of both chambers of the Michigan Legislature. Tom Perkins, *Once again, Michigan Dems get more state Senate and House votes, but GOP keeps power*, Detroit MetroTimes, Nov. 7, 2018, http://bit.ly/2H8MqHE; *Quantifying the Level of Gerrymandering in Michigan*, Citizens Research Council of Mich. (June 2018), http://bit.ly/2Nyzn3O.

Pennsylvania and North Carolina. The effect of partisan gerrymandering in 2018 is especially apparent when comparing the results in Pennsylvania and North Carolina. At the beginning of the decade, Republicans drew congressional maps in both States to benefit Republican candidates, and the results under both maps exhibited similar partisan bias: In Pennsylvania, Democrats won only the same five seats (out of 18), or 27.7% of the seats, in 2012, 2014, and 2016—despite receiving between 44.46% and 50.28% of the popular vote in each of those years. *See* Karen L. Haas, Clerk of the United States House of Representatives, ***Election Statistics, 1920 to Present***, http://bit.ly/ElectionStats1920-Present (follow links to years 2012, 2014, and 2016). Similarly, in North Carolina, Democrats won only the same three seats (out of 13), or about 23% of the seats, in 2014 and 2016, despite receiving between 43.95% and 46.6% of the votes in those years.[8] *Id.*

In the 2018 election, however, the Pennsylvania congressional map was replaced with a new court-drawn map. Democrats in Pennsylvania received 55.5% of the two-party vote, and now hold seats in nine of the State's 18 districts. Samuel S.-H. Wang, ***Pennsylvania 2018 Detailed Results***, Princeton Gerrymandering Project, http://bit.ly/2BVrm4a (click on Pennsylvania); Lieb, *supra*. As in Pennsylvania, Democratic

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[8] In 2012, Democrats in North Carolina won a fourth seat 50.1% to 49.9%. *See* Haas, *supra*.

candidates in North Carolina performed well statewide[9]—Democratic candidates won every statewide election on the ballot. But Democratic congressional candidates have won only three seats (out of 13)—the same three seats they won in previous years. Lieb, *supra*.[10]

B. Both Parties Relied on Modern Gerrymanders to Dilute the Votes of Opposing Party Voters

Republicans and Democrats alike deploy modern gerrymanders to dilute the votes of individual voters in gerrymandered districts. In States in which Democrats created gerrymanders, they were able to hold and even gain seats during the 2014 and 2016 election cycles, notwithstanding Republican gains in the popular vote in those years.

For example, in Maryland, Republicans have controlled only one of Maryland's eight congressional seats (or 12.5% of the seats) since 2011. Republicans

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[9] Democrats in North Carolina earned 48.3% of the total vote in 2018, which represented an increase over their vote share in the 2014 and 2016 elections. Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. Times, Nov. 29, 2018, https://nyti.ms/2Stpx3T; Haas, *supra*.

[10] Based on allegations and evidence of absentee-ballot fraud, North Carolina's Board of Elections did not certify the 2018 results of the McCready/Harris congressional race in North Carolina's Ninth District and has ordered a new election for that District. Amy Gardner, *N.C. board declares a new election in contested House race after the GOP candidate admitted he was mistaken in his testimony*, Feb. 21, 2019, https://wapo.st/2Tt0aUi.

have not won more than one congressional seat since 2011 despite wide swings in the congressional statewide Republican vote share in that time period ranging from 32.27% in the 2018 Democratic wave election to 41.36% in the 2014 Republican wave election. *2018 Maryland Election Results*, N.Y. Times, Jan. 28, 2019, https://nyti.ms/2EyvVmD.

The voters in Maryland's Sixth Congressional District had elected a Republican for the previous two decades before the enactment of the current maps. Under the new maps, Democrats were able to defeat the Republican incumbent, Roscoe Bartlett, who had held the seat since 1992. While Bartlett won the Sixth District with a 22.28% margin in 2010 (the year before the gerrymander), he lost by a 20.9% margin in 2012, the first election under the current maps. *See* Maryland State Board of Elections, https://bit.ly/2Tmfbar (2010 results), https://bit.ly/2T5ytlc (2012 results). Since then, Democrats consistently have won in the Sixth District despite two Republican wave elections in 2014 and 2016. *2016 Maryland House Election Results*, N.Y. Times, Aug. 1, 2017, https://nyti.ms/2GKPtGH.

II. PARTISANS CAN EXPLOIT NEW TECHNOLOGY AND VOTER DATA TO CREATE PARTISAN GERRYMANDERS THAT ARE MORE PRECISE AND DURABLE THAN EVER BEFORE

Modern partisan gerrymanders resist wave elections because of three phenomena, not all present in

prior redistricting cycles. *First*, partisan affiliation (self-identification with a party) and voter behavior are highly stable and predictable, making the partisan affiliation of voters a dependable trait on which mapmakers can rely. *Second*, a wealth of granular voter data now available to mapmakers enables them to predict voter behavior with an unprecedented degree of accuracy. *Third*, new and advanced statistical and map drawing applications enable partisans to translate voting data and analysis into districts that maximize partisan advantage.

A. Partisan Identity Is Highly Stable and Predictable

As a general matter—and despite suggestions to the contrary[11]—the partisan identity of voters is highly stable and mapmakers can use data about partisan identity to predict voter behavior with a very high degree of confidence from election to election.[12]

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[11] *See* Br. of Amicus Curiae Nat'l Republican Redistricting Trust in Supp. of Appellants 28-29 ("[V]oter choices fluctuate, and party affiliation is not enough to tie the interests of a group to the personal interests of voters for preferred candidates."); Br. of Amicus Curiae Nat'l Republican Cong. Comm. ("NRCC") in Supp. of Appellants 21 ("[V]oters' partisanship, partisan affiliation, political positions, and electoral choices are not immutable.").

[12] The National Science Foundation funded a panel survey that re-interviewed 9,500 voters in 2010 and 2014. *See* Brian Schaffner & Stephen Ansolabehere, *2010-2014 Cooperative Congressional Election Study Panel Survey (Version 10)*, Harvard Dataverse (June 10, 2015), http://bit.ly/2BUbeA5. The results provide an example of the high stability of partisan identity among voters: only 1% of respondents who identified as Democrats in

Voter predictability enables mapmakers to design maps that survive wave elections, which are largely driven by differential turnout between voters who identify with each party. Daron Shaw, *If Everyone Votes Their Party, Why Do Presidential Election Outcomes Vary So Much?*, 10 The Forum 3 (2012).[13]

Social science research shows that voters are "socialized" into a particular party at an early age, and partisan affiliation tends to harden in early adulthood. *See* Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Hearts and Minds* 6, 10-11 (2002). Once formed, these "identities are enduring features of citizens' self-conceptions," and "remain intact during peaks and lulls in party competition." *Id.* at 4-5. And an individual's partisan identification is, on average, more enduring and stable than his or her core values or positions on political issues. Paul Goren, *Party Identification and Core Political Values*, 49 Am. J. Pol. Sci.

2010 identified as Republicans in 2014 and only 1% of respondents who identified as Republicans in 2010 shifted to Democrats in 2014. *Id.*

[13] In 2018, for example, registered Democrats and Democratic-leaning independents—including groups that often skip midterms, such as youth voters—showed up to the polls in significantly higher numbers than Republicans. Approximately 51.7 million Democrats voted in midterm House races in 2018, compared to 47.4 million Republicans. In 13 States, Democratic vote counts surpassed those of the 2016 presidential election. Dan Keating & Kate Rabinowitz, *Turnout was high for a midterm and even rivaled a presidential election*, Wash. Post, Nov. 8, 2018, https://wapo.st/2U6Gzq4; Abby Vesoulis, *The 2018 Elections Saw Record Midterm Turnout*, Time Magazine, Nov. 13, 2018, https://bit.ly/2sqvbJq.

882, 891-94 (2005); Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds: Party Identification and Policy Preferences in the American Electorate*, 50 Am. J. Pol. Sci. 471, 473 (2006); *see also* Alexander G. Theodoridis, *Me, Myself, and (I), (D), or (R)? Partisanship and Political Cognition through the Lens of Implicit Identity*, 79 J. of Pol. 1253 (Oct. 2017).

Partisan attachment is a stronger predictor of voting behavior than gender, class, religion, and often race. Green, *Partisan Hearts and Minds*, *supra*, at 3; *see also* Stephen Ansolabehere & Bernard L. Fraga, *Do Americans Prefer Coethnic Representation? The Impact of Race on House Incumbent Evaluations*, 68 Stan. L. Rev. 1553, 1589 (2016). Thus, the distribution of partisan identities among the electorate "provides powerful clues as to how elections will be decided." Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Stability: Evidence from Aggregate Data*, *in Controversies in Voting Behavior* 356, 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001).

In recent years, the predictive power of partisan identity has only increased. Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. Pol. 1 (2009). Based on an analysis of American National Election Studies time-series data conducted in 2015, the "observed rate of Americans voting for a different party across successive presidential elections has never been lower," indicating that each party has a reliable and predictable "base of party support that is

less responsive to short-term forces." Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 365, 379-81 (2017). A Pew Research Report notes that "[t]oday, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican." Pew Research Ctr., *Political Polarization in the American Public* 6 (2014), https://pewrsr.ch/2Exx0v4.

Political scientists also have detected an increase in the *intensity* of party preferences within the electorate. Although enthusiasm for partisans' own parties has remained relatively stable over time, empirical evidence shows that "partisans like their opponents less and less." Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 Pub. Opinion Q. 405, 412-15 (2012); *see also* Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016).

Increases in intensity across parties since the 1980s have two important implications: Today's partisans are less willing "to treat the actions of partisan opponents as legitimate," and today's partisan identification "is all encompassing and affects behavior in both political and nonpolitical contexts." Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690, 691, 705 (2015). Independent voters are not immune from the effects of partisan intensity, given that "[m]ost of those who identify as

independents lean toward a party." Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015), https://pewrsr.ch/2Exh4ci. Voters who identify as independents, but who lean towards a party, generally exhibit policy opinions and voting behavior similar to outright partisans. David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, 10 The Forum 1, 17 (2012). Furthermore, independents who lean to one party or another "are far more likely to cite negative than positive factors for why they form their loose partisan ties"—that is, independent voters are likely to lean Democratic or Republican because they view the other party's policies as harmful to the country. *See* Pew Research Ctr., *Partisanship and Political Animosity in 2016*, at 6 (2016), https://pewrsr.ch/2NtK2MV.

One metric that coincides with this shift towards increased and stable partisanship is the decline in split-ticket voting.[14] While split-ticket voting was commonly observed in the 1970s and 1980s, the 2012 election featured record high numbers of voters engaged in straight-ticket voting—that is, voting for the candidate for President from one party and voting for House or Senate members from the same party. *See* Abramowitz & Webster, *supra*, at 12, 13. The rate of straight-ticket voting in the presidential and House

[14] Split-ticket voting refers to the phenomenon of a voter opting for the candidate from one party in the presidential election and the candidate of another party in the House or Senate elections.

elections in 2012 was approximately 89%, up from 70% in 1972, resulting in a relationship between presidential and House election outcomes that was three times stronger than it was in the 1970s. *Id.* at 13, 18. The rate of straight-ticket voting in the presidential and Senate elections in 2012 was approximately 90%, resulting in a relationship between presidential and Senate election outcomes that was similarly much stronger than it was in the 1970s. *Id.* at 13, 19. Nationalized, party-line voting behavior also influences elections for state and local office. Daniel J. Hopkins, *The Increasingly United States: How and Why American Political Behavior Nationalized* (University of Chicago Press 2018).

The decline in split-ticket voting also coincides with a decline in split *outcomes* (*i.e.*, congressional districts carried by a presidential candidate from one party, but won by a House candidate of the opposite party), culminating in 2016 with only 8% of districts electing a House member from a different party than their preferred presidential candidate, and zero splits in outcome between the Senate and presidential races. *See* David Hawkings, *The Incredible Shrinking Split Tickets*, Roll Call, Feb. 1, 2017, http://bit.ly/2IBrtHS.[15] In fact, 2016 marked the first election since 1914—when the country began electing Senators by popular

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[15] Due to the sharp decline of split-ticket voting, knowledge of top-ticket voting is becoming an increasingly useful proxy when assessing how people will vote in a legislative race, further enhancing the reliability of predictive voting models, discussed *infra* at Section II.B.

vote—in which no State had divided outcomes between Senate and presidential votes. Harry Enten, *There Were No Purple* States On Tuesday*, FiveThirtyEight, Nov. 10, 2016, https://53eig.ht/2XoDDHk.

The concurrent phenomena of stable partisan identity as an indicator of voting preferences, intensifying partisanship, and the decline of ticket-splitting allow mapmakers to rely on the predictability of voter behavior as never before when working to maximize the partisan bias and durability of gerrymanders.

B. Publicly-Available Voter Data Enables Partisans to Predict Voting Behavior at a Granular Level

Today's mapmakers have access to more voter data about partisan affiliation than they did just a few years ago. Data gathering has become so precise that voters can be individually targeted with customized messages. *See* Dan Patterson, *How campaigns use big data tools to micro-target voters*, CBS News, Nov. 6, 2018, https://cbsn.ws/2BTWKjp. Data brokers like Civis Analytics advertise their ability to create a "scientific understanding of the voter" to calculate the "likelihood for a certain behavior of a voter based on multiple characteristics like income, age, and geography." Civis Analytics, *Political Campaign Tools—Running a Digital Campaign* 14 (2018), http://bit.ly/2SoTWjX.

Data brokers are experienced in creating "augmented voter files," or extensive public and commercial

datasets of voter data. *See* Eitan D. Hersh, *Hacking the Electorate: How Campaigns Perceive Voters* 67, 69-72 (2015). These voter files combine traditional voter registration records with substantial additional information, such as "data from frequent-buyer cards at supermarkets and pharmacies, hunting- and fishing-license registries, catalog- and magazine-subscription lists, membership rolls from unions, professional associations, and advocacy groups." Chris Evans, *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 Minn. J.L. Sci. & Tech. 867, 883-84 (2012).

The 2018 elections demonstrate the power of using voter records, data, social media and even credit reports to micro-target and track voters. Patterson, *supra*. The 2018 election was marked by unprecedented use of social media information to predict and influence voter behavior. Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. Times, Dec. 17, 2018, https://nyti.ms/2SsqlpR. During the 2018 Georgia governor's race, for example, candidate Stacey Abrams eschewed traditional, broad targeting tactics, choosing instead to target an "untapped market" of 90,000 voters that her campaign identified as "persuadable" based on collected data. From the outset, she "targeted her message, the mechanics of her campaign and much of her nearly $17 million fundraising haul" on these "irregular voters." Bill Barrow, *Inside Stacey Abrams' strategy to mobilize Georgia voters*, AP News, Oct. 12, 2018, http://bit.ly/2NqsIbN.

The quantity and granularity of publicly-available voter data, and improvements in data analytics, will allow mapmakers to assess and predict partisan affiliation at both the individual and aggregate levels more accurately than ever. Data broker Civis Analytics correctly forecasted the winner in 383 out of 394 *contested* races (97%) in 2018 and its estimate of the national popular vote was accurate to within tenths of a percent. Civis Analytics, *Data science and the midterm elections: breaking down the results*, Nov. 28, 2018, http://bit.ly/2XpRLjB. By inputting proprietary voter data and existing Census and consumer data into advanced statistical models and predictive analytics, political campaigns can determine partisan affiliation at a level of precision that did not exist in even the recent past.

C. Advanced Analytics and New Statistical Techniques Enable Partisans to Draw Districts for Maximum Partisan Advantage

Advanced analytics and new statistical techniques have allowed mapmakers to optimize voter data to create durable gerrymanders capable of stopping and even reversing the effects of "wave" election years. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, McKinsey Global Institute (May 2011), https://mck.co/2VhvlPC. Legislators are "now more knowledgeable about the need to avoid drawing a *dummymander* . . . than they were in past decades," and mapmakers have "gained

more technical sophistication in mapping historical election data into proposed districts, and then checking to make sure that they do not make a *dummymandering* kind of mistake." Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 278 (2018), http://bit.ly/2BTrnpj; *cf.* Editorial, *Gerrymandering failed for GOP in state Senate loss*, Buff. News, Nov. 12, 2018, http://bit.ly/2U97NfZ.

During the 2010 redistricting cycle, mapmakers had access not only to expansive data sets that allowed them to predict voter behavior accurately, but to new and/or improved redistricting software, such as AutoBound, developed by Citigate GIS; Maptitude, developed by Caliper Corporation; and ArcGIS, developed by ESRI. This type of software, combined with modern statistical techniques, allowed mapmakers to draw durably biased maps. Users could quickly and easily develop redistricting plans based on customizable data sets, including data that predict the projected partisan affiliation of voters. *See, e.g.*, AutoBound, http://bit.ly/2TnXxU0.

Mapmakers aligned with both Republicans and Democrats used these techniques and technologies to design maps in the most recent redistricting cycle. For example, in North Carolina's redistricting process, Maptitude was used to collect past election data and to "'pursue partisan advantage without sacrificing compliance with traditional districting criteria.'" *See Common Cause* v. *Rucho*, 318 F. Supp. 3d 777, 883

(M.D.N.C. 2018) (quoting *Whitford* v. *Gill*, 218 F. Supp. 3d 837, 889 (W.D. Wis. 2016)). The maps that emerged from North Carolina's multiple rounds of redistricting this cycle, including court-ordered redistricting, have substantial and durable partisan bias and preserved the Republican Party's 10-3 partisan advantage in North Carolina's congressional delegation, despite a ratio of registered Republicans to Democrats of 0.7 to 1 in 2012 in the electorate. *See id.* at 869; Royden, Li & Rudensky, *supra*, at 1, 6, 25 (2018); Voter Registration Statistics, N.C. St. Board Elections & Ethics Enforcement, http://bit.ly/2TkJ0rZ.

Similarly, in Maryland, the Democratic Party leadership retained a consultant who used Maptitude to create different hypothetical districts and gauge potential election results for each configuration based on precinct-level voter registration, voter turnout, and election results. *Benisek* v. *Lamone*, 348 F. Supp. 3d 493, 517-18 (D. Md. 2018). Under the maps that emerged from this process, Democrats won seven out of eight of Maryland's congressional districts, capturing a historically safe Republican seat in the Sixth Congressional District by 21 points. *Id.* at 501-02.

While historical mapmakers may have experimented by drafting three or four maps, now they can use software to generate tens of thousands of possibilities, all precisely engineered based on hyperlocal voting data, allowing partisan actors to select the single map that exhibits the greatest partisan advantage. These tools enable mapmakers to reduce the risk that they have drawn anything less than a

maximally-partisan map, which in turn enable them to create more durable and aggressive partisan gerrymanders.

III. IN THE ABSENCE OF JUDICIAL INTERVENTION, PARTISAN GERRYMANDERS WILL ONLY BECOME MORE DURABLE AND MORE RESISTANT TO WAVE ELECTIONS

As powerful as current methods are, predictive modeling and other large-scale analytical tools will become more potent in the near future. New technologies and data sources, such as augmented voter files and modern machine-learning algorithms, will make it easier for mapmakers to predict the decision-making habits of Americans in a more nuanced and accurate way than ever before. When applied to the process of redistricting, new data analysis techniques will enable partisan mapmakers to create gerrymanders that are even more biased, more durable, and more capable of withstanding the effects of "wave" election years.

A. Partisans Will Deploy Even More Advanced Data Analytics to Dilute the Votes of Opposition Party Voters

Data analytics have grown more potent in recent times due to two important developments: (1) greater commercial availability of compiled data about Americans, and (2) more powerful and precise data analysis

techniques. Like their corporate counterparts, political parties are leveraging these advancements.

First, political data brokers and vendors are growing increasingly sophisticated in their ability to collect public voter information and create augmented voter files. *See supra* Section II.B.; David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. Econ. Persp. 51 (2014). These augmented files have emerged only recently in part because large-scale, public voter information was not available until the mid-2000s. *See* Hersh, *supra*, at 67. Candidates in 2022 will be able to target their campaign efforts and micro-targeted campaign appeals to the same voters and using the same data and the same prediction of their behavior as their party did in drawing the new district lines for that election.

In future redistricting cycles, augmented voter files will become powerful mapmaking tools because they will allow mapmakers to predict voting patterns at an individualized level. For example, private vendors can predict a voter's race with reasonable accuracy by using the voter's name and the general racial composition of his or her neighborhood. *Id.* at 127. Such accurate, individualized data at the fingertips of mapmakers will only serve to enhance mapmakers' current abilities to create district maps with extreme partisan bias.

Second, in addition to having access to a greater breadth of information, political vendors are able to

deploy data analysis techniques involving machine-learning, which will allow them to recognize previously undiscovered individual voting patterns. *See supra* Section II.A. "Machine learning" refers to the ability of a computer to learn from a data set without relying only on a set of pre-existing rules. *See* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147, 1156-57 (2017). Modern machine-learning algorithms outperform traditional methods in predictive accuracy because the algorithms are able to apply numerous variables to large volumes of data in order to make inferences about the behavior of individuals. *See id.* at 1157. In addition, the algorithm can determine by itself which variables are relevant for predictive purposes, whereas traditional statistical techniques only allowed scientific researchers to make predictions by designing models based on rigid, pre-defined assumptions. *See id.*

In past campaigns and redistricting efforts, a political party may not have used anything more than basic regression techniques to predict voter behavior. *See* Nickerson & Rogers, *supra*, at 59. However, basic regression techniques are of limited utility when confronted with complicated relationships involving a large number of variables. *See id.* at 59-60. Additionally, in the context of voter behavior, relationships between variables are often nonlinear and context-dependent. *Id.* at 59-61. For example, older voters tend to turn out at a higher rate than younger ones, but this relationship peaks between ages 60 and 70, and for voters older than 70, the turnout gap between them

and younger voters begins to narrow. *Id.* at 61. Because of such nuances, past campaigns had difficulty predicting individual voter behavior with accuracy. *See id.* at 59-61.

Modern machine-learning algorithms, however, do not suffer from these drawbacks. Machine-learning algorithms will be better able to process nonlinear nuances within a voting model, such as the above-mentioned relationship between voting and age, and are able to do so with less reliance on the skill of any particular analyst. *See id.*; Olivia Guest, Frank J. Kanayet, and Bradley C. Love, *Cognitive Capacity Limits and Electoral Districting* (Dec. 12, 2018), http://bit.ly/2TlmXBm.

B. "Matched-Slice" Gerrymandering Schemes Designed to Maximize Partisan Bias Will Become Possible in the Next Round of Redistricting

The availability of augmented voter files and analytical tools will soon enable mapmakers to prepare maps that are far more biased and durable than historical gerrymanders—including even those drawn during the 2010 redistricting cycle.

A theoretical technique called "matched-slice" gerrymandering can draw election maps in order to maximize partisan bias based on accurate, individualized knowledge of voter behavior. *See* Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on*

Partisan Gerrymanders, 59 William & Mary L. Rev. 1601, 1650-51 (2018) (citing John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 Am. Econ. Rev. 113, 126, 134-35 (2008)). In a matched-slice gerrymander, a district is divided optimally from the mapmakers' perspective if each geographic subdivision within the district contains matched-slice representations—*i.e.*, highly partisan Republican voters are paired with highly partisan Democrat voters, center-right Republicans are paired with center-left Democrats, and so on.

Matched-slicing strategies are optimal because they neutralize a party's most reliable voters. For example, if a group of reliable Republican voters resides in one particular area, a gerrymander could dilute their power by drawing a map such that the strong Republican base is split up, with each "slice" of strong Republicans being matched with a slightly larger and equally fervent group of reliable Democratic voters. Over time, this "matched-slice" strategy will produce optimal partisan results because it most efficiently distributes a party's base of reliable voters. *See* Friedman & Holden, *Optimal Gerrymandering*, 98 Am. Econ. Rev. at 126; *see also* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. Chi. L. Rev. 553, 567 (2011).

Historically, partisan redistricting efforts lacked sufficient individualized voter data and the ability to process that data for use in matched-slice strategies. *See* Elmendorf, *supra*, at 1650-51. Instead, mapmakers relied on broader, geographic-based proxies, such as

ward-level data of voter preferences. *See id.*[16] With the proliferation of individualized voter data, however, future mapmakers using new techniques such as the matched-slice strategy will be increasingly capable of forming districts designed to entrench and expand partisan bias to a degree sufficient to withstand "wave" election years with even higher vote differentials than 2018.

IV. SOCIAL SCIENCE PROVIDES OBJECTIVE MEASURES AND RELIABLE TOOLS THAT COURTS COULD USE TO EVALUATE PARTISAN BIAS IN MAPS

Even as data and technology have been used to create maps with extreme and durable partisan bias, these same tools have been and can continue to be a part of the solution to extreme partisan gerrymandering. With the aid of expert witnesses, courts can use

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[16] For example, a district may contain a simple 52% majority of voters siding with the party in control of the mapmaking process, but that majority may be composed of a mix of strong partisan voters and more moderate voters. This distribution is far less reliable than an "ideal" district containing a 52% majority of only strong partisan voters because the former, "mixed" district is subject to swing voters. *See* Cox & Holden, *supra*, at 567. Historically, it was not possible to ensure this distribution reliably because of difficulty in obtaining sufficiently robust and precise data on individual voters. *See* Nickerson & Rogers, *supra*, at 55-56. Instead, to combat this distribution, historical mapmakers would have to either accept the risk of swing voters or inefficiently move more partisan voters into districts to ensure that the district votes for the mapmaker's party. *See* Cox & Holden, *supra*, at 565-67.

advanced computer modeling techniques to identify partisan gerrymanders.

For example, modern software and computers can randomly generate a large number of alternative redistricting plans that adhere to traditional redistricting criteria and then compare the computer-generated alternatives to existing plan. If the existing plan is more biased than all or almost all of the plans the computer has drawn, lower courts can conclude that the traditional criteria do not explain the plan. *See* Daniel B. Magleby & Daniel Mosesson, *A New Approach for Developing Neutral Redistricting Plans*, 26 Pol. Analysis 147-67 (2018); Jowei Chen & David Cottrell, *Evaluating partisan gains from Congressional gerrymandering: using computer simulations to estimate the effect of gerrymandering in the U.S. House*, 44 Electoral Stud. 329 (2016); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351 (2016). In recent years, courts have utilized such innovative, large-scale analytical tools to assess partisan bias in maps. *See, e.g.*, *League of Women Voters of Mich.* v. *Johnson*, No. 2:17-cv-14148, 2018 WL 6257476, at *7-9 (E.D. Mich. Nov. 30, 2018); *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *City of Greensboro* v. *Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 949 (M.D.N.C. 2017).

A variant of these modeling techniques is the Markov Chain technique, which involves making billions of small and randomized adjustments to an existing map.

Maria Chikina, Alan Frieze & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. Nat'l Acad. Sci. 2860 (2017); Benjamin Fifield, Michael Higgins, Kosuke Imai & Alexander Tarr, *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (May 24, 2018) (unpublished manuscript), http://bit.ly/2VqCDRx. If the vast majority of those random adjustments result in maps that exhibit a reduction in partisan bias when compared to the existing map, they can support a conclusion that the original map is a partisan gerrymander.

Courts and litigants can use computer modeling techniques and social science tools to identify gerrymanders and to evaluate proposed remedial election plans. These tools have been vetted by scholars and political scientists and are generally regarded as objective, verifiable, and reliable mechanisms to assess partisan bias. This Court should set a standard allowing lower courts to use the many tools now available to identify constitutional violations.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court rule in favor of Appellees and affirm the judgment in Case Nos. 18-422 and 18-726.

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants

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QUESTIONS PRESENTED

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

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Interest of Amicus Curiae[1]

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. This case is of interest to the Foundation as it is concerned with protecting the sanctity and integrity of American elections and preserving the Constitutional balance of state control over their own elections. The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Additionally, one of the members of the Foundation's Board of Directors, Hans von Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002. Mr. von Spakovsky also served as a commissioner on the Federal Election Commission. The Foundation believes that this brief—exploring the Constitutional concerns implicated in the lower court's opinion—will aid in the Court's consideration of whether partisan gerrymandering claims are justiciable.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of briefs of *amici curiae*.

Summary of Argument

The authors of one of the constitutional provisions the challengers invoke here were elected under congressional districting plans that resulted in more political disparity than the challenged North Carolina plan presently before this Court.

Appellees point to recent North Carolina elections where the statewide vote results "were exceedingly close...[y]et Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and *ten* seats in 2014 and 2016." Motion to Affirm of League of Women Voters of North Carolina, *et al.* at 13 (emphasis in original). As the Foundation shows in the charts to follow, North Carolina's recent elections resulted in less "partisan asymmetry" than the elections under which the members of the 39th Congress were elected.

The Framers left the power to run elections to the states. This includes how the states divide their congressional districts. As this Court has "observed, redistricting 'involves lawmaking in its essential features and most important aspect.'" *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The lower court invited unlimited federal intrusion into a core constitutional power granted to the states without Congress expressly permitting the intrusion.

The issue of a workable standard for partisan gerrymandering claims has plagued this and the lower courts for decades. At its core, there simply is no workable standard. When the question of whether partisan gerrymandering claims are justiciable was

before this Court more than thirty years ago, Justice O'Connor simply found that "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Yet the lower court divined, "Partisan gerrymandering runs contrary to both the structure of the republican form of government embodied in the Constitution and fundamental individual rights preserved by the Bill of Rights." J.S. App. 90. Looking at the nation's history, the lower court's reasoning falls short.

Argument

The lower court considered and rejected the "contention that founding era practice indicates that the founding generation viewed some amount of partisan gerrymandering as constitutionally permissible." J.S. App. 111. According to the lower court,

> [E]ven if some degree of partisan gerrymandering had been acceptable during the founding era, that does not mean that the ratification of the Fourteenth Amendment and the incorporation of the First Amendment against the States did not subsequently render unconstitutional the drawing of district lines to frustrate the electoral power of supporters of a disfavored party.

J.S. App. 115. However, a historical look at the Congress that passed the Fourteenth Amendment casts doubt on the lower court's reasoning.

I. The Original Intent of the Fourteenth Amendment Does Not Support Political Gerrymandering Causes of Action.

The original intent of the authors of the Fourteenth Amendment could hardly include a political gerrymandering cause of action. They were elected from districts with far greater disparity between statewide political preferences and the partisan composition of legislative delegations than those districts challenged here. The authors of the Fourteenth Amendment benefited from gerrymandered districts that, in one state, did not allow a single House representative from the opposing party despite statewide support approaching forty-nine percent. Districts that elected members to the 39th Congress that authored the Fourteenth Amendment were designed in a way that created overwhelming electoral dominance of one political party despite the other party having significant support in statewide elections.

The Common Cause Appellees refer to the challenged plan as "the most overt partisan gerrymander this Court has ever seen." Common Cause Motion to Affirm at 1. A simple analysis of the composition of the 39th Congress[2] in each state as compared to the

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[2] Biographical Directory of the United States Congress: 1774-present, *available at* http://bioguide.congress.gov. *See also*, Biographical Directory of the United States Congress 1774-2005, H. Doc. No. 108-222 at 170, *available at* https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf.

results of the 1864 Presidential election[3] in that state, shows that the disparity raised by the challengers here is mild compared to that of the district lines from the very Congress that authored the provision in the Constitution upon which they rely.

Indeed, in six states, Republicans held 100 percent of the seats in the House despite the Democratic candidate for President receiving over 40 percent of the popular vote in the state.

California

	Republican	Democrat
Representatives (39th Congress)	3	0
1864 Presidential Election, Popular Vote	58.6%	41.4%

Connecticut

	Republican	Democrat
Representatives (39th Congress)	4	0
1864 Presidential Election, Popular Vote	51.4%	48.6%

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[3] Results from the 1864 Presidential Election, The American Presidency Project, https://www.presidency.ucsb.edu/statistics/elections/1864.

Maine

	Republican	Democrat
Representatives (39th Congress)	5	0
1864 Presidential Election, Popular Vote	59.2%	40.8%

Michigan

	Republican	Democrat
Representatives (39th Congress)	6	0
1864 Presidential Election, Popular Vote	55.3%	44.7%

Minnesota

	Republican	Democrat
Representatives (39th Congress)	2	0
1864 Presidential Election, Popular Vote	59%	40.9%

New Hampshire

	Republican	Democrat
Representatives (39th Congress)	3	0
1864 Presidential Election, Popular Vote	52.6%	47.4%

In two states, Republicans held 100 percent of the seats despite the Democratic candidate for President receiving more than a quarter of the popular vote in the state.

Iowa

	Republican	Democrat
Representatives (39th Congress)	6	0
1864 Presidential Election, Popular Vote	64.1%	35.9%

Massachusetts

	Republican	Democrat
Representatives (39th Congress)	10	0
1864 Presidential Election, Popular Vote	72.2%	27.8%

In seven additional states, Republicans held the vast majority of the House seats despite the Democratic candidate for President receiving a significant percentage of the popular vote in the state, at times close to fifty percent.

Illinois

	Republican	Democrat
Representatives (39th Congress)	10 (plus one at-large member)	3
1864 Presidential Election, Popular Vote	54.4%	45.6%

Indiana

	Republican	Democrat
Representatives (39th Congress)	9	2
1864 Presidential Election, Popular Vote	53.5%	46.5%

Missouri

	Republican	Democrat
Representatives (39th Congress)	8	1
1864 Presidential Election, Popular Vote	69.7%	30.3%

New York

	Republican	Democrat
Representatives (39th Congress)	21	10
1864 Presidential Election, Popular Vote	50.5%	49.5%

Ohio

	Republican	Democrat
Representatives (39th Congress)	17	2
1864 Presidential Election, Popular Vote	56.4%	43.6%

Pennsylvania

	Republican	Democrat
Representatives (39th Congress)	15	9
1864 Presidential Election, Popular Vote	51.7%	48.3%

Wisconsin

	Republican	Democrat
Representatives (39th Congress)	5	1
1864 Presidential Election, Popular Vote	55.9	44.1

II. The Constitution Grants the States the Power Over Elections.

The power to regulate federal elections is directed by the Constitution. To the States, the Framers granted exclusively the authority to control who may vote in federal elections. *See* U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures).

With respect to *how* federal elections are conducted, the Framers divided authority between Con-

gress and the States. Under the Constitution's Election Clause, Congress may regulate the "Times, Places, or Manner" of holding federal elections. U.S. Const., Art. I, § 4, cl. 1. Congress's power to regulate *how* elections are held, however, is superior to the States' power to do the same only when they differ.

To be sure, the States' power of redistricting is not absolute. It is subject to certain constitutional and statutory standards, often involving systems prohibited by the Fifteenth Amendment or well-established Fourteenth Amendment protections. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment") and *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

III. Allowing a Federal Cause of Action Under the First and Fourteenth Amendments for Partisan Gerrymandering Upsets the Constitutional Balance.

The lower court's invalidation of North Carolina's redistricting plan, however, was not based on well-established constitutional principles. Instead, the lower court found that "the General Assembly sought to advance the interests of the Republican Party at the expense of the interests of non-Republican voters." J.S. App. 155. Stunningly, the League of Women Voter Appellees make it clear that they believe claims of partisan gerrymandering are justiciable because claims of

racial gerrymandering are justiciable. Motion to Affirm of League of Women Voters of North Carolina, *et al.* at 26 ("It is implausible, in particular, that racial vote dilution could be justiciable—under both the Voting Rights Act and the Constitution, *see, e.g., Rogers v. Lodge*, 458 U.S. 613 (1982)—while partisan vote dilution is not.").

However, as this Court has made plain recently, states have the general power to manage their own elections subject to *explicit* and *well defined* exceptions. In *Shelby County v. Holder*, this Court considered whether Section 4 of the Voting Rights Act of 1965, the formula by which covered jurisdictions were chosen for the Act's "preclearance" requirement for changes in voting procedures, was constitutional. 570 U.S. 529 (2013). Ultimately, the Court determined that Section 4 was unconstitutional. *Id.* at 557. In so finding, the Court acknowledged that Section 5 of the Voting Rights Act, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Id.* at 535.

It is clear that "[t]he Federal Government does not…have a general right to review and veto state enactments before they go into effect." *Shelby County*, 570 U.S. 529, 542. However, the circumstances of the era during which the Voting Rights Act was enacted merited the "uncommon exercise of congressional power," *id.* at 545 (quotations and citations omitted).

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem"—racial discrimination in voting. *Shelby County*, 570 U.S. at 534. "'The lesson of the great decisions of

the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 n.35 (1978) (quoting A. Bickel, The Morality of Consent 133 (1975)).

Indeed, such "strong medicine" was chosen in order "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Shelby County*, 570 U.S. at 535 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

But the "extraordinary measures" came with a price. As Judge Williams noted in his dissent in the D.C. Circuit case later reversed by the Supreme Court, "the federalism costs of § 5 are 'substantial.'" *Shelby County v. Holder*, 679 F.3d 848, 885 (2012) (J. Williams, dissenting) (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

In *Shelby County*, this Court considered "whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements." 570 U.S. 529, 536. While the Court acknowledged that "voting discrimination still exists[,]" *id.* at 536, it also acknowledged that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." 570 U.S. at 535.

There is no doubt that the federalism costs of shifting power away from the States and to the judiciary regarding redistricting are also substantial. The complaints of the Appellees of partisan disadvantage can hardly be said to describe an "extraordinary problem" akin to the racial discrimination that warranted the "unprecedented" measures of the Voting Rights Act. *Shelby County*, 570 U.S. at 534-35. The lower court's decision is an affront to the important federalist balance reaffirmed in *Shelby County* and should be rejected.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court of the Middle District of North Carolina

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INTEREST OF *AMICUS CURIAE*

Amicus curiae D. Theodore Rave is the George A. Butler Research Professor and Associate Professor of Law at the University of Houston Law Center. He is an expert in the areas of election law and public fiduciary law. *Amicus* has an interest in the proper interpretation of the constitutional limitations on legislative redistricting and their effects on governance. *Amicus* believes that the U.S. Constitution prohibits legislators from manipulating district lines to entrench themselves and their political allies and to punish their political opponents and that this Court is the only institution that can provide a remedy.[1]

SUMMARY OF ARGUMENT

In *Davis v. Bandemer*, 478 U.S. 109 (1986), this Court held that political gerrymandering claims are justiciable. A majority of this Court reaffirmed that holding in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). But in *Vieth*, several members of this Court raised legitimate concerns about whether the federal courts

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The law school employing *amicus* provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing this brief. Otherwise, no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

are well suited to police such an inherently political process as redistricting.

Reaffirming the justiciability of political gerrymandering claims and affirming the district court in this case will not inevitably involve the federal courts in supervising every redistricting decision. The purpose of this amicus brief is to explain how the Court can create incentives for states to adopt independent redistricting processes to which the federal courts can safely defer.

As this Court, the Framers, and foundational political theory have recognized, elected officials, such as Members of Congress and state legislators, are fiduciaries who have a duty to loyally serve the interests of the people they represent, not their own interests. This commitment to fiduciary government is embedded deep in the constitutional structure. But the process of redistricting is rife with conflicts of interest where incumbent legislators can manipulate the process to entrench themselves and their political allies—a breach of their fiduciary obligation.

Courts are no better at reviewing business judgments than political ones. But when faced with the analogous problem of self-dealing directors in corporate law, courts do not just throw up their hands and declare the whole matter nonjusticiable. Instead, corporate law creates a two-track system of judicial review. Decisions made by conflicted fiduciaries are subjected to exacting scrutiny, but corporate law creates a safe harbor for decisions made or ratified through independent processes. When conflicted directors run their decisions through

an independent process, the taint of self-dealing is cleansed, and reviewing courts can safely defer to the substantive outcome so long as they ensure that the process was independent.

Finding an unconstitutional political gerrymander in this case will not plunge the federal courts ever deeper into the political thicket if this Court creates a safe harbor for redistricting decisions made through independent processes. State legislatures are insufficiently independent from their co-partisans in Congress. But the threat of litigation and skeptical judicial review of districts drawn by conflicted state legislatures will create a powerful incentive for those legislatures to adopt independent processes—like the citizens redistricting commissions in Arizona and California—to engage in the complex and delicate task of redistricting without the temptation to manipulate district lines for partisan entrenchment. Courts can safely defer to the substantive redistricting decisions of these institutions and confine their review to ensuring that the process was fair and independent—a task for which courts are well suited.

If, however, the Court decides to overrule *Bandemer* and *Vieth*, the Court should limit its holding to *congressional* gerrymandering and not reach the justiciability of political gerrymandering claims involving *state* legislative districts. Neither this case nor *Lamone v. Benisek*, No. 18-726, involves state districts, and the contexts are sufficiently different that the Court should not reach the question here.

ARGUMENT

I. Reaffirming The Justiciability Of Political Gerrymandering Claims Will Not Require The Federal Courts To Review All Redistricting Decisions.

Appellants and their *amici* argue that recognizing the justiciability of political gerrymandering claims and affirming the district court here will require massive intervention by the federal courts in practically all redistricting. *See, e.g.*, Appellants' Br. at 55; State of Texas et al. Amicus Br. 1; American Civil Rights Union et al. Amicus Br. 14–16; Judicial Watch Inc. et al. Amicus Br. 7; Wisconsin State Senate et al. Amicus Br. 4, 10; Texas Representative Carl Issett Amicus Br. 20. This need not be the case. And it is not a reason to declare political gerrymandering a nonjusticiable political question. The Court can create incentives for states to adopt independent processes for redistricting decisions. And reviewing courts can defer to the redistricting decisions of sufficiently independent bodies, keeping self-dealing insiders from manipulating district lines and courts from needing to second-guess every redistricting decision.

A. Legislators Are Fiduciaries Who Should Not Manipulate District Lines To Entrench Themselves And Their Political Allies.

This Court, the Framers of the Constitution, and longstanding political theory all recognize that elected officials, such as Members of Congress and state legislators, are fiduciaries for the people they represent. This idea of "political trusteeship" has

ancient roots, dating back to Plato and Cicero, and was well accepted in England by the time of John Locke, who described the legislative power as "only a fiduciary power to act for certain ends." John Locke, *The Second Treatise of Civil Government* § 149 (J.W. Gough ed. 1946) (1690).[2] The Framers thought about government in fiduciary terms, and their intent to impose fiduciary obligations on public officials permeates the constitutional structure. *See generally* Gary Lawson & Guy Seidman, *"A Great Power of Attorney": Understanding the Fiduciary Constitution* (2017); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004). Indeed, the fiduciary theory of government was nearly universally accepted by proponents and opponents of the Constitution alike during the ratification debates.[3] Natelson, *supra*, at

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[2] For accounts of how deeply the fiduciary model of government runs throughout history, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699, 708–09 (2013); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 123–25 (2006); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration From the Reign of Trajan*, 35 U. Rich. L. Rev. 191, 211–32 (2001).

[3] Noah Webster was the lone dissenter from the idea that public officials acted in a fiduciary capacity. *See* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 245 n.18 (2007). As James Madison explained in *The Federalist No. 46*, "The federal and State governments are in fact but different agents and trustees of the people." Similarly, several state constitutions at the time of the Framing explicitly recognized that the delegation of power from the people to government officials imposed fiduciary obligations

1086. And this Court recognized in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013), that elected officials are "agents of the people" and owe them "a fiduciary obligation."

Like private-law fiduciaries, legislators bear a duty of loyalty to those they represent. Thus they cannot put their own interests ahead of the interests of the people they represent. That is, after all, what it means to be a fiduciary. Legislators breach their duty of loyalty when they manipulate the machinery of democracy to entrench themselves and their political allies in power and frustrate potential challengers. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 713–19 (2013).

The conflicts of interests in redistricting are well-recognized. Indeed, the process is often described as representatives picking their voters instead of "the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). Reviewing courts should be skeptical when fiduciary legislators act in the face of such a conflict of interest. Although it has not used

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on those officials. *E.g.*, Pa. Const. of 1776, art. IV ("[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."); Va. Const. of 1776, § 2 ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Md. Const. of 1776, art. IV ("That all persons invested with the legislative or executive powers of government are the trustees of the public . . . ."); *see also* Natelson, *Public Trust*, *supra* at 1134–36.

fiduciary language, this Court has long recognized that when it comes to legislation that manipulates the process of elections, we cannot trust conflicted legislators to act in the best interests of those they represent, nor can we count on the political process to correct their self-dealing. *See, e.g., Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969). "More exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" is thus required. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

B. The Court Can Create Incentives For Legislatures To Adopt Independent Redistricting Processes By Following Corporate Law's Example.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several members of this Court raised legitimate questions about the federal courts' institutional competence to review redistricting decisions. There is no doubt that redistricting involves inherently political judgments. But this Court's apprehension about its competence to handle political issues is not a reason to declare political gerrymandering claims nonjusticiable and give a green light to manipulation by partisan insiders. Instead the Court can look to the strategies that courts have developed in other areas of law to get around their questionable competence to police fiduciary self-dealing. *See* D. Theodore Rave, *Institutional Competence in Fiduciary Government*, *in Research Handbook on Fiduciary Law* 418, 424–26 (Andrew S. Gold & D. Gordon Smith, eds. 2018).

The same problem arises in corporate law. Courts are no better suited to make business judgments than political ones, but they still manage to police self-dealing by corporate directors. Corporate law gets around courts' limited competence with business matters by adopting a two-track system of judicial review. When shareholders challenge a conflicted director's self-dealing transaction, the reviewing court will closely scrutinize the transaction for "entire fairness," inquiring into the substance of the deal and the fairness of the bargaining process. *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983). Supervision by a court of limited competence looks comparatively attractive when the alternative is leaving the decision in the hands of a conflicted fiduciary. But to take some pressure off the reviewing court, corporate law provides safe harbors that can cleanse the taint of self-dealing if the transaction is approved by an independent decisionmaker. Thus, if a majority of the disinterested directors or disinterested shareholders approve the interested-director transaction, the reviewing court will apply the much more deferential "business judgment rule" standard. *See, e.g.*, Del. Code Ann. tit 8, § 144(a)(1)–(2); *Benihana of Tokyo Inc. v. Benihana Inc.*, 906 A.2d 114, 120 (Del. 2006).

By adopting this two-track standard of review, corporate law channels corporate decisions about conflicted transactions into independent processes to which courts can safely defer. This allows reviewing courts to shift their focus from the substantive fairness of the outcome to the adequacy and independence of the process used to approve it—a

role that courts are institutionally much better suited to play. Rave, *Politicians as Fiduciaries*, *supra* at 703–06.

The Court can make a similar move here. Redistricting decisions made by conflicted insiders should be subject to heightened scrutiny and skeptical judicial review. *See id.* 725–28; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 641–43 (2002). But by creating a safe harbor for redistricting decisions made through independent processes, the Court can provide a powerful incentive for states to create independent institutions to make redistricting decisions in the first instance. Rave, *Politicians as Fiduciaries*, *supra* at 723–24. The federal courts will thus not be forced to review the substantive political fairness of almost every redistricting decision as Appellants claim. Instead, the courts can defer to substantive political judgments of custom-designed independent redistricting institutions and focus their review on process. That is, the courts can focus on ensuring that these alternative line-drawers are not themselves conflicted or captured by conflicted insiders and that they are provided with sufficient information and resources to make intelligent and independent decisions on where to draw district lines. *Id.* 728–29.

In finding the districts drawn by the state legislature here unconstitutional, the Court should recognize a safe harbor for districts drawn through independent processes. There is no need, however, for the Court to specify at this time the precise form that independent redistricting institutions must take

to justify deference. States should be free to experiment with different models. The Court need only direct the lower courts to review these institutions to ensure that they are sufficiently independent from conflicted insiders to cleanse the taint of self-dealing. Following the corporate law model thus keeps reviewing courts focused on process, not politics. *See id.*

C. State Legislatures Are Not An Adequate Safe Harbor For Congressional Districting.

Appellants argue that the Framers attempted to solve the conflict of interest inherent in legislative control over districting by placing primary responsibility for drawing congressional districts in the hands of the state legislatures, leaving Congress with a secondary, supervisory role. *See* Appellants' Br. 32. Thus, Appellants and their *amici* argue, the appropriate check on partisan manipulation of congressional districts is Congress. *See id.*; Members of Cong. from N.C. Delegation Amicus Br. 6. While this theory might have worked in a purely Madisonian republic where the state and federal legislatures were independent actors capable of policing each other, the rise of national political parties has undermined this structural check. State legislatures are not sufficiently independent from their congressional delegations to serve as an adequate safe harbor.

The national political parties of today—a feature of our political process that the Framers did not anticipate—align interests and provide vehicles for concerted action across both state lines and different

levels of government. Therefore, instead of the independent actors that Madison envisioned, today we have an interdependent system where well-organized parties can entrench themselves in power. Parties can broker deals or exert pressure on state legislators who oppose a congressional gerrymander by threatening to withdraw support, cut off campaign funding, or even run an opponent in a primary. *See* Rave, *Politicians as Fiduciaries*, *supra* at 686.

Because of this interdependence, we cannot count on ambition to counter ambition, as Appellants attempt to reassure us. See Appellants' Br. 32. We cannot count on state legislators to draw congressional districts without taking the interests of members of Congress into consideration. Nor is there any reason to think that Congress—whose members benefit from this arrangement—will effectively police their political allies in the state legislatures. *See, e.g.*, Richard H. Pildes, *The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 81–82 (2004) ("Far from a detached check on the self-interested behavior of state politicians, party leaders in Congress are often the very catalysts who incite party affiliates in the states to aggressive partisan gerrymandering.").

Despite Appellants' and their *amici's* contention that Congress has attempted to perform its supervisory role, none of the bills that would provide a more independent process have passed, as self-interested actors continue to block the channels of change. *See* Members of Cong. Amicus Br., *supra*, at 7–13. When Congress decides under Article I § 4 to

leave redistricting responsibility in the hands of interested co-partisans in the state legislatures, it breaches its fiduciary duty to act in the interests of the people it represents instead of its own self interest. *See* Rave, *Politicians as Fiduciaries*, *supra* at 724 n. 303.

Given the conflicts of interest inherent in redistricting and the interdependence of Congress and the state legislatures, this is a problem that politics is unlikely to fix on its own. Despite all of the state-level reform proposals that Appellants' amici cite, Members of Cong. Amicus Br., *supra* at 13–21, real reform has occurred almost exclusively in states with direct-democracy mechanisms that allow the people to circumvent the conflicted state legislatures. *See, e.g.*, Ariz. Const. art IV, pt.2, §1; Cal. Gov't Code §8252; Colo. Const. art. V, § 44; Mich. Const. art. IV, § 6; Mo. Const. art. III, §3; N.Y. Const. art. III, § 5b; Utah Code §20A-19-201. Outside of those states, only this Court can unblock the political process. *Cf. Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (finding judicial intervention necessary where an "informed, civically militant electorate" could not convince either the state legislature or Congress who benefitted from malapportionment to draw new districts).

But doing so does not require this Court to micromanage the delicate process of redistricting. It need only set up incentives for political actors to adopt more independent institutions on their own. The threat of heightened judicial scrutiny accompanied by a safe harbor for independent processes would do just that. *See* Rave, *Institutional Competence*, *supra* at 433–44.

D. Courts Can Defer To Districts Drawn Through Independent Processes.

This approach is workable in practice. Of course, not all alternative redistricting processes are created equal, and courts will still have to play a role in policing these processes for capture by insiders. But the point is not to take the politics out of inherently political decisions as Appellants and their amici claim. *See, e.g.*, Appellants' Br. 2, 22; American Civil Rights Union et al. Amicus Br. 4, 14. The point is simply to shift the locus of redistricting decisions away from conflicted actors and towards more neutral processes. Rave, *Institutional Competence*, *supra* at 14.

Successful independent redistricting commissions will likely need to build in roles for partisans on both sides of the aisle and create opportunities for various interest groups to offer input. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1841–43 (2012). But in order to cleanse the taint of self-dealing, they will need to provide a layer of insulation from conflicted incumbents both in how the commissioners are selected and how the commissions operate. Partisans, lobbyists, interest groups, and other political intermediaries will inevitably struggle and bargain for influence and power in whatever alternative process is set up. But once the reviewing court has determined that the process is fair and independent, it can defer to the substantive outcome of these pluralist clashes and compromises. Rave, *Politicians as Fiduciaries*, *supra* at 733–35.

Independent redistricting commissions have been successful in some states, including Arizona and California, and reviewing courts have given the districts they produce great deference. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 685–89 (Ariz. 2009) (scrutinizing whether independent redistricting commission followed mandated procedures, but deferring to substantive outcome); *Vandermost v. Bowen*, 269 P.3d 446, 484 (Cal. 2012) (after rejecting a legal challenge against districts drawn by independent redistricting commission, holding that if a referendum to override the commission qualified for the ballot, the commission-drawn districts, which were the product of "an open, transparent and nonpartisan redistricting process," would be used on an interim basis instead of district drawn by the legislature).

Indeed, this Court has, at least implicitly, recognized that independent redistricting commissions are entitled to more deference than conflicted legislatures. In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301, 1305 (2016), the Court rejected a one-person-one-vote challenge to state legislative districts drawn by an independent redistricting commission. The Court deferred to the commission's decision to deviate from perfect population equality, even though the district court had found that "partisanship played some role." *Id.* at 1306. By contrast in *Cox v. Larios*, 542 U.S. 947 (2004), the Court showed far less deference when a conflicted legislature made similar deviations from perfect population equality for partisan reasons, and summarily affirmed the lower

court's judgment that the districts violated the Fourteenth Amendment. *See also* Cain, *supra* at 1842–43 ("The courts might consider a higher level of deference to redistricting institutions such as independent citizen commissions that are more likely to adopt reasonably imperfect plans.").

When interested state legislators manipulate district lines to entrench their partisan allies, as in this case, the federal courts should be inherently suspicious and apply searching review. But when redistricting decisions are made through independent processes, the taint of self-dealing is cleansed and courts should apply a more deferential standard of review. This two-track system of judicial review is a workable model that creates incentives for states to adopt independent processes for redistricting to which courts can defer. It keeps conflicted legislators out of the business of manipulating district lines and courts out of the business of second-guessing political judgments.

II. If This Court Reverses *Bandemer* and *Vieth*, It Should Limit Its Holding To *Congressional* Gerrymandering And Not Reach Claims Involving *State* Districts.

As this brief has explained, reaffirming the justiciability of political gerrymandering claims will not plunge the federal courts hopelessly into the political thicket. But if this Court nevertheless decides to reverse *Bandemer* and *Vieth*, it should limit its nonjusticiability holding to *congressional* gerrymandering and not reach the justiciability of political gerrymandering claims involving *state*

legislative districts. Contrary to Appellants' suggestion, Appellants' Br. 33 n.6, the contexts of state and congressional redistricting are sufficiently different to warrant the Court staying its hand for at least three reasons.

First, neither this case nor *Lamone v. Benisek*, No. 18-726, involves state legislative districts, so any declaration that political gerrymandering challenges to state legislative districts are nonjusticiable would be dicta.

Second, there is no provision of the Constitution that even arguably textually commits oversight of state legislative redistricting to a coordinate branch of government. *Cf. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (treating textual commitment as one of the most salient factors in the justiciability analysis). The Elections Clause in Article I, § 4 is limited to congressional elections and says nothing at all about state elections. And the Tenth Amendment is entirely silent on the matter (not to mention having nothing to do with coordinate branches of the federal government).

Third, the conflict of interest in state legislative redistricting—and thus the incompatibility with the fiduciary principles of government embedded in the Constitution—is all the more stark. Incumbent state legislators literally draw the districts in which they will seek reelection. The opportunity and temptation for entrenchment is palpable. *See* Rave, *Politicians as Fiduciaries*, *supra* at 724; Rave *Institutional Competence*, *supra* at 430–32. This is a substantial difference from state legislators drawing

congressional districts, and it should be considered in a case that squarely presents the issue.

The Court need not—and should not—weigh in on the justiciability of political gerrymandering claims involving *state* legislative districts to resolve this case.

CONCLUSION

This Court should affirm the decision below.

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No. 18-422

In The Supreme Court of the United States

ROBERT RUCHO, ET AL.,
Appellants,

V.

COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

AMICUS BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are political committees that assist their Republican members achieve electoral victories. The Republican National Committee ("RNC") manages the Republican party's business at the national level, supports Republican candidates and state parties, coordinates fundraising and election strategy, and develops and promotes the national Republican platform. The National Republican Congressional Committee ("NRCC") supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities.

Amici curiae have a vital interest in the law regarding redistricting since congressional districts and legislative redistricting directly impact their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, the district court's ruling has widespread implications for *Amici curiae* and their members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs are filed with the clerk.

INTRODUCTION

This case presents a fundamental question as to the extent to which the federal judiciary should be engaged in reviewing the constant and ongoing political system that shapes how political parties struggle to gain, regain, and control majorities in the United States House of Representatives and in state legislatures. The Plaintiffs below urge the Court to action in order to "take the politics out" of what is inherently a political process. Plaintiffs are wrong. As one well-known Democratic professor and economist once wrote, "[i]t is, of course, neither possible nor desirable to depoliticize government. Policymaking in a democracy must be political – that is, legitimized by popular support rather than by technical analyses. And American democracy, in particular, was designed to be messy and frustrating." Alan Blinder, *Is Government Too Political?*, 76 FOREIGN AFFAIRS 115 (1997).

This Court should decline the invitation to insert the federal judiciary into questions asking which districting plans, duly enacted by state legislatures, are too political, based upon assessments of conflicting opinions of political scientists and prognosticators attempting to predict the future behavior of American voters.

ARGUMENT

On January 9, 2018 a three-judge panel in the United States District Court for the Middle District of North Carolina determined that North Carolina's 2016 Congressional Redistricting Plan ("2016 Plan") constitutes a partisan gerrymander in violation of

the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Article I, Sections 2 and 4 of the United States Constitution. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). In doing so, that court determined, *inter alia*, that partisan gerrymandering claims are justiciable and divined its own standards for adjudicating such claims. *Id.* at 619-36 (justiciability); *id.* at 636-38 (Fourteenth Amendment); *id.* 672-75 (First Amendment); *id.* at 683-84 (Article I).

The foundation of the district court's initial opinion, and that supporting its justiciability determination and all of its new legal standards, is that *any* partisan intent in redistricting essentially creates "voter-proof" maps; that regardless of voters' sentiment they will be unable to overcome the partisan intent of map drawers. *See id.* at 612-15; *id.* at 619 ("partisan gerrymandering violates the core principle of republican government . . . that the voters should choose their representatives, not the other way around." (citing *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *Common Cause*, 279 F. Supp. 3d at 597 ("The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data' . . . to draw a districting plan that would *ensure* Republican candidates would prevail in the vast majority of the state's congressional districts.") (emphasis added); *id.* at 620-21 ("A partisan gerrymander that is intended to and likely has the effect of entrenching a political party in power undermines the ability of voters to effect

change when they see legislative action as infringing on their rights."); *id.* at 635-36; *id.* at 640 ("a wealth of evidence proves the General Assembly's intent to 'subordinate' the interests of non-Republican voters and '*entrench*' Republican domination of the state's congressional delegation.) (emphasis added); *id.* at 640 ("the Partisan Advantage criterion reflects an express intent to entrench the Republican supermajority in North Carolina's congressional delegation by seeking to 'maintain' the partisan make-up of the delegation achieved under the unconstitutional 2011 Plan"); *id.* at 641-50 (relying on computer modeling which, among other issues, "assumed that the candidate does not matter . . . ."); *id.* at 650, 656-58, 679-80, 686-87; *id.* at 688-90 ("the 2016 Plan amounts to a successful effort by the General Assembly to disfavor a class of candidates and dictate electoral outcomes.") (internal citations and quotation marks omitted); *et seq.*

Eventually on appeal, the Court vacated the judgment of the district court, and remanded the case for further consideration in light of the Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). On remand, the district court determined, *inter alia*, that *Gill* did not affect the justiciability of Plaintiffs' claims. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 779, 814 (M.D.N.C. 2018). This opinion similarly rested on the conclusion that partisan redistricting creates voter-proof maps. *See, e.g., id.* at 814 ("the 2016 Plan violates Article I by . . . interfering with the right of 'the People' to choose their Representatives."); *id.* at 821-27 (discussing the various congressional districts and whether they are "winnable for Democratic candidates") (internal quotation marks and citations omitted); *id.* at 829-30

(crediting testimony discussing that "only three [congressional] districts would elect Democrats and the others will not be able to elect Democrats . . . .") (internal quotations and alterations omitted); *id.* at 830-31 (crediting testimony of constitutional injuries due to "skewed" electoral "outcomes"); *id.* at 938 (discussing how the 2016 Plan "entrenched Republicans candidates in power."); *et. seq.*

Shortly thereafter, Appellants-Defendants filed their jurisdictional statement challenging, *inter alia*, whether Plaintiffs' partisan gerrymandering claims are justiciable. On January 4, 2019, this court postponed further consideration of the question of jurisdiction and set argument for the March 2019 session.

The district court's rationale, and indeed that of every district court which has ruled partisan gerrymandering claims to be justiciable in practice, is deeply flawed for at least one fundamental reason: it rests on the presumption that the maps at issue are politically "voter-proof." Every judicial decision to the contrary in the last 35 years has proven wrong. This is because "partisan intent" in map drafting cannot overcome the will of the voters due to shifting voter attitudes and the realities of political campaigns and political environments. Essentially, "[t]he assumption underlying [these plaintiffs' cases] is that party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election." *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting). However, "[p]arty affiliation is not set in stone or in a voter's genes. . ." *id.* This mutability is precisely the reason that partisan gerrymandering claims cannot be

justiciable. *See Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (O'Connor, J. concurring).

I. ELECTORAL UPSETS UNDER MAPS JUDICIALLY DETERMINED TO BE "VOTER-PROOF"

The history of redistricting litigation is wrought with examples of courts getting it wrong. Time and time again courts have determined electoral maps to be unconstitutional partisan gerrymanders due to those maps' effect of "entrenching" a political party in power and then subsequently, under those same maps, the supposedly "entrenched" party was defeated, sometimes in spectacular fashion. This history demonstrates that partisan gerrymandering should not be a justiciable claim because the judiciary is not suited to examine such issues.

a. The 1980's

Davis v. Bandemer involved the 1981 redistricting of the Indiana state legislature. 478 U.S. at 109. At the time the 1981 plan was enacted the Governor was a Republican and majorities in both the State House and State Senate were Republican. *Id.* Several Indiana Democrats filed suit alleging that the 1981 plan "constituted a political gerrymander intended to disadvantage Democrats" in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 115. A divided three-judge court held that the reapportionment was unconstitutional and enjoined state officers from holding elections pursuant to the 1981 plan. *Bandemer v. Davis*, 603 F. Supp. 1479, 1495-96 (S.D.

Ind. 1984). Specifically, the district court indicated that the plan contained "a built-in bias favoring the majority party, the Republicans" who made efforts to "insulate itself from risk of losing its control of the General Assembly." *Id.* at 1486, 1488. Similar to the district court in the present case, the *Bandemer* district court seemed to indicate that the plan was intended to proscribe and would result in a "predestined outcome" and "predictable disadvantaging effect[s] . . ." *Id.* at 1492, 1494.

The Court subsequently stayed the judgment of the district court, *Davis v. Bandemer*, 474 U.S. 991 (1985), and reversed the judgment of the district court. 478 U.S. 109. In doing so, a majority of the Court, however, did hold that partisan gerrymandering cases were justiciable *in theory*. *Id.* The *Bandemer* plurality determined that it is necessary for a plaintiff to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127. The *Bandemer* plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129. Recognizing that redistricting is an inherently political process, the *Bandemer* plurality rejected the notion that unconstitutional discriminatory effect could be shown by "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Id.* at 131. Instead, the plurality ruled that discriminatory effect in political gerrymandering cases would only be found "when the electoral system is arranged in a manner that

will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132 (emphasis added). The plurality held that a plaintiff group must prove "a history (*actual or projected*) of disproportionate results" in conjunction with indicia that the group has "essentially been shut out of the political process." *Id.* at 139 (emphasis added).

Justice O'Connor, joined by Chief Justice Burger and Justice Powell, in her concurrence wisely took issue with the majority's justiciability determination regarding the political question issue. *Id.* at 144. Specifically, she took issue with the same elemental problems Amici Curiae take issue with here: factual questions concerning electoral success are impossible for anyone, let alone the judiciary to determine to a degree of certainty. *Id.* at 156-60.

The *Bandemer* plurality eventually held that the results of a single election were insufficient to establish discriminatory effect.

Indiana's subsequent elections, therefore, were conducted under the map previously declared unconstitutional by the *Bandemer* district court. During the 1986 General Assembly election, this "predestined" and "predictable" map yielded Democrats an increased share of the State House from 39 Democrats and 61 Republicans to 48 Democrats and 52 Republicans. Doug Richardson, *Democrats Celebrate Gains in Congress, State Legislature*, THE ASSOCIATED PRESS (Nov. 5, 1986); The Associated Press, *Key Races State By State, At A Glance* (Nov. 6, 1986, PM cycle). Indiana's 1988 General Assembly election was also conducted under the same map and in that year, Democrats increased their electoral share in the State House, resulting in

an even 50 Democrat and 50 Republican split, and increased their share of the State Senate from 20 Democrats and 30 Republicans to 24 Democrats and 26 Republicans. Anne Hazard, STATES NEWS SERVICE (Nov. 11, 1988); see also Rick Gladstone, *Democrats Gain Strategic Victories In State Legislatures*, THE ASSOCIATED PRESS (Nov. 9, 1988, PM Cycle).[2] In 1990, the last election under the 1981 plan, Democrats took control of the State House with 52 Democrats and 48 Republicans. The map, despite a district court's predetermination that it favors Republicans, ultimately did not have the electoral consequences of being politically voter-proof.

The circumstances surrounding *Bandemer* show exactly why partisan gerrymandering claims should be nonjusticiable. In order to have a valid claim, litigants must prove that "the electoral system is arranged in a manner that *will consistently* degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at

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[2] While *Bandemer* concerned legislative redistricting, the 1981 plan's congressional districts are another great example of voter volatility. *See* Michael Orekes, *The 1990 Elections: The Future - Redistricting; Elections Strengthen Hand of Democrats In '91 Redistricting*, THE NEW YORK TIMES (Nov. 8, 1990) ("[E]ven lawmakers' best efforts at gerrymandering can have unintended results. In Indiana in 1981 the Republicans had control over drawing district lines, and they set out to oust as many Democrats as possible when national reapportionment cost the state a Congressional seat. But in their zeal the map makers apparently spread the Republican support too thin. In 1980 seven Democrats and four Republicans represented Indiana in Congress. In the first election after redistricting, in 1982, the breakdown was five and five. But in the Congress that convenes next January, the Indiana delegation will be eight Democrats and only two Republicans.").

132 (emphasis added). It is impossible for any litigant to sufficiently meet the discriminatory effect prong because it is impossible to make completely accurate future projections of disproportionate election results. *See also Badham v. March Fon Eu*, 694 F.Supp. 664, 670 (N.D. Cal. 1988) (three judge panel) *sum. aff'd* (citing a district court's refusal to referee a dispute over projected disproportionate election results.). *See also id.* at 672-73 (rejecting Republicans' challenge to California redistricting plan because Republicans were still able to exercise *some* political power.).

b. The 1990's

In *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C.) sum. *aff'd*, 506 U.S. 801 (1992) (mem.), the Republican Party of North Carolina and a group of voters brought an action challenging the State of North Carolina's federal congressional redistricting plan ("1992 Plan") as a partisan gerrymander in the United States District Court for the Western District of North Carolina. While the three-judge *Pope* district court seemed to doubt that it would be possible for the plaintiffs to corroborate discriminatory effect under *Bandemer*, it assumed for purposes of the motion to dismiss, *i.e.* taking the allegations of the complaint as true, "that the plaintiffs could, theoretically, prove that the [1992 Plan] would establish a 'projected history' of disproportionate results." *Id.* at 396-97.[3]

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[3] As the *Pope* district court succinctly stated, "[t]he gravamen of the plaintiffs' action is that the [1992] Plan adopted by the Democratic legislature *will* result in disproportionately high representation for the Democratic Party in the state's

Nonetheless, the district court dismissed the case for failure to state a claim because it found the plaintiffs' claims failed under the second prong of the *Bandemer* test for discriminatory effect—plaintiffs did not allege that the state's redistricting plan had caused them to be shut out of the political process and plaintiffs could not make the showing that they had been consistently degraded in their participation of the political process as a whole, not just in the process of redistricting. *Id.* at 396-97. Accordingly, the subsequent congressional elections in North Carolina were held under the 1992 Plan which was allegedly politically gerrymandered to favor Democrats.

Despite the *Pope* plaintiffs' claims, and the *Pope* district court's holding that those plaintiffs could theoretically prove a projected history of disproportionate electoral results, the voters of North Carolina did not vote as "projected" under the 1992 Plan. At the time of the *Pope* litigation Democrats controlled 8 congressional seats and Republicans controlled 4 congressional seats in North Carolina. In the very next election in 1994, Democrats won only 4 congressional seats and Republicans won 8 under the exact same plan. During the following election in 1996, North Carolina voters elected 6 Democrats and 6 Republicans to Congress. In 1998 and 2000, North Carolina elected 7 Republicans and 5 Democrats to Congress. None of the parties to *Pope v. Blue*, nor the district court, accurately predicted how the

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congressional delegation." *Pope*, 809 F. Supp. at 396 (emphasis added).

voters of North Carolina would behave in subsequent elections.

c. The 2000's

Then came *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in which a group of registered Democrats challenged Pennsylvania's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of Article I and the Fourteenth Amendment. The *Vieth* plurality, composed of Chief Justice Rehnquist, and Justices Scalia, O'Connor, and Thomas, determined that partisan gerrymandering claims present a nonjusticiable question and would overturn *Bandemer*. Specifically, the *Vieth* plurality held that, *inter alia*, it was impossible to determine the effects of partisan gerrymandering. *Id.* at 287 (*plurality*).

> [A] person's politics is rarely as readily discernible--and never as permanently discernible--as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

Id. *(plurality)* (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment).

With the challenge to Pennsylvania's congressional plan defeated, Pennsylvania's subsequent congressional elections were held under it. At the time of *Vieth* in 2004, Pennsylvania had 12 Republican members of Congress and 7 Democratic members of Congress. During the 2006 elections, just one election cycle after the *Vieth* plaintiffs and the dissenting members of the Court would have struck the plan as unconstitutional because, *inter alia*, it served to heavily favor and entrench Republicans, Democrats won 11 congressional seats and Republicans won only 8 congressional seats. In 2008, only 4 years after *Vieth*, Democrats increased their share of the Pennsylvania congressional delegation to 12 Democrats and 7 Republicans. Justice Scalia could not have been more right.

d. The 2010's

In 2015, a group of Democratic citizens of Wisconsin challenged that state's legislative redistricting plan passed in 2012, ("Act 43") as a partisan gerrymander in violation of the First and Fourteenth Amendments. *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018). In November, 2016, a three-judge panel of the United States District Court for the Western District of Wisconsin agreed, enjoining the defendants from using the Act 43 map in future elections and ordered them to enact a remedial districting plan. The district court supported its determination with testimony and expert reports of political scientists who testified that their calculations demonstrated that Act 43 did not yield a

change in Republican-held seats even in hypothetical wave elections that most favorably favor Democrats, and that Republicans will be heavily favored "for the lifetime of the plan." *Whitford*, 218 F. Supp. 3d at 860, 898-910. The district court also referred to Act 43 as "lock[ing]-in" Republican victories, *id.* at 886, and "maintain[ing] a comfortable majority" for Republicans in the legislature. *Id.* at 895. The district court essentially found that it was impossible for Democrats to ever win more than their then-existing current share of the legislature under that plan. *Id.* 860, 886, 895, 898-910.

The defendants appealed directly to the Court, which, after staying the district court's judgment, 137 S. Ct. 2289, (2017), reversed on standing grounds. *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Accordingly, the map remained in place despite plaintiffs' experts testifying that Democrats will not be electorally successful given the composition of the current districts.

However, despite the dire predictions in expert testimony by political scientists and findings by the district court, Wisconsin Democrats have fared well in recent elections. In June 2018, a Democrat won a special election in northeastern Wisconsin's First Senate District, which voted for Republican Donald Trump by a significant 17-point margin in the 2016 presidential election. Tara Golshan, *Democrats just won a Wisconsin special election Scott Walker didn't want to have*, VOX (June 13, 2018), https://www.vox.com/2018/6/12/17455922/wisconsin-special-elections-results-june. In January 2018, Democrats flipped a rural state senate district, which Donald Trump carried by 17 points, with a comfortable 10-point margin of victory. David

Weigel, *Democrats flip traditionally conservative Wisconsin senate seat, kicking off 2018 election season*, CHICAGO TRIBUNE (Jan. 17, 2018), https://www.chicagotribune.com/news/nationworld/politics/ct-wisconsin-state-senate-election-20180116-story.html. Further, during the 2018 general election Democrats flipped an additional state assembly seat. Wisconsin Elections Commission, 2018 Fall General Election Results, https://elections.wi.gov/elections-voting/results/2018/fall-general (accessed Feb. 3, 2019).

In 2018 a smorgasbord of legal challenges to Pennsylvania's 2011 congressional redistricting plan ("2011 Plan"), in both state and federal court, culminated in a fractured Supreme Court of Pennsylvania striking the 2011 Plan as unconstitutional under the Pennsylvania Constitution. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Penn. 2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018). Specifically, the majority of that court agreed with the plaintiffs and determined that the 2011 Plan violated Article I, Section 5 — the Free and Equal Elections Clause — of the Pennsylvania Constitution because, *inter alia*, "Republicans' advantage is *nearly impossible to overcome*" and Democrats' "have been denied *any 'realistic opportunity to elect representatives of their choice . . . .'*" *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Penn. 2018) (emphasis added) (quoting plaintiffs' Petition for Review at ¶¶ 118-19) cert. denied, *Turzai v. Brandt*, 139 S. Ct. 445 (2018). The court enjoined the 2011 Plan's further use with the very notable exception of the March 13, 2018 special election for Pennsylvania's 18th Congressional

District, which was to be conducted under the 2011 Plan. *League of Women Voters of Pa.*, 175 A.3d at 284; *League of Women Voters*, 178 A.3d at 741, n. 7.

Pennsylvania's 18th Congressional District was held by a Republican since 2003, who consistently carried the district with at least 58 percent of the vote. Once that congressman retired, a special election was called for March 13, 2018 in order to fill the seat until the 2018 general election. Office of Governor Tom Wolf, *Governor Wolf Sets Special Election For Pennsylvania's 18th Congressional District* (Oct. 23, 2017), https://www.governor.pa.gov/governor-wolf-sets-special-election-pennsylvanias-18th-congressional-district/. The Democratic candidate, Conor Lamb, won the March 13 special election with 49.8 percent of the vote. Nate Cohn, Josh Katz, Sarah Almukhtar, and Matthew Bloch, Pennsylvania Special Election Results: Lamb Wins 18th Congressional District (Apr. 26, 2018), https://www.nytimes.com/interactive/2018/03/13/us/elections/results-pennsylvania-house-special-election.html?mtrref=www.google.com&gwh=E7A203251FBD534ADB47DC7C979325A7&gwt=pay. This very district was used as an example by plaintiffs' experts and credited by the Supreme Court of Pennsylvania, as a district in which it was "impossible" for Democrats to overcome Republican's political "advantage." *League of Women Voters*, 178 A.3d at 766 (quoting plaintiffs' Petition for Review at ¶¶ 118-19; *id.* at 764 n. 26; *id.* at 760-61; *id.* at 773 (crediting the testimony of Dr. Jowei Chen); *id.* at 788; et. seq. Despite the omnipotence and electoral certainty proffered by plaintiffs' experts, and the Pennsylvania courts, the Pennsylvania 18th

congressional district was unexpectedly won by a Democrat.

In December 2017, a group of Michigan voters and the League of Women Voters of Michigan brought a suit challenging Michigan's 2011 congressional and state legislative maps as unconstitutional political gerrymanders under the First and Fourteenth Amendments. *League of Women Voters of Mich. v. Johnson*, 2:17cv14148 (filed Dec. 22, 2017) (hereinafter "Compl."). In their complaint, the plaintiffs describe Michigan's political maps as a "durable and severe gerrymander" which "preserve[s] and enhance[s] the controlling party's power." Compl. at 2. Plaintiffs claimed that "[t]here is a near zero chance that the efficiency gaps for the [plan] will neutralize during this decade, let alone "switch signs" to favor Democrats. Compl. at 23. For example, plaintiffs' expert Christopher Warshaw, an Assistant Professor of Political Science at George Washington University, stated that Michigan's efficiency gaps "are durable, and thus partisan gerrymandering in [the] state legislature[] is unlikely to be remedied through the normal electoral process". Plaintiffs Expert Report, Christopher Warshaw at 32 (June 1, 2018).

At the time the Michigan plaintiffs filed their complaint and their "experts" authored their reports, Republicans held 9 congressional seats while Democrats held 5 congressional seats, Republicans held 27 state senate seats while Democrats held 11, and Republicans held 63 state house seats while Democrats held 47. Despite the "durable Republican gerrymander" Michigan Democrats were incredibly successful during the 2018 elections. Democrats flipped 2 Congressional seats, resulting in an evenly

split congressional delegation of 7 Republicans and 7 Democrats. Democrats flipped 5 additional state senate seats, resulting in a closely split state senate of 22 Republicans and 16 Democrats. And, Democrats flipped 5 additional state house seats. The "durability" of Michigan's partisan gerrymander was apparently limited to elections prior to 2018.

e. Other Examples

The judiciary's inability to predict election results is not limited to claims of partisan gerrymandering in legislative elections. Until the early 1990's, superior court judges in North Carolina were elected on a statewide basis. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2286 (1998). In the late 1980's the North Carolina Republican Party, unhappy with the statewide election of superior court judges brought suit. *Id.* at 2285; In *Republican Party v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd as modified sub nom*; *Republican Party of N.C. v. N.C. State Bd. of Elections*, 27 F.3d 563 (4th Cir. 1994), *remanded sub nom*; *Republican Party v. Hunt*, 77 F.3d 470 (4th Cir. 1996). The state Republican Party asserted that Republicans would be successful in several areas if superior court elections were held district-wide rather than statewide. *See id.* at 726. Because the Democratic Party held a wide margin in voter registration, the Republicans argued that the Democratic candidates would *always* win in statewide elections *See id.* As a result, the United States District Court for the Eastern District of North Carolina held that statewide elections of

superior court judges were unconstitutional because they diluted Republican voting power. *Id.* at 732. "Reality seemed to support the court's conclusion because only one Republican had ever been elected to a superior court judgeship in a statewide election." Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2285 (1998). Accordingly, the district court ordered that superior court candidates be elected by voters in their home districts, but also appear on the statewide ballot just in case the decision was reversed by a higher court. *Id.* at 733-34.

Notwithstanding the district court's findings, Republican candidates for superior court were very successful in the 1994 statewide general elections, winning all court of appeals seats and carrying the statewide vote in 8 superior court races. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2285 (1998). Despite plaintiffs' and the district court's predictions, the new election procedure actually disadvantaged Republican candidates in a number of races in which they were successful on the statewide ballot, but lost close races to Democratic candidates in their home districts. *Id.* at 2285 n. 174.

In light of the Republican successes in the 1994 statewide general election, the Fourth Circuit Court of Appeals reconsidered *Hunt*. Defendants below argued that the Republican Party "failed to carry its burden of showing unconstitutional discriminatory effects resulting from the statewide election of superior court judges." *Id.* at 2286 (citing *Republican Party v. Hunt*, 1996 WL 60439, at *1-4 (4th Cir.

1996)). The Court of Appeals determined that the results of the 1994 elections "were directly at odds with the recent prediction by the district court that Republican electoral exclusion would continue unabated into the future" and remanded the case to the district court for further consideration. *Id.* Eventually, the North Carolina General Assembly, likely tired of the uncertainty created by the judicial decisions, declared all superior court judges would be elected from local districts starting in 1996 and that starting in 1998 those elections would be non-partisan. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2286 (1998).

f. Judicial Elections Predictions Have Not Yet Been Accurate

This history clearly demonstrates that, respectfully, the judiciary cannot be the best arbiter of questions of partisan gerrymandering or claims of political harm, because state and federal judges continuously fail to be able to see clearly the future. There simply are no reliable standards the judiciary, or anyone else for that matter, can employ to predict the future behavior of the electorate. Accordingly, partisan gerrymandering claims cannot be justiciable.

II. VOTER PREFERENCE IS NOT IMMUTABLE

No matter how well judges might think they can determine the effects of partisan influences on

redistricting, undoubtedly a necessary part of the justiciability of these types of claims, they are unable to do so because voters' partisanship, partisan affiliation, political positions, and electoral choices are not immutable. There are many causes to this mutability but the result is all the same—every voter does not vote based solely on partisanship in every instance. *See Bandemer*, 478 U.S. 156-60 (O'Connor concurring); *Vieth*, 541 U.S. at 287 (*plurality op.*).

The changing and dynamic electorate has been a feature of politics in America for decades. The publication *Dynamics of the Party System: Alignment and Realignment of the Political Parties* by noted scholar James L. Sundquist provides this:

> Every election sees some change in the distribution of the vote between the parties. A Democrat who dislikes his party's candidate or is attracted by the Republican nominee may vote Republican, or vice versa. A party's record in office, or its stand on particular issues, will attract or repel at least some voter, in every contest.

James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of the Political Parties* 4 (Brookings Institution Press 2011). This is precisely the sort of long-term view of political parties and candidate performance that the proponents of partisan gerrymandering claims ask this court to eschew. They ask this Court to direct federal judges to act as political scientists and statisticians. They urge this Court to demand that federal courts look at a handful of recent elections

and assume that future elections will always result the same way as in the past. The problem with this view of the American body politic is that it ignores the incredibly dynamic and ever-changing nature of election results and voter behavior.

One need only look to the elections of 2012, 2016, and 2018 to see that voter preferences change candidate-to-candidate and year-to-year regardless of partisan affiliation. In 2016 Donald Trump was elected to the presidency. *See* David Wasserman, *Purple America Has All But Disappeared*, FIVETHIRTYEIGHT (Mar. 8, 2017), https://five thirtyeight. com/features/purple-america-has-all-but-disappeared/. Donald Trump won the majority of the vote in 21 congressional districts Barack Obama carried only 4 years earlier in 2012. Nathaniel Rakich, *Election Update: The Swing District Showdown*, FIVETHIRTYEIGHT (Sep. 12, 2018), https://fivethirtyeight.com/features/election-update-the-swing-district-showdown/. Further, 206 counties voted for both Obama and Trump. *See* David Leip, *Atlas of U.S. Presidential Elections*, available at https://uselectionatlas.org. These were two of the most opposite presidential candidates of the modern era in terms of style and ideology, and yet 21 congressional districts and 206 counties voted for them both.[4] In 2016, the voters of 12 congressional districts both voted for Trump and to elect a Democrat to Congress. Aaron Bycoffe and Nate

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[4] Further, Hillary Clinton won the majority of the vote in 13 congressional districts Mitt Romney carried in 2012. Nathaniel Rakich, *Election Update: The Swing District Showdown*, FIVETHIRTYEIGHT (Sep. 12, 2018), https://fivethirtyeight.com/features/election-update-the-swing-district-showdown/.

Silver, *Tracking Congress In The Age Of Trump, 115th Congress*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/congress-trump-score/ (last accessed Jan. 30, 2019). Conversely, in 2016, Republicans won 23 congressional districts in which Hillary Clinton won the popular vote. David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2016 and 2012 Elections*, DAILY KOS (NOV. 19, 2012), https://www.dailykos.com/stories/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections. In 2018 the voters of 9 congressional districts who voted for Trump in 2016 elected Democrats to Congress. *Id.* at *116th Congress*. And there are currently 31 Democratic Members of Congress from districts that voted for Donald Trump in 2016. *See* Kyle Kondik, *House 2020: The new crossover districts*, RASMUSSEN REPORTS (Nov. 29, 2018), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_kyle_kondik/house_2020_the_new_crossover_districts.

This volatility is not only present in voting between offices, but also between subsequent elections for the same office. For example, during the 2018 election 41 congressional districts flipped from Republican to Democrat. Sean McMinn, *Where The Suburbs Moved Left — And How The Shift Swung Elections*, NPR (Nov. 27, 2018), https://www.npr.org/2018/11/27/668726284/where-the-suburbs-moved-left-and-how-it-swung-elections. *See also supra*. In fact, some of the biggest county flips in the South in 2018 were in the suburbs of Charlotte, North Carolina, the very state at issue in the present case. *Id.* This huge swing over the course

of only 2 years cannot be explained only in terms of voter migration, but also in terms of cross-party voting from year-to-year and candidate-to-candidate.

Voters defect from parties all the time. "In every election cycle a substantial portion of partisan voters defect and cast their ballots for candidates from the other party." Paul S. Herrnson and James M. Curry, *Issue Voting and Partisan Defections in Congressional Elections*, vol. 36, no. 2 LEGISLATIVE STUDIES QUARTERLY 281, 282-83 (2011). There are innumerable reasons for these defections, such as presidential popularity, preference for creating divided government,[5] incumbency favoritism, social contexts, whether a candidate is a prominent hero or celebrity, and even the physical attractiveness of a particular candidate. *Id.* at 283.

Issues and issue-based campaigning also lead directly to defection among "partisan" voters. *Id.* at 284. These issues can be "party-owned," *i.e.* those which differentiate one political party from the other. *Id.* Party-owned issues can also "change quite dramatically across generations as the result of new events and new political issues, as well as the positions the parties take." *Id.* Alternatively, candidates and their allies strategically set issue agendas to support their candidacy, and research has shown that "voters are fairly responsive to such

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[5] Recent studies have shown that some voters switch their electoral choices based on who is in control of the executive in order to balance political power. Michael A. Bailey and Elliott B. Fullmer, *Balancing in the U.S. States, 1978-2009*, VOL. 11, NO. 2 STATE POLITICS & POLICY QUARTERLY 158 (2011). This balancing behavior results in voters disfavoring the party in control of the executive when voting in midterm elections at both the federal and state levels. *Id.* at 149.

agenda-setting efforts." *Id.* at 285. Regardless of the type of issue, it can have substantial crossover appeal, causing voters to defect from the party with which they have traditionally identified. *Id.* at 295-97.

> [I]ssues have an impact on voter decision making in congressional elections—one that extends beyond shoring up of the votes of partisans or winning the votes of independents. . . . [Issues] have the potential to encourage some voters to look beyond their party identification and vote for a candidate of the opposing party. . . . Although an individual's partisan attachments may be a stable part of their social identity . . . results suggest that some voters can and do act contrary to their partisanship.

Id. at 298-99.

Recent studies also suggest that voters weigh ideology differently depending on where they fall in the ideological spectrum. Specifically, moderate voters, those who identify as neither ideologically conservative or liberal, weigh the ideology of their preferred congressional candidates much less and may not even be able to identify the ideology of their preferred candidate. *See generally* James Adams, et al., *Do Moderate Voters Weigh Candidates' Ideologies? Voters' Decision Rules in the 2010 Congressional Elections*, UNIVERSITY OF CALIFORNIA, DAVIS (Dec. 12, 2013), https://www.vanderbilt.edu/csdi/events/Adams_Paper.pdf. The most recent data suggests that self-identified moderates, and

those who are unable to classify themselves, make up the majority of the U.S. adults. Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx. Accordingly, the majority of adults in the United States make their voting decisions not based on ideology at all, but on other more amorphous factors. The malleable nature of voters' preferences results in real competition for their votes.

Further, voting trends change over time. These trends can be based on changes in electoral district demographic structure including socioeconomic factors, race, education, age, and so forth. Rob Griffin, Ruy Teixeira, and William H. Frey, *Report: America's Electoral Future, Demographic Shifts and the Future of the Trump Coalition*, BROOKINGS (Apr. 19, 2018), https://www.brookings.edu/research/americas-electoral-future_2018/. Further, elections have been, and will continue to be, swung by unpredictable third-party voter activity. *Id.* This is exactly what happened in 2016, and it will happen at unforeseen times in the future. *Id.*

The dynamic nature of this system is not a new phenomenon. One published study nearly 20 years ago was titled *Electoral Continuity and Change, 1868-1996*, Electoral Studies, 1998, Larry Bartels. One illuminating chart from the article, showing the constancy of volatility in the popular vote for president over long periods of time. That chart is reproduced here:

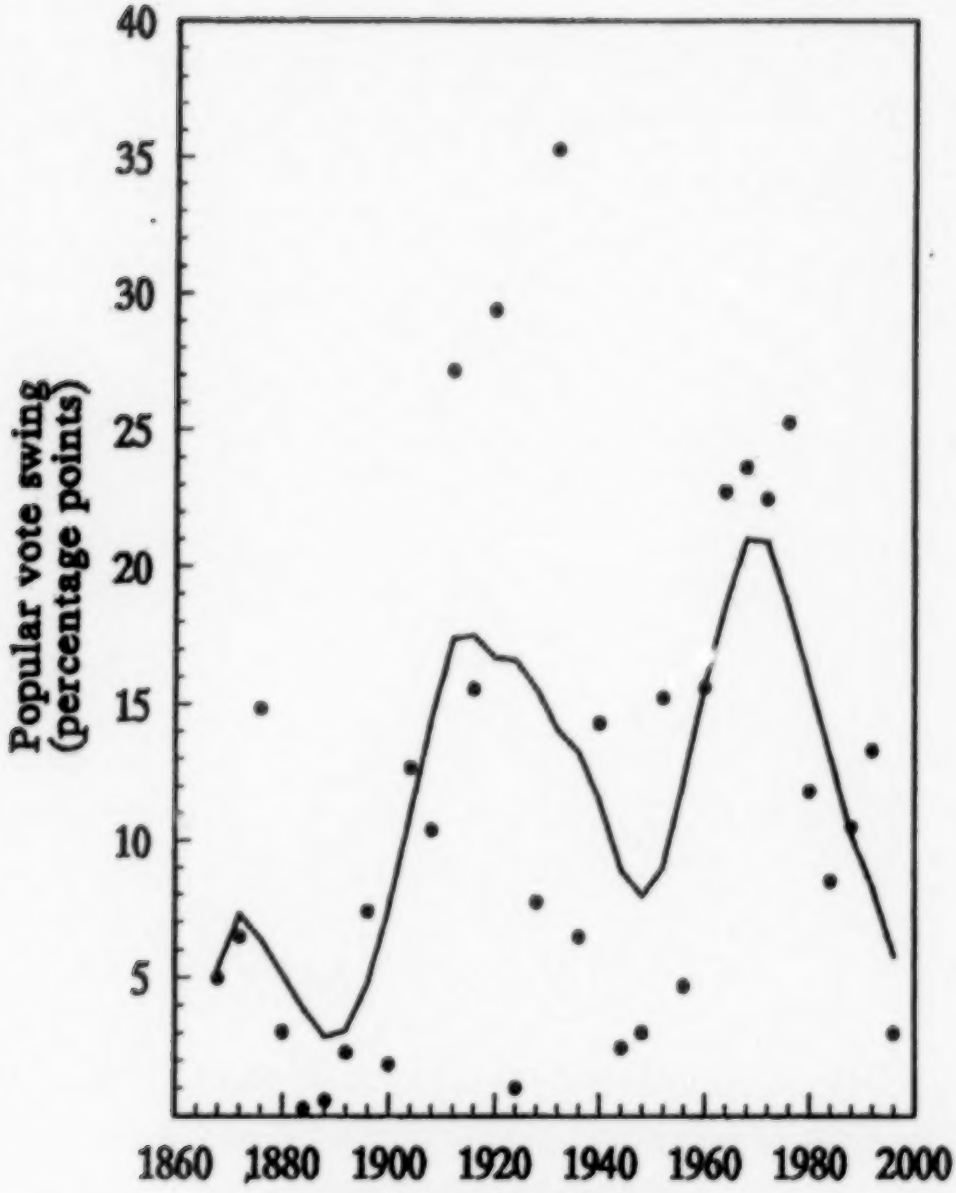

Fig. 10. Electoral volatility, 1868–1996

Electoral volatility, Bartels concludes, must be looked at over long periods of time, and that there are constant changes in the voting behavior of the electorate.

A look at the partisan composition of state legislatures from 1990 through 2000 provides a good visual representation. In most states then, state legislatures enacted redistricting plans as ordinary legislation. In 1990, Republicans held 6 state legislatures, Democrats held 29, and 14 were split control.[6] By 2000, Republicans held 18 state legislatures, Democrats held 16, and 15 were split control. A chart depicting this is available at the National Conference of State Legislatures (NCSL), *Partisan composition of State Legislatures 1990-2000*, http://www.ncsl.org/documents/statevote/legiscontrol_1990_2000.pdf (accessed Feb. 2, 2018) and is reproduced here:

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[6] Nebraska has a non-partisan unicameral legislature.

NCSL

Partisan composition of State Legislatures 1990-2000

(Partisan composition as reported in January of each year.)

State	1990 Legis Comp.	1992 Legis Comp.	1994 Legis Comp.	1996 Legis Comp.	1998 Legis Comp.	2000 Legis Comp.
Alabama						
Alaska						
Arizona						
Arkansas						
California						
Colorado						
Connecticut						
Deleware						
Florida						
Georgia						
Hawaii						
Idaho						
Illinois						
Indiana						
Iowa						
Kansas						
Kentucky						
Louisiana						
Maine						
Maryland						
Massachusetts						
Michigan						
Minnesota						
Mississippi						
Missouri						
Montana						
Nebraska	NA	NA	NA	NA	NA	NA
Nevada						
New Hampshire						
New Jersey						
New Mexico						
New York						
North Carolina						
North Dakota						
Ohio						
Oklahoma						
Oregon						
Pennsylvania						
Rhode Island						
South Carolina						
South Dakota						
Tennessee						
Texas						
Utah						
Vermont						
Virginia						
Washington						
West Virginia						
Wisconsin						
Wyoming						

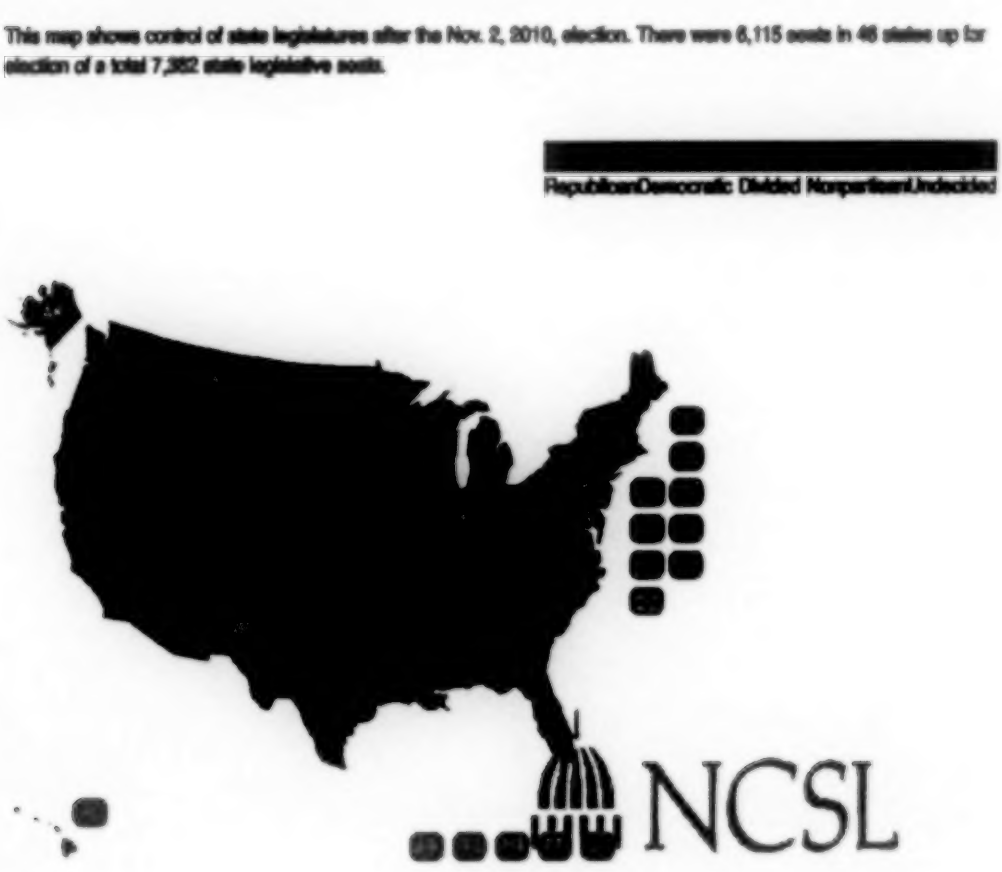
Key:

Split

= Both legislative chambers have Republican majorities
= Both legislative chambers have Democratic majorities
= Neither party had majorities in both legislative chambers
= Nebraska is a non-partisan unicameral legislature

National Conference of State Legislatures

The next decennial election found the Republican party at a near high water mark. Democrats controlled 16 legislatures, while Republicans held 25 legislatures, and 8 were split control. A visual representation of this distribution, available at NCSL, *2010 Post-Election Party Control of State Legislatures*, http://www.ncsl.org/research/elections-and-campaigns/2010-postelection-control-of-legislatures.aspx (accessed Feb. 2, 2018) is reproduced here:



Following the 2018 elections, these numbers shifted dramatically again. According to NCSL, there were 30 states with Republican legislative majorities, 18 with Democratic majorities, and 1 with split control. The post-2018 information is available here: http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

The dissenting opinion in *Whitford v. Gill* expressed well the concerns with volatile electoral patterns. "When the Plaintiffs say there is a large efficiency gap, all they are saying is that one side won a lot of close winner-take-all districts. As such, the efficiency gap appears to be of little utility in measuring constitutional injury." As Judge Greisbach noted, "Professor Nicholas Goedert, credibly testified that wave elections were relatively common." *Whitford*, 218 F. Supp. 3d at 959. In fact, some experts believe that wave elections are now the "norm." *Id.* at 862. This suggests that the trends noted by Sundquist, Bartels, and nearly every observer of American politics has been that the electorate's voting behavior constantly changes. Judge Greibach even noted that granular trends of volatility do not even remain constant throughout the geographic unit that comprises even a single state. He wrote:

> President Obama was hugely successful in a few, traditional bastions of Democratic voters—even more successful than in 2008. But in the rest of the state, his support declined. President Obama's landslide wins in the Cities of Milwaukee and Madison resulted in *hundreds of thousands* of wasted votes—not wasted for the President, of

> course, but for the down-ticket assembly candidates who either won in landslide victories or, more commonly, were unopposed entirely.

Id. at 960. The implications for elections conducted on a district by district basis are obvious. Even changes in the electorate in a national or statewide level say nothing about how voters in a particular area of a state or a region of a state might act relative to statewide or national trends. And when voters are located in particular geographic areas, the potential for unique voting behavior in particular districts remains and is difficult to predict.

Simply put, voters do not vote in a vacuum and there are innumerable reasons they vote for certain candidates, only one of which may be partisan affiliation, and voters in different parts of a state may vote for different candidates in different levels of elections. Voter behavior is inherently unpredictable and volatile from election-to-election and candidate-to-candidate. This means that, contrary to what Appellees may argue, there is real competition in nearly every district for the support of voters every election cycle. *See also generally Brief of Amicus Curiae, The National Republican Congressional Committee in Support of Appellants, Gill v. Whitford*, No. 16-1161 at 41-55 (Aug. 4, 2017).

For decades, academic scholars have studied political trends over time, and there is somewhat of a consensus that change is constant. What Plaintiffs-Appellees ask the Court to do is require that federal judges ignore long term trends of constant change, and assume that each subsequent election is

predictable by the previous election. On that basis, they say, federal courts should make determinations of the constitutionality of redistricting maps using numbers from the last several elections. They ask that the use of this "social science" to predict the future be enshrined in this Court's interpretation of the Constitution and applied to every Congressional and legislative map across the country. This Court should reject such a short term and rigid view of the American electorate and approach this request with skepticism about the ability of federal judges to accurately predict future political trends.

III. PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE

Every litigant that has advanced a partisan gerrymandering claim has asked that courts consider as an issue the political intent and partisan impact of the maps. They claim that assessing redistricting's partisan effect on elections or electability of candidates is a necessary part of any justiciable standard under which such claims could weighed. Indeed, in order to adjudicate partisan gerrymandering claims courts must "assess the effects of partisan gerrymandering, . . . fashion a standard for evaluating a violation, and finally . . . craft a remedy." *Vieth*, 541 U.S. at 287 (*plurality op.*) (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment). The mutability of voters' partisanship and electoral choices make all of these impossible to accomplish in redistricting challenges. *Id.* The only logical conclusion of this paradox is that partisan gerrymandering claims cannot be justiciable. *See id.* at 287 (*plurality op.*) (citing

Bandemer, 478 U.S. at 156 (O'Connor, J., concurring in judgment).

Justice O'Connor put it perfectly over 30 years ago: "To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160 (O'Connor, J. concurring). This is because "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287. *See also supra*.

Indeed, even Justice Kennedy, who repeatedly refused to foreclose the possibility of finding a justiciable standard to adjudicate partisan redistricting challenges, expressed wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006). *See also Gill*, 138 S. Ct. at 1928. *See also* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (noting that the *Bandemer* plurality's standard requires judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy"); *Vieth*, 541 U.S. at 283 (plurality op.).

Plaintiffs-Appellees present to this Court a claim that "partisan gerrymandering" is an unbounded exercise that will ***always*** control the outcome of elections. Not only has every judicial conclusion about the future outcomes of elections been wrong, but the fundamental truth about

"partisan gerrymandering" was well understood by Justice O'Connor. She wrote:

> [T]here is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat. – rights they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more search in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

Bandemer, 478 U.S. 152. Justice O'Connor's words were no truer in 1984 than they are today. On the basis of her observations from this Court after her many years as an elected official, her words have proven true over the last 35 years of judicial missed predictions and electoral experiences. This Court should finally accept her conclusion and determine

that there is no basis for judicial intervention in these cases.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court and hold that partisan redistricting claims are not justiciable.

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No. 18-422, No. 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR GOVERNORS ARNOLD SCHWARZENEGGER AND LAWRENCE JOSEPH HOGAN JR. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the former California Governor Arnold A. Schwarzenegger and current Maryland Governor Lawrence Joseph Hogan Jr., have governed states that have suffered the consequences of partisan gerrymandering. They have both witnessed how this process leads to hyper-partisanship. While politicians and parties benefit, the public and more centrist voters lose. *Amici* believe that extreme partisan gerrymandering warrants constitutional scrutiny.

Arnold A. Schwarzenegger served as the Governor of California from 2003 to 2011. During his tenure, he successfully advocated for ballot measures that dramatically reformed the election process in California. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California, which is committed to advancing post-partisanship where leaders put people over political parties and work together to find the best ideas and solutions to benefit all.

Larry Joseph Hogan Jr. is the Governor of Maryland currently serving in his second term. As Governor, he continues to advocate for redistricting reform, including the creation of a statutory, nonpartisan redistricting commission. He has also successfully enacted numerous ethical reforms designed to hold government officials to higher standards and keep them more accountable to the public.

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[1] Rule 37 statement: All parties have consented to the filing of this brief. No party's counsel authored this brief in any part and no person or entity other than *amici* and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

Where extreme partisan gerrymandering exists, district lines are drawn in a manner that ensures that all seats remain safe. In such districts, elections are as predictable as a Harlem Globetrotters game. It may be theoretically possible for a party to lose a gerrymandered district, but it is highly unlikely.[2] Politicians whose only competitive election is their party primary are more responsive to that electorate than the electorate as a whole. As a result, legislators often hold far more extreme views than the citizens they ostensibly represent.

This deprives many citizens of any mechanism by which they can influence the policy making process and disenfranchises moderate voters in particular. Despite this, Appellants and others argue that challenges to partisan gerrymanders should be non-justiciable. The Court should reject this argument, as it would effectively give legislators free rein to systematically entrench party extremes and artificially dilute the strength of moderate voters.

Last term in *Janus*, this Court held that public employees could not be compelled to subsidize a union they do not necessarily support. To be sure, as a doctrinal matter, the legal issues presented in *Janus* are different from the ones here. The core constitutional concerns, however, are similar. In *Janus*, the Court

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[2] The Harlem Globetrotters have beaten the Washington Generals 99.96% of the time. Nate Silver, *A Statistical Appreciation of the Washington Generals And Harlem Globetrotters*, Five Thirty Eight (July 21, 2014), https://53eig.ht/2TiQkVR.

reasoned that a compelled agency fee scheme conflicted with citizens' fundamental right to advocate in favor of laws and policies of their own choosing. If public sector unions want employees' support, they must earn it. The same should be true of politicians. Districts designed to protect one party, however, mean that elections are not competitive, and moderate voices are made all but irrelevant.

For these reasons and the reasons explained below, *amici* respectfully urge this court to hold that the present disputes are justiciable and affirm the judgments below.

ARGUMENT

I. GERRYMANDERING AMPLIFIES THE VOICES OF PARTISANS AND DROWNS OUT THE VOICES OF MODERATES

A. Gerrymandering Results in Legislative Bodies That Are More Extreme Than The Electorate As a Whole

Our constitutional republic was founded on one overarching principle: "government will represent and remain accountable to its own citizens." *See Printz v. United States*, 521 U.S. 898, 920 (1997); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (It is "a central feature of democracy [] that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.") As the framers recognized, "it is particularly essential that the [legislative branch] have immediate dependence on, and an intimate sympathy with, the

people[,]" and "frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." The Federalist No. 52 (James Madison).

But elections can only instill in representatives the "habitual recollection of their dependence on the people," Federalist No. 57 (James Madison), if representatives who fail to cultivate this habit risk defeat. *Amici*, who were both elected to office in statewide elections, know well the importance of being responsive to the demands of voters. As a current and a former Republican governor of majority Democratic states, they each had to appeal to broad swaths of electorate to win elections. This meant building coalitions that included moderate voters in the middle of the political spectrum; voters who are open to considering alternative points of view.

Many legislators, however, at both the state and federal level, rarely face similar pressures to win over voters in general elections as the framers intended. Instead, members of both parties depending on the state have drawn district lines that all but guarantee the election of the candidate of one party in a given district; the primary is the election that matters as the outcome of the general election is preordained. As former speaker of the house Newt Gingrich once remarked, "'[Democrats] get to rip off the public in the states where they control and protect their incumbents, and [Republicans] get to rip off the public in the states [Republicans] control and protect our incumbents, so the public gets ripped off in both circumstances . . . .'" David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 63 (2009).

Partisan gerrymandering, by design, decreases electoral competition in general elections and democratic accountability along with it. For example, prior to the adoption of California's redistricting and primary reforms in 2010, "California's election system produc[ed] winners and losers with relative certainty . . . before 2008, no seat in the California legislature had changed party hands since the last redistricting, and [by 2009], only 3 of 400 elections to the California legislature since 2001 have resulted in a party change." Matthew G. Jarvis, *Redistricting Reform Could Save California from Itself*, California Journal of Politics and Policy Vol. 1, 5 (2009). Congressional races with gerrymandered districts exhibit similar partisan stability. In Maryland, although Republicans have won between 31 percent and 42 percent of the votes in recent congressional elections, the Democratic controlled legislature has drawn maps that "all but guarantee[] Democrats seven out of eight [congressional] districts . . . even during strong Republican years like the wave election of 2014." Laura Royden, et al., *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice 16 (2018).

In gerrymandered districts, representatives stand little risk of losing a general election. Their central objective is to win primaries by catering to their party base. *See, e.g.*, G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("[L]egislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system."); Jarvis, *supra*, at 6

("The safe members are relatively free to be as partisan and extremist as they please . . . ."). The result is legislators who are ideologically more extreme than the citizens they are supposed to represent. Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines In California*, 53 J.L. & Econ. 545, 564 (2010) (noting studies demonstrating that "state-level legislators[] tend to take more extreme positions on issues than does the general population").

The empirical evidence bears this out: gerrymandering results in less competitive districts, which in turn leads to less responsive government and polarization. *See, e.g.*, J. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, The Journal of Politics, Vol. 68, No. 4 (Nov. 2006) ("[C]onsiderable evidence support[s] the claim that competitive districts induce greater responsiveness among elected officials."); Grainger, *supra*, at 548 (finding "evidence that legislative behavior changes after each redistricting, and these changes are consistent with the polarization argument. Specifically, drawing districts legislatively . . . is associated with increased polarization in the state legislature."); Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839, 862 (2012) (The empirical evidence "strongly suggest[s] that district maps created by nonpartisan officials will lead to greater responsiveness to voter preferences.").

Amici have witnessed this breakdown in the political process first hand. By experience, *amici* know that gerrymandered legislative bodies look nothing like the deliberative bodies imagined by the founders.

See Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1637 (2014) (partisan gerrymandering reduces the kind of "rational, civic discourse" that is essential "to form a consensus to shape the destiny of the Nation and its people."). Instead of working towards legislative compromise, representatives cater to their base. Indeed, often the only issue on which legislators are willing to cooperate is the gerrymandering process itself (at least where one party has not been able to shut the other out of a meaningful role in the legislative process entirely). Legislators sometimes work together to enact redistricting plans that protect the seats of *both* parties, not just their own. Maryland Redistricting Reform Commission, 2015 Report, 19 (Nov. 3, 2015) ("[L]egislatures that are split by party can still usually agree on one principle: protecting incumbents."); Grainger, *supra*, at 548-49 & n.7 ("[I]n 2001 the district lines [in California] were drawn in a high-profile *bipartisan* gerrymander.") (emphasis added).

B. Partisan Gerrymandering Dilutes the Voting Strength of Moderate Voters

A "perverse consequence" of partisan gerrymandering is that it drives "the center out of [legislatures]." Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004). From the perspective of a partisan mapmaker, predictability of outcomes is the goal. Thus, the mapmaker minimizes the role of moderate or swing voters in election outcomes, voters who are more open to consider alternative viewpoints.

There is no doubt that a law that decreased the weight of the votes of moderate voters from 1 to 0.5 while giving a full vote to those on the left and the right would be unconstitutional. Yet sophisticated gerrymandering technology can effectively accomplish this result. John Hart Ely once warned, "given the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in a those pre-computer days) its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance." John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders*? 56 U. Miami L. Rev. 489, 505 (2002).

The result is either one party dominance, or, in the case of bipartisan gerrymanders, highly polarized legislatures and endless gridlock. The experience of *amici* as governors are illustrative.

In Maryland, for example, partisan gerrymandering has led to one party dominance such that the Democrats now enjoy legislative supermajorities. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS. In essence, Democrats have been able to gerrymander around Governor Hogan's veto power even though Governor Hogan was recently reelected by double-digit margins. Rachel Chason, *Inside Larry Hogan's victory: The numbers behind a GOP win in a blue wave*, Washington Post (Nov. 9, 2019), https://tinyurl.com/y5mybk6g. The people of

Maryland clearly want the Governor to have a say in the legislative process and act as a check on the legislature even if the partisan Democrats in the legislature do not.

During Governor Schwarzenegger's term, California faced the different but related problem of persistent partisan gridlock. The state "was reeling from the effects of destructive partisanship — stuck with structural deficits" and a perpetual inability to pass timely budgets. Arnold Schwarzenegger & Ro Khanna, *Don't listen to the establishment critics. California's open primary works,* Washington Post (June 18, 2018), https://wapo.st/2NzCBDX. Historically, "California [was] notorious for its budget gridlock" due in large part to extreme partisanship. *See* Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12(1) State Politics and Policy Quarterly 23, 23 (2012) (noting that "[f]rom 1950 to 2008, the budget was adopted late 44% of the time"); *see also id.* at 37 ("[T]he lack of accountability could also signify a larger problem concerning partisan gerrymandering where safe districts serve to insulate legislators from the consequences of gridlock."). The result was not only that the legislature failed to track the views of the public; it was also that nothing could get done, making governing difficult.

In sum, partisan gerrymandering grossly distorts the normal legislative process. This is also why we cannot rely on the normal political process to fix it absent court intervention. As *amici* can attest, state legislatures jealously guard their redistricting powers and can be expected to resist any real reform efforts. For example, even though 73% of Maryland citizens

would prefer maps drawn by an independent commission, the legislature has ignored Governor Hogan's efforts to implement this type of reform. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS.

In California, Governor Schwarzenegger and other reformers were only able to enact election reform by circumventing the legislature entirely and appealing directly to the people themselves through the referendum process. These reforms included the creation of an independent redistricting commission and top-two primaries. Unfortunately, California is an exception, and in most states the politicians and the political parties have the ability to ignore the majority of the voters who detest gerrymandering.

California, however, demonstrates that the harms of gerrymandering are real. Following California's reforms, legislative partisanship in California measurably decreased. Christian R. Grose, *Political Reforms in California are Associated with Less Ideologically Extreme State Legislators*, Schwarzenegger Institute Report, March 2016, at 7 ("Legislative voting in California is, on average, less extreme in 2013 and 2014 following the enactment of the top-two primary and redistricting reforms."). "Comparing the extremity measure in 2011 to the extremity measures in 2014, [there was] a 34 percent reduction in ideological extremity in the Assembly pre- and post- reform." *Id.* at 9. In addition, "from early 2011 to late 2014, the average California senator had a decrease in ideological extremity of 31%." *Id.* at 3, *see also* Royden, *supra*, at 4. (finding that "California's commission

drawn congressional map . . . [is] among the most responsive in the country.").

If this Court were to hold that challenges to partisan gerrymanders are non-justiciable, most of this nation's citizens will, like those in Maryland, have no remedy against the constitutional harms outlined above and scourge of unrepresentative legislatures due to gerrymandering. This is not the system our founders envisioned, nor is it one this Court should embrace and endorse.

Extreme gerrymandering prevents government from functioning properly and can deprive citizens of their constitutional right to "influenc[e] the passage . . . of laws." *See ERR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Partisan gerrymandering thus disenfranchises voters twice: first, by facilitating the election of representatives whose views are more extreme and partisan than the population as a whole and second, by potentially creating one-party rule or, alternatively, legislative gridlock.

II. *JANUS* ADDRESSED COMPARABLE ISSUES

This Court has, on occasion, compared public unions to political parties, despite their obvious differences. Such comparisons are relevant here. In *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, this Court held that government employees could not be "forced to subsidize" public sector unions that they "choose not to join." 138 S. Ct. 2448, 2459-60 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). The concerns that motivated this Court in *Janus* suggest that constitutional challenges

to partisan gerrymanders warrant serious consideration.

The petitioner in *Janus* was Mark Janus, a state employee who did not want to pay an agency fee to the union that a majority of his fellow employees had chosen as their exclusive bargaining agent. This Court held that the First Amendment prohibited the agency fee requirement. In reaching that result, the Court posited a hypothetical about political parties: "Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for . . . the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 138 S. Ct. at 2475.

This extreme hypothetical presents an obviously unconstitutional state rule requiring residents to align themselves with a particular political party. Extreme partisan gerrymandering, where a computer systematically discounts the votes of voters who do not adhere to views of the dominant party in their gerrymandered district, is government action that forces moderate voters to be represented in all districts by candidates aligned with the platform of a political party. In effect, extreme partisan gerrymandering is comparable to the very hypothetical that this Court observed in *Janus* is clearly unconstitutional. If Mr. Janus were a Democratic voter in North Carolina, or a Republican voter in Maryland, or moderate voter in either state, he would be harmed by extreme partisan gerrymandering in a comparable way.

To be sure, *Janus* is a very different case involving different legal issues. But it would be a strange

result indeed if public sector unions, who are now required to convince public employees to support them based on the merits, are constitutionally required to be more responsive than elected representatives. *See Abood*, 431 U.S. at 256 ("The ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the views and perceived interests of its membership.") (Powell, J., concurring). In *Janus*, this Court "end[ed] the oddity of allowing public employers to compel union support . . . but not to compel party support. . . ." *Janus*, 138 S. Ct. at 2484. But it would be no less of an oddity if this Court were to hold that compelled agency fees, which affect only a subset of the population and implicate only a narrow set of political issues, warrant constitutional scrutiny, but partisan gerrymandering, which undermines the electoral process on which representative government depends, does not.

The *Rucho* Appellants assert that the Court should hold that the present dispute is non-justiciable and not enter the political fray by intervening in the redistricting process: "[t]he framers delegated this delicate and politically fraught task to Congress for good and sufficient reasons, and this Court should decline the invitation to reassign the authority to itself." *Rucho*, Op. Br. at 36. In *Janus*, this Court rejected a similar argument:

> We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," [cite]—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American

> doctrine of judicial review requires us to enforce the Constitution. . . . ." [t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

Janus, 138 S. Ct. at 2486, n.28. The Court should similarly ignore Appellants' plea not to intervene here.

CONCLUSION

For the reasons set forth above, partisan gerrymandering creates real constitutional harms that require a judicial remedy, and the decisions below should be affirmed.

Respectfully submitted,

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No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

APPELLANTS,

v.

COMMON CAUSE, ET AL.,

APPELLEES.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF OF AMICUS CURIAE STEPHEN M. SHAPIRO IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS[1]

Amicus Stephen M. Shapiro lives in Maryland's Eighth Congressional District. He filed the original and first amended complaints in what is now *Lamone v. Benisek*, pro se, in 2013, and was the petitioner when that case was before this Court as *Shapiro v. McManus* in 2015. After that case was remanded in 2016, plaintiffs focused their challenge more narrowly on the First Amendment harms to Republican voters within the former Sixth District, and amicus withdrew to avoid challenges to his standing. Amicus files here to provide insights on Article I, on which Appellees here rely, that are also relevant to the circumstances Appellees in *Benisek* attack on First Amendment grounds in that case.

SUMMARY OF ARGUMENT[2]

Part I of this brief answers key questions:

(1) Does a state abridge voters' right to choose their Representative when it preselects the party of the likely election victor through a district's design?

(2) Does it further offend Article 1 that the state does so to further its choice of the party controlling the U.S. House of Representatives?

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

[2] Amicus has also filed a brief in *Lamone v. Benisek*, No. 18-726, which offers argument applicable here as well.

Part I then develops standards and argues that if the Court adopts a predominance standard to test for actionable intrusions of representational rights, evidence of intrusion should be balanced against factors the state reasonably and legitimately adopted to enable effective representation.

Part II of this brief argues why questions (1) and (2) cannot be exclusively committed to Congress.

The North Carolina General Assembly abridged voters' Article I right to choose their Representatives and exceeded its Article I authority to facilitate congressional elections when it configured the state's congressional districts to preselect the likely party of each Representative. *See Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (reaffirming that legislatures may not use Article I, § 4 authority—to regulate the "manner" of elections—so as to "dictate electoral outcomes"); *U. S. Term Limits*, 514 U. S. 779, 820–21, 833–34 (1995) (holding that state-imposed term limits violate voters' Article I, § 2 rights and exceed states' Article I, § 4 authority).

This case surpasses any plausible standard for violations with respect to breadth of impact beyond a district as well as depth of impact within a district. First, this violation has national impacts, triggering a viable threshold standard for when a partisan gerrymandering case most strongly demands judicial resolution—when such district-by-district preselection implements a plan to achieve or maintain a statewide configuration tilting districts to a favored party. A statewide configuration, as here, has this national impact. More than "root and

branch" internal state politics, it is a concerted effort to advance the legislature's partisan preference—not just within North Carolina, but for overall partisan control of the U.S. House of Representatives. Replication, in other Republican-leaning states also using REDMAP—and then in Democratic-leaning states such as Maryland—turns state legislatures into an electoral college of sorts for determining control of the U.S. House of Representatives. Nothing in Article I or this Court's precedents remotely affords legislatures such a role.

While district-by-district violations alone warrant intervention, this standard would allow the Court to set a minimum impact level for actionable cases. This threshold standard stems from this Court's precedent on political question doctrine—that judicial intervention is most imperative when "a controversy affect[s] the structure of the national government as established by the provisions of the national Constitution," as this case does. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (distinguishing such impacts from those of political questions).

In a district-by-district analysis, this Court should announce that *any* dilution of disfavored voters done to predetermine a district's likely party choice is an actionable violation. *Cf. Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding *any* unjustified variance from exact population equality violates the one-person one-vote standard for congressional districts mandated by Article I, § 2); Appellees and amicus do offer predominance as a manageable limiting alternative that lower courts

could readily implement. But while predominance is consistent with this Court's racial cases, *see e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 905–06 (1996), a more exacting standard analogous to *Karcher* is appropriate in an Article I context as here. And this standard may well be more manageable than predominance, as it would not encourage states to test a predominance limit.

In order to support a lower court's district-by-district analysis—particularly if this Court adopts a predominance standard to assess violations—the Court should announce that intrusion upon voters' representational rights shall be considered a district design's predominant focus *unless* the design is found to predominantly incorporate features that the state reasonably and legitimately adopted to support its citizens' effective representation. Article I, § 2 affords citizens a right to effective representation, and states have a duty to facilitate that right in their enactment of districts. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("The object of districting is to establish 'fair and effective representation for all citizens.'")); *Gralike*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (defining the state's Article I, § 4 duty as being to "enforce the fundamental right involved" under Article I, § 2).

If a state must *not* predominantly design a district to predetermine the party of the victor—or to dilute disfavored voters toward that end—it helps courts and states to know what states *are* supposed to do. This balancing process is similar to how courts

determine predominance to test for impermissible racial gerrymandering. *Cf., e.g., Shaw*, 517 U.S. at 907. It is also analogous to this Court's cases considering variance justifications under the one-person one-vote standards for congressional and state legislative districts. *See, e.g., Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016); *Tennant v. Jefferson County Comm'n*, 567 U.S. 758, 764 (2012); *Karcher*, 462 U.S. at 730–33; *Swann v. Adams*, 385 U.S. 440, 443–44 (1967). While *Gralike* and *Smiley* specifically addressed voters' right to choose Representatives, a predominance test for compliance should incorporate the constitutional purpose of these Representatives, consistent with the Framers' intent and the term's contemporary and current definitions.

Finally, the Court's precedents on political question doctrine demand intervention here. The doctrine does not apply to state actions. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Nor does this case implicate any of the criteria suggesting an exclusive commitment to Congress. *Id.* at 217. Standards relevant to Article I are readily discoverable. Further, this Court has never found that a case implicated a constitutional provision, yet deemed the case political merely for lack of standards. This observation makes sense; finding that a constitutional provision is implicated, as here, inherently suggests the presence of a standard sufficient for deciding at least that case. And more generally applicable standards discoverable here are as manageable, if not more, than those the Court has announced to interpret a wide range of

constitutional mandates and prohibitions. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (announcing a standard for regulatory takings).

This case presents a question of the constitutional floor set by Article I, below which the range of political districting decisions may not descend. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (noting the Court's responsibility to "scrupulously" inquire into a violation of a constitutional provision or statute, while leaving to political officials the "wide range of 'judgment calls' that meet constitutional and statutory requirements"). This case also presents a need to enforce the separation of powers between the People and the states. *Cf. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (finding a judicial duty to determine whether a statute intrudes on executive powers); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (Ginsburg, J., concurring) ("The result of staying the judicial hand is to upset rather than to preserve the constitutional allocation of powers."). While the separations referenced in those cases were specific to the federal branches, this principle is equally compelling here, where North Carolina exceeded its Article I authority and intruded into that of voters.

ARGUMENT

APPELLANTS VIOLATED ARTICLE I BY PRESELECTING THE PARTY OF THE STATE'S REPRESENTATIVES; POLITICAL QUESTION PRECEDENTS REQUIRE INTERVENTION

I. North Carolina's Congressional Districts Violate Article I, §§ 2 & 4.

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States * * * .
>
> U.S. Const. art. I, § 2

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * * .
>
> U.S. Const. art. I, § 4

North Carolina violated three discernible mandates relevant here. First, Article I, § 2 of the Constitution affords voters, not states, the right to select their Representatives in Congress. U.S. Const. art. I, § 2; *U. S. Term Limits*, 514 U. S. 779, 820–21 (1995). Accordingly, states exceed their Article I, § 4 authority to regulate elections if they

"dictate electoral outcomes" or "favor or disfavor a class of candidates." *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (quoting *U.S. Term Limits*, 514 U.S. at 833–34) (striking a ballot designed to influence the election result by adding notations next to candidates' names with whom the state disagreed). Appellants abridged this mandate by designing districts so as to preselect the party of each Representative.

Second, Article I, § 2 forbids placing disfavored voters into districts so as to minimize the weight of their votes relative to those of favored voters. *Wesberry v. Sanders*, 376 U.S. 1, 14, 17 (1964) (explaining the Court's one-person one-vote holding). Appellants abridged this second mandate by cracking and packing populations of disfavored voters in pursuit of abridging the first mandate. Third, Article I, §§ 2 and 4 imply a duty to design districts consistent with their constitutional purpose—to facilitate effective representation. *Cf. Gralike*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (defining the state's Article I, § 4 duty as to "*enforce the fundamental right involved*") (emphasis added)); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (stating that "fair and effective representation" is the purpose of districting."). Appellants subordinated this duty to pursue abridging the first two Article I mandates.

A. A State May Not Choose the Party of a District's Representative

The General Assembly violated Article I, §§ 2 and 4 by preselecting the party of each district's Representative through its design of North Carolina's 2016 congressional districts. Article I, § 2 reserves such choice for the voters. *U. S. Term Limits*, 514 U. S. at 813–14 (recounting the Framers' positions that the People should choose their Representatives); *id.* at 820–21 (holding that state-imposed term limits on Representatives violate the voters' right to choose under Article I, § 2); *id.* at 891 (Thomas, J., dissenting) (recounting the Framers' development of Article I, § 2 to implement their decision that voters should choose Representatives). Such choice is *exclusive* to voters. *Id.* at 857, 882 (finding the clause leaves the "selection of the Representatives * * * entirely to the people" with "virtually unfettered discretion"). Thus, a state may not assume any degree of the voters' choice here as a spoil of war—to the victorious party of state elections to the General Assembly.

The Framers were clear in their concern that the legislatures not intrude upon their voters' right to choose Representatives. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (quoting discussions of the Framers reflecting such concerns); *Vieth v. Jubelirer*, 541 U.S. 267, 275–76 (2004) (quoting the same discussions).

U.S. Term Limits held that the right to choose in Article I, § 2 was abridged by state-imposed term

limits on Representatives. 514 U. S. at 820–21. In that case, voters would not be able to elect their incumbent, but they could freely elect anyone other than the incumbent; the state was not preselecting the party of the new Representative. In this case, while the voters placed within each district are "choosing," it is not be the "unfettered discretion" Article I, § 2 demands. Voters' choice in the general election is more akin to ratifying the choice of party made by the General Assembly through redistricting. The actual selection of the individual Representative is made by primary voters, with the state shutting Appellees out of the real choosing. While this scenario is similar to that in many non-gerrymandered districts that lean heavily to one party, the leaning here was purposefully engineered toward this result. This infringement on the election result, and hence on voter choice, is greater than that which this Court struck down in *U.S. Term Limits*. That precedent requires the same holding to strike this greater abridgment of Article I, § 2.

The analysis of Article I, § 4 is nearly identical, as state action inherently exceeds the scope of its authority if it violates Article I, § 2. This Court has been just as clear that the General Assembly must not use its Article I, § 4 authority to "dictate electoral outcomes" or "favor or disfavor a class of candidates." *Gralike*, 531 U.S. at 523–24 (quoting *U.S. Term Limits*, 514 U.S. at 833–34). Article 1, § 4 provides states no authority to directly or indirectly influence the choosing of Representatives through its setting the "manner" of elections. *See id.* Rather, Article I, § 4 mandates a duty to enact "procedure and safeguards * * * necessary * * * to

enforce the fundamental right involved." *Id.* at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Thus, a state's authority under Article I, § 4 is limited to that needed to facilitate their citizens' representational rights under Article I, § 2. *See id.* And Article I, § 4 is exclusive; a state has no other authority it can bring to bear in setting the manner of congressional elections, *id.* at 522–23; *U.S. Term Limits*, 514 U.S. at 804–05, whether designing ballots or congressional districts. Even if North Carolina did have other enumerated or reserved powers it could bring to bear in its course of redistricting, the Privileges or Immunities Clause forbids North Carolina to apply *any* power in a manner that abridges the Article I, § 2 rights of its citizens. *See infra* Section I.C.

Here, the General Assembly has done precisely that which *Gralike* and *U.S. Term Limits* forbid. It specifically designed each of North Carolina's ten Republican-leaning districts to favor Republican and disfavor Democratic candidates. It did the opposite in the other three packed Democratic-leaning districts to facilitate tilting the other ten. J.S. App-14–App-18. While the court below found some districts would have leaned toward their tilted party in a non-gerrymandered scenario, *see e.g.*, J.S. App-243, that cannot excuse the result in either the other districts or the overall plan. And Article I, § 4 is violated in both the packed and cracked districts. *Cf. Shaw*, 517 U.S. at 907 (finding both impermissible in a racial gerrymandering case).

In *Gralike*, this Court struck down a ballot design because it placed a negative notation by the name of a candidate with whom the state disagreed on a policy issue. 531 U.S. at 514–15, 523. Voters there could still elect the candidate despite the state's preference. But this Court held the ballot design exceeded the state's Article I, § 4 authority. *Id.* at 525–26. Here, the General Assembly designed districts to make the election of nominees with whom the state disagreed on policy unlikely—because the state fenced out the number of disfavored voters the state believed sufficient to achieve the desired outcome. Both in *Gralike* and here, the state acted under Article I, § 4 authority to set the "manner" of congressional elections. U.S. Const. art. I, § 4. *Gralike* compels the same holding here; the General Assembly exceeded Article I, § 4.

In *U.S. Term Limits*, this Court similarly struck down state-imposed term limits as exceeding a state's Article I, § 4 authority to set the "manner" of congressional elections. 514 U.S. at 828. This Court held such term limits impermissibly "dictate electoral outcomes" and "favor or disfavor a class of candidates." *See id.* at 833–34. Here, the General Assembly did just that in designing North Carolina's congressional districts as discussed *supra*. It exceeded merely facilitating the elections by doing so in a manner proactively determining the likely electoral outcome—favoring Republican candidates. The state in *U.S. Term Limits* merely precluded voters from electing certain incumbents. The degree of "dictation" and "favoring" is even greater here. *U.S. Term Limits* compels holding that the General Assembly exceeded its Article I, § 4 authority.

These Article I, §§ 2 and 4 violations cannot have become constitutional by the fact that some degree of gerrymandering may be a longstanding practice. *See Elrod v. Burns*, 427 U.S. 347 353-55 (1976) (striking political patronage actions despite long history). States cannot have gained adverse possession of voters' Article I rights merely because these merits have not been decided by this Court before now. *See District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008) (listing many constitutional rights that remained "unilluminated" until litigated, one for "nearly two centuries after the founding").

While this Court can and should readily decide this case based on *Gralike* and *U.S. Term Limits*, this case is distinguished by a scope of impacts beyond just North Carolina. While district-by-district impacts alone warrant intervention, the national impacts posed by this case could serve as a standard for when a partisan gerrymandering case most strongly demands judicial intervention: when it implements a plan to achieve or maintain a *statewide* configuration tilting districts to a favored party. The intent and impact of this statewide configuration is to advance the legislature's partisan preference—not just within North Carolina—but for overall partisan control of the U.S. House of Representatives. Replication in other states, such as in Maryland, is turning state legislatures into a de facto electoral college for influencing if not determining partisan control of the U.S. House of Representatives. *See* Evan Bonsall & Victor Agbafe, *Redrawing America: Why Gerrymandering Matters*, Harv. Pol. Rev. (May 24, 2016),

http://harvardpolitics.com/united-states/redrawing-america-gerrymandering-matters/
(highlighting national impacts of statewide partisan gerrymandering);
Amber Phillips, *The 2020 Redistricting War is (Already) On*, Wash. Post (July 16, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/16/the-2020-redistricting-war-is-on/
(describing efforts of both national parties to capture state legislatures before the 2020 districting cycle).

Nothing in Article I or this Court's precedents remotely affords the states such a role—or authorizes them to intrude upon the Article I rights of voters on such a grand scale. Judicial intervention is most imperative when "a controversy affect[s] the structure of the national government as established by the provisions of the national Constitution," as this case does. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (distinguishing such cases from those posing political questions or purely local questions). The cases cited in *Highland Farms* as such controversies of national significance addressed the separation of powers between the federal political branches. Ramifications to the structure of Congress—posed by this legislature's taking a role in determining the party in control of the House of Representatives—similarly demand this Court's intervention here.

The text of Article 1, §§ 2 and 4 themselves serve as standards for concluding that Appellees voting rights were abridged and that the General Assembly went beyond merely setting the manner of elections. Interpretations of these provisions, guided by this

Court's precedents, afford similarly manageable standards to confirm district-by-district violations:

> Did the legislature design the challenged congressional district so as to preselect the party of the Representative from that district?

This standard interprets abridging the voters' right to choose under Article 1, § 2 to include a state's preselection of the Representative's party. It similarly incorporates an Article 1, § 4 benchmark from *U.S. Term Limits*, 514 U.S. at 833–34 (noting that "dictat[ing] electoral outcomes" exceeds a state's Article 1, § 4 authority).

> Did the legislature design the challenged district to favor candidates of a party or to disfavor those of another?

This standard incorporates another Article 1, § 4 benchmark from *U.S. Term Limits*, 514 U.S. at 833–34 (noting that "favor[ing] or disfavor[ing] a class of candidates" exceeds Article 1, § 4 authority). A very similar Article 1, § 2 benchmark from *Wesberry*, 376 U.S. at 4, recasts this from the *voter's* perspective:

> Did the legislature design the district to favor or debase the impact of certain voters so as to elect a candidate of the legislature's favored party?[3]

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[3] This dilution question also sounds in the First Amendment. *See* J.S. App-276, App-280, App-286. *See also* Br. Appellees 27–28, *Lamone v. Benisek*, No. 18-276 (offering similar questions as a standard). Appellees are burdened not just on account of their prior votes—constituting unlawful retaliation, Br. Appellees 25, *Lamone*—but also on account of their

Here, the answers to all three are simple, as Appellants actions admitted it through clear and convincing evidence. Appellants directed a hired expert who, using REDMAP, configured North Carolina to have ten Republican-leaning districts, and three Democratic-leaning districts. They implemented this plan by cracking some areas with largely Democratic voting histories, while packing others—through precise analysis and siting of each precinct. J.S. App-14–App-18.

Similarly, this case breaches a subsidiary standard looking to what a legislature does, as the General Assembly did here, to implement its choice—to crack and pack precincts based on party to craft districts favoring the party of its choice. In this way, a violation can be proven by showing precincts were arranged within a challenged district with the intent of diluting voters of a plaintiff's party, with the purpose and effect of achieving a projected outcome disfavoring the candidate of the plaintiff's party. Injury occurs when the legislature enacts a map with one or more such districts. While each district would be examined individually, a statewide plan—such as the General Assembly directed its expert to prepare here—and other multidistrict evidence would certainly be relevant in the examination of individual districts. *Bethune-*

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projected future votes. Thus, within a congressional district, the harm attributable to a First Amendment violation includes this Article I, § 2 abridgment—and conversely, Appellees here incur First Amendment injuries as an element of the overall harm to their representational rights.

Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 800 (2017). While districts may not superficially appear cracked at first glance—*compare* JA-328 (N.C. districts), *with* JA-945, *Lamone v. Benisek*, No. 18-726 (Md. districts)—courts, as here, are capable of finding and analyzing the facts needed to perform this test. *See e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (reviewing a complex racial gerrymandering case); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (finding circumstantial facts in a complex voting rights case).

Mere lack of proportionality based on a vote for statewide office, even adjusted to account for densely populated areas greatly favoring one party, would not be sufficient. It could be one piece of potentially-relevant evidence, but would have to accompany sufficient direct or circumstantial evidence to prove the intentional arrangement of precincts to accomplish the legislature's purpose—to predetermine the likely election outcome. This Court should announce that a plaintiff must show such purpose, intent, and effect to prove an Article I claim. These showings should prevent finding violations in less than certain circumstances.

The question of how forcefully a legislature's hand must push on the scale to constitute an abridgment is more a question of what should constitute an *actionable* abridgment. First, Appellants themselves answered this question—in how forcefully *they* opted to press on the scale. Here, Appellants designed the amount of push within each district to achieve an overall ratio comprising ten Republican-leaning seats. It makes no difference to

Article I whether Appellants had chosen to push less within individual districts, with a goal to tilt eleven seats to be sufficiently Republican, or to push harder to tilt nine more firmly and definitively.

Second, nothing in Article 1, §§ 2 or 4 or in the Framers' discussions of these sections suggests that a legislature may assume *any* role in the selection of Representatives. *U.S. Term Limits*, 514 U. S. at 813–14, 820–21; *id.* at 857, 882, 891 (Thomas, J., dissenting). Article 1, § 2 is abridged when the enacted "manner" of election poses any unjustified intrusion upon the selection. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992) ("[T]he level of the fee is irrelevant. A[n unconstitutional] tax * * * does not become more constitutional because it is a small tax.").

A standard permitting no concerted abridgment is also consistent with this Court's precedents holding that Article I, § 2 precludes any unjustified dilution of *congressional* districts in the one-person one-vote context, whereas this Court enforces one-person one-vote within *state* legislative districts under the Equal Protection Clause, where a ten percent variance is presumed compliant. This affords states some discretion to pursue legitimate non-discriminatory goals in state districts. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306–07 (2016); *Karcher*, 462 U.S. at 730–33 (contrasting the Court's precedents); *Tennant*, 567 U. S. at 764–65 (permitting a 0.79 percent variance to avoid splitting a county—a tradeoff supporting representation); *White v. Weiser*, 412 U.S. 783, 793 (1973); *Roman v. Sincock*,

377 U.S. 695, 710 (1964) (allowing state districts having "minor deviations * * * that are free from any taint of arbitrariness or discrimination").

Setting an actionable abridgment standard may encourage states to test that line. *See Harris*, 136 S. Ct. at 1306–07 (noting the ten percent variance standard for enforcing one-person one-vote in state districts, and that a 9.9 percent variance presented was presumed compliant). However, the Court could establish an actionable standard of predominance, which has been proven manageable in the racial context. Here, testimony admits that achieving a ten-to-three configuration of Republican and Democratic districts was Appellants' predominant focus. Amicus argues that predominance is a proven, manageable standard in his brief in support of Appellees in *Lamone v. Benisek*, No. 18-726.

If a district is *not* to be predominantly designed to procure victory for the candidate of a legislature's favored party, it helps states and courts to know what Article I implies that the predominant focus of a district's design *must* be—on representation.

B. Enabling Effective Representation Must Take Priority over Engineering Election Outcomes

If this Court announces a predominance standard for finding an actionable violation of Article I, the Court should also announce that such abridgment shall be considered a district design's predominant focus *unless* the design is found to predominantly incorporate features that the state

reasonably and legitimately adopted to support its citizens' effective representation.

This Court announced a similar process to determine predominance in racial gerrymandering. *Shaw*, 509 U.S. at 647 (noting that traditional districting criteria may serve to refute a racial gerrymandering claim but are not required). In an Article I context, as here, representational rights afford a more pertinent basis for considering features that enable effective representation in a predominance analysis beyond merely refuting abridgment of voters' right to choose. A state would not be limited to traditional districting criteria here, but would have broad discretion to incorporate features that the state reasonably and legitimately adopts to support citizens' effective representation. However, a state would need to show these factors predominate where there is also significant evidence that factors focused on engineering outcomes. Voters' representational rights should win in a tie.

Particularly where there is only marginal evidence of a district being designed to engineer election outcomes, the design features chosen, and their application, are properly within a legislature's "wide range of judgment calls." *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979). But a lesser presumption of wise discretion is in order where the evidence suggests otherwise. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (guiding judicial review of agency regulations).

A legislature has a duty to regulate congressional elections so as to facilitate their

citizens' representational rights. *Smiley*, 285 U.S. at 366. It follows that representational rights include a right to effective representation, and that states have a duty to design districts to enable and not inhibit that function. *See Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (noting that "fair and effective representation" is the purpose of districting"). When a state designs a district that subordinates its citizens' effective representation to favor the election of the legislature's preferred candidate, that design is particularly averse to Article 1, §§ 2 and 4—as it subordinates a duty mandated by these provisions to pursue a purpose these same provisions forbid.

The functions of a Representative are found in Article I, in the term's definitions, and in historic and current understandings of representation. Article I, § 8 lists the range of topics on which Representatives legislate. U.S. Const. art. I, § 8. In providing an early definition, Webster noted the role of Members of Parliament, who had far more limited duties in representing their constituents:

> A member of the house of commons is the representative of his constituents and of the nation. In matters concerning his constituents only, he is supposed to be bound by their instructions, but in the enacting of laws for the nation, he is supposed not to be bound by their instructions, as he acts for the whole nation.

Noah Webster, *American Dictionary of the English Language* (online ed. 1828) (defining Representative). *See also Black's Law Dictionary* (10th ed. 2014) (defining "representative" as

"someone who stands for or acts on behalf of another"); Webster, *supra* ("In legislative or other business, an agent, deputy or substitute who supplies the place of another or others, being invested with his or their authority"); Samuel Johnson, *A Dictionary of the English Language* 1682 (online ed. 1755) ("One exercising the vicarious power given by another").

The framers addressed the qualities needed for effective representation. George Mason argued that Representatives "ought to know and sympathise with * * * the community," reflecting "different interests and views arising from the difference of produce, of habits, etc." Wilbourne E. Benton, *1787: Drafting the U.S. Constitution* 197 (1986). Mason declared that "requisites in actual Representation are that the Representatives should sympathize with their constituents; should think as they think, and as they feel." *Id.* at 204. James Madison stated that Representatives must not have "a personal interest distinct from that of their Constituents." *Id.* at 267. Similarly, James Wilson held that the "true Doctrine of Representation is, that the Representative ought to speak the language of his Constituents, and that his voice should have the same influence, as if given by his Constituents." *Id.* at 102. Joseph Story concurred a few decades later:

> No reasoning, therefore, was necessary to satisfy the American people of the advantages of a [H]ouse of [R]epresentatives, which should emanate directly from themselves; which should guard their interests, support their rights, express their opinions, make known

> their wants, redress their grievances, and introduce a popular pervading influence throughout all the operations of the government.

Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. IX, § 573 (1833). The duties of a Representative are held remarkably similar today. *See* R. Eric Petersen, Cong. Research Serv., RL33686, *Roles and Duties of a Member of Congress: Brief Overview* (Nov. 9, 2012). This Court described the role of a Representative from a presumably non-cracked district as being to give a "minority of the people in a state * * * [a] voice * * * in the national councils." *Colegrove v. Green*, 328 U.S. 549, 553 (1946) (quoting 1 Kent, *Commentaries* 230–31 (12th ed. 1873)), *abrogation on other grounds recognized by Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964).

States have adopted a range of features in designing districts to support effective representation as just described. *See* Royce Crocker, Cong. Research Serv., R42831, *Congressional Redistricting: An Overview* (Nov. 21, 2012) (providing data on state adoption of specific districting features) Many of these adopted features incorporate commonalities, such as geography, that intuitively serve to combine residents likely to share local concerns, economic interests, and political opinions in a manner that supports their joint representation by a single Representative, performing the duties noted above on their behalf. *See* Crocker, *supra*, at 9–14; *cf. Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("When a district obviously is

created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

A court should be mindful of these duties and qualities of Representatives in reviewing the features adopted to determine whether their predominant focus was to facilitate citizens' effective representation or to intrude upon their choosing their Representative. Inexplicably sharp divergences in both geography and partisan preference within a single district may be highly suspect. But less divergence does not necessarily compel an opposite conclusion, as the design specifics employed to engineer a desired partisan outcome in one state may not be required to do the same in another, such as in North Carolina.

Here, the cracking and packing of Democratic areas to influence the election outcomes was the General Assembly's stated primary focus in designing North Carolina's congressional districts. J.S. App-14–App-18. That the General Assembly incorporated traditional districting criteria as a secondary focus does not disprove nor immunize the Article I violations. *See supra* Section I.A.

C. The Privileges or Immunities Clause Reinforces That a State May Not Abridge its Citizens' Article I Rights Using Any Source of Power

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
>
> U.S. Const. amend. XIV, § 1, cl. 2

This Court has held that Article I, § 4 affords states their sole authority under which they may regulate congressional elections. *Gralike*, 531 U.S. at 522–23. This Court has also held that Article I, § 4 affords states no authority to regulate elections so as to abridge voters' Article I, § 2 rights. *U. S. Term Limits*, 514 U. S. at 820–21, 833–34.

The Privileges or Immunities Clause explicitly reinforces and expands beyond those holdings—protecting voters' Article I, § 2 representational rights in full, from any abridgment done through a state's use of its limited Article I, § 4 authority, or through any reserved powers a state could apply in either designing congressional districts or in support of any other state action that directly or indirectly causes such harm. U.S. Const. amend. XIV, § 1, cl. 2; *see U.S. Term Limits*, 514 U.S. at 842–45 (Kennedy, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884); *Wiley v. Sinkler*, 179 U.S. 58, 62–63 (1900)), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *cf. Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) (holding that the rights of political assembly and speech are "a

privilege inherent in citizenship of the United States which the Amendment protects").

II. Political Question Doctrine Compels a Judicial Resolution Here

The question as to whether North Carolina's congressional districts violate Article I cannot be considered a *political* question. First, this question does not meet the two remotely applicable *Baker* criteria—a textual commitment to a political branch, or a lack of discoverable and manageable standards. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Second, this Court has never found that a claim implicated a constitutional provision, but then deemed it a political question *merely* for a lack of standards. The Court has also found such questions committed to a political branch or posing extraordinary prudential implications against judicial resolution. Finding that a constitutional provision is implicated, as here, inherently suggests the presence of a standard sufficient for deciding at least the case at hand. Further, the *Baker* criteria are not independently decisive but rather guides to assist a court in ultimately determining whether a question is at least impliedly committed to a political branch for decision. *See id.* at 210–11, 217.

At its root, a political question is one that is, textually or impliedly, *exclusively* committed to a political branch. *See id.* This Court has consistently recognized *its* duty to decide the constitutionality of legislative acts—distinguishing such legal questions from questions applying policy discretion *within the range* of constitutionality. *See e.g., Zivotofsky v.*

Clinton, 566 U.S. 189, 196–97 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) ("No policy underlying the political question doctrine suggests that Congress * * * can decide the constitutionality of a statute; that is a decision for the courts.")); *Bell*, 441 U.S. at 562 (noting the Court's responsibility to "scrupulously" inquire into a violation of a constitutional provision or statute, while leaving to policy officials the "wide range of judgment calls" that meet constitutional and statutory requirements); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912) (contrasting "the legislative duty to determine the political questions involved" with the judiciary's "ever-present duty * * * to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

"[The judiciary] is compelled, when called upon, to decide whether a law is constitutional or not. If it declines to declare it unconstitutional, that is an affirmance of its constitutionality." Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. XXXVII, § 1576, n.1 (1833).

The court below did not strike North Carolina's congressional districts as being repugnant to public policy, but rather because they violate Article I. Judicial abstention here would affirm the constitutionality of North Carolina's congressional districts, Story, *supra*, § 1576, and effectively announce an "anything goes" standard as the constitutional floor for the range of policy discretion.

A. This Court Cannot Properly Abstain Here Under the Political Question Doctrine

The question of whether North Carolina's congressional districts violate Article I cannot be considered political under *Baker*, 369 U.S. at 217. First, neither Article I, § 2 nor § 4 commit questions as to constitutionality to Congress or the General Assembly. Authority for these political branches to *legislate*, given in Article I, §§ 4 and 8, cannot be conflated as an implied commitment, or interpreted to afford them Article III powers. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring); *Zivotofsky*, 566 U.S. at 196–97 (*quoting Chadha*, 462 U.S. at 941–42)); *Vieth*, 541 U.S at 275–78 (discussing Congress' Article I, § 4 legislative authority, but not noting an implied commitment to Congress); *Bell*, 441 U.S. at 562.

Second, constitutionally-relevant manageable standards are readily discoverable here, *supra* Section I.A., and while these do include generally applicable standards, *Baker* requires resolution here even if an available standard would only decide this case. *See* 369 U.S. at 217. *See also District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands of [the judiciary] the power to decide on a case-by-case basis whether the right is *really* worth insisting upon."); *id.* at 628–29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights * * * [this statute] would fail constitutional muster."); *Gralike*, 531 U.S. at 530 (Kennedy, J., concurring) ("If there are to be cases

in which a close question exists regarding whether the State has exceeded its constitutional authority * * * this case is not one of them. In today's case the question is not close.")

The *Baker* criteria are not "stand-alone definitions," but are "guides" to "be used together with the Constitution" in determining "whether a question is entrusted * * * exclusively to a *federal* political branch." *Comer v. Murphy Oil USA*, 585 F.3d 855, 872 (5th Cir. 2009), *vacated and then dismissed for lack of quorum to hear en banc*, 607 F.3d 1049, 1055 (5th Cir. 2010); *see Baker*, 369 U.S. at 210–11, 217. The doctrine cannot commit questions to states, *see id.*, and a federal court is not free to abstain unless it finds the issue exclusively committed, *Comer*, 585 F.3d at 872 (citing *Boumediene v. Bush*, 553 U.S. 723, 771 (2008)). A court's review starts with interpreting the provision at issue for such a commitment. *Id.* at 875 (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)). Here, Appellees attack a *state* action—and this Court has noted a particular commitment *to the judiciary* to review state actions pursuant to the very provision at issue:

> The practical construction of Article I, § 4, is impressive. * * * [L]ong and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny.

Smiley v. Holm, 285 U.S. 355, 369 (1932).

Relatedly, this case poses a question analogous to a separation of powers question—enforcing the Article I bounds of authority between voters and the General Assembly. Thus, deferral here on political question grounds would be particularly imprudent since it would *sub silentio* locate this boundary against voters and in favor of the General Assembly. *Cf. El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[Abstention] would systematically favor the Executive Branch over the Legislative Branch—without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues.") While *El Shifa* involved a federal statutory claim, abstention here would similarly and imprudently favor the General Assembly by default, just as deferral in a federal statutory case could unduly favor the Executive.

Consistent with the purpose of the doctrine—to abstain from reaching questions exclusively committed to federal political branches—this Court has never found that a claim implicated a constitutional provision, but then deemed it a political question for lack of standards—unless the Court also found the question was committed to a political branch or that it posed extraordinary prudential implications against judicial resolution. *See e.g.*, *Pacific States*, 223 U.S. at 151 (finding a claim based on the Guarantee Clause committed to Congress); *Coleman v. Miller*, 307 U.S. 433, 452–54 (1939) (finding that while the Constitution requires time limits for ratifying constitutional amendments,

the setting of such limits was impliedly committed to Congress—as the Court's lack of standards and prudential implications both weighed against announcing a time limit); *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946), *abrogated by Wesberry v. Sanders, 376 U.S. 1, 6–7 (1964)* (holding that whether districts must have equal populations was a question committed to Congress, as the Court lacked standards to redraw districts to have equal populations); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (finding military oversight committed to the political branches); *Nixon*, 506 U.S. at 230, 236, 238 (1993) (finding the discovery of standards to review Senate impeachment "trials" under Article I, § 3 beyond the Court's capacity, noting the potential "chaos" resulting from the Court overturning a Senate trial, and concluding that such trials are exclusively committed to the Senate); *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (finding it "dubious" that partisan gerrymandering violates the Equal Protection Clause, and finding prospective standards "severely unmanageable"). *Cf. Powell v. McCormack*, 395 U.S. 486 519–22 (1969) (holding that the basis for the U.S. House's refusal to seat an elected Representative *was justiciable*).

Vieth was an exception in abstaining—but not holding the question exclusively committed, 541 U.S. at 278. However, notably and perhaps decisively, *Vieth* doubted that partisan gerrymandering implicates the Equal Protection Clause in the first place, *id.* at 286. Three years before *Vieth*, in *Gralike*, and four years later in *Heller*, the Court enforced what it viewed as clear

violations without generally applicable standards. *See* discussion *supra* pp. 28–29.

Here, we have a clear constitutional command, and discoverable standards similar in manageability to those this Court has announced to enforce a wide range of constitutional mandates. *See, e.g.*, *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (Takings); *Strickland v. Washington*, 466 U.S. 668 (1984) (Right to Counsel under the Sixth Amendment); *INS v. Chadha*, 462 U.S. 919 (1983) (Bicameralism & Presentment); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Due Process); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (Equal Protection); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936) (Case or Controversy; Disposal Power); *Ex parte Wilson*, 114 U.S. 417 (1885) (Infamous Crimes under the Fifth Amendment); *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (Commerce).

Standards need not be simple in order to be adequately manageable. *See Zivotofsky*, 566 U.S. at 201 ("To say that [a] claim presents issues the Judiciary is competent to resolve is not to say * * * [resolution] is simple."); *id.* at 211–12 (Alito, J., concurring) (noting that determining the constitutionality of a statute may not be "an easy matter" but not necessarily "a political question that the Judiciary is unable to decide"); *id.* at 204 (Sotomayor, J., concurring) ("[C]ourts are []capable of interpreting or applying somewhat ambiguous standards using familiar tools of statutory or constitutional interpretation."); *Kerr v. Hickenlooper*, 759 F.3d 1186, 1193–94 (10th Cir. 2014) (Gorsuch, J., dissenting from the denial of

reh'g en banc) ("[P]rinciples and precedents don't always dictate a single right answer.").

"[A]pplication of the doctrine ultimately turns, as Learned Hand put it, on 'how importunately the occasion demands an answer.'" *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (quoting L. Hand, *The Bill of Rights* 15 (1958)). The Court's precedents have remained consistent with Judge Hand's prescient observation for the past sixty years. And this case calls for such an answer, ahead of the 2020 redistricting cycle.

B. Sequential Analysis Using *Baker*'s Second Prong Dispels Any Implied Commitment to a Political Branch

In analyzing this case under the *Baker* criteria, this Court should consider the discrete elements of *Baker*'s second prong, on standards, in a *sequential* fashion. The plurality in *Vieth simultaneously* looked to whether (1) partisan gerrymandering implicates the Equal Protection Clause, (2) whether standards relevant to such an equal protection violation are discoverable, and (3) if such standards are manageable. *See Vieth*, 541 U.S. at 284–86. This simultaneous handling of all three of these analyses was unhelpful, as each successive analysis should start with the results of the prior analysis.

Baker v. Carr held that a question's commitment to a political branch may be indicted by a "lack of discoverable and manageable standards." *Baker*, 369 U.S. at 217. *Davis v. Bandemer* restated the standards prong in *Baker* as the lack of

"*judicially discernible* and manageable standards." *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (emphasis added). *Vieth v. Jubelirer* refined "judicially discernible" as "being relevant to some constitutional violation." *Vieth*, 541 U.S. at 288.

Any standard for determining a violation of Article I must relate to its text and precedents. *See supra* Section I.A. The initial showing here, that Article I is implicated, supports the follow-on discovery and assessment of standards. The combined analysis in *Vieth* showed the difficulty of simultaneously determining (1) whether the Pennsylvania legislature's revision of the state's congressional districts implicated a constitutional provision; (2) if a standard confirming such a violation was available; and (3) whether such standard was adequately manageable. *See id.* at 284–86 (using this process to determine if a predominant intent standard was "discernible and manageable" for deciding an equal protection claim of statewide partisan gerrymandering).

These are inherently sequential steps. The first two—determining that Article I is implicated, and discovering a standard to confirm its violation—are essentially different levels of the same inquiry. The first is a high-level inquiry—as this Court performed in *Gralike* and *Heller*—through interpretation of the constitutional text as informed by precedents. Here, the interpretation itself serves as a high-level standard. *See supra* Section I.A., p. 15 (deriving straightforward high-level standards from the text and this Court's precedents on Article I).

Beyond these high-level standards, which alone are adequate here, more generally applicable subsidiary standards are readily discoverable from what is discernible from the evidence that confirms a violation or actionable violation—the concerted statewide cracking and packing of Appellees and similarly situated Democratic voters that was shown to be the predominant focus of each district's design. *See supra* Section I.A., pp. 16–17 (deriving a subsidiary standard based on the methods used to violate Article I—cracking and packing of disfavored voters). *See supra* Section I.A., pp. 13–14, 19 (deriving further actionable standards that could limit intervention to cases posing greatest impacts).

Where a violation is demonstrated from a standard adequate for the case at hand, less than ideal manageability, without more, should rarely if ever signify an implied commitment to a political branch—and thus allow a clear violation to escape judicial intervention. *Cf. Vieth*, 541 U.S. at 286. ("[C]ourts might be justified in accepting a modest degree of unmanageability to enforce a [clear] constitutional command * * * ."). Manageability here is consistent with standards enforcing other constitutional rights. *See supra* Section II.A., p. 32. And the clear command of Article I confers a particularly strong duty to intervene here. *See Smiley*, 285 U.S. at 369.

Prudential considerations should be considered last. Where a violation is shown, only extraordinary prudential ramifications should imply an exclusive commitment. Here, the ramifications soundly dispel any such commitment—as abstention would leave

this abridgment of representational rights in place, to be copied after the 2020 census by more state legislatures seeking to choose the party in control of the U.S. House of Representatives.

* * *

Maryland's General Assembly proposed a compact with North Carolina and other states whereby they would mutually cease and desist from partisan gerrymandering. Fiscal Note, S.B. 1023, 2017 Reg. Sess. (Md.). The proposal went nowhere, and was not likely expected or intended to. But North Carolina and Maryland already have such a compact—the United States Constitution—that forbids state legislatures to take, barter, trade, or hold hostage any slice of their voters' unfettered right to fully choose their Representatives.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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March 8, 2019

No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL., APPELLANTS

v.

COMMON CAUSE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Georgia, Indiana, Louisiana, Ohio, Oklahoma, South Carolina, and Utah. The States have a vital interest in the rules that govern apportionment of seats for state legislative bodies and the United States House of Representatives. This Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Such reapportionment, the Court has recognized, is an inherently political task. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). The Court has never held that a State violates the Constitution by pursuing or achieving political goals through reapportionment.

Yet in this case, the district court struck down the North Carolina map as an impermissible gerrymander under *four* different theories. The district court's decision does not articulate a manageable standard for distinguishing permissible from impermissible partisan motivation. Although it considers partisan motivation, the district court's analysis rests on a statistical analysis that is designed to ignore partisan concerns. The end result is an "I-know-it-when-I-see-it" approach that invites judges to choose the winners and losers in both redistricting and in the state legislatures based on the judges' own political leanings. It invites openly partisan policy battles in the courtroom. Such battles will expose every State to litigation under a legal standard so indeterminate that any party that loses in the legislature has a plausible chance of overriding that policy decision in the courts. The Constitution does not support, let alone compel, this result.

SUMMARY OF ARGUMENT

For the reasons set out in appellants' briefing, the district court lacks jurisdiction. The plaintiffs lack standing under the principles set out in *Gill*, and in any event, their claims are not justiciable. The Court thus need not reach the merits.

If the Court were to reach the merits, it should conclude that the Equal Protection Clause does not prohibit partisan purposes when reapportioning legislative seats. The Court has repeatedly recognized that legislative reapportionment is an inherently partisan task. That is because partisan purpose is inherent in the nature of legislative reapportionment, and there is nothing invidious or irrational about such purposes. Indeed, to equate partisan preference with invidious purpose—as the district court did below—contravenes this Court's presumption of constitutionality and good faith for government actions.

ARGUMENT

This Court has repeatedly recognized a widely known fact: Politics is, and always has been, a part of redistricting. Far from being invidious or irrational, political competition is a necessary component of legislative-controlled redistricting. The district court fundamentally misunderstood this Court's Equal Protection Clause precedent, which requires a showing of invidious or irrational purpose—and one that overcomes the strong presumption of constitutionality and good faith accorded to legislative acts.

I. Legislatures Do Not Act Invidiously or Irrationally, Under the Equal Protection Clause, When They Reapportion With a Partisan Purpose.

Legislatures do not act invidiously or irrationally when they reapportion with a partisan purpose. And the Court has recognized numerous times that partisan politics are inherent in the nature of legislative-controlled reapportionment. This fatally undermines the existence of partisan-gerrymandering claims.[1]

A. Partisan-gerrymandering claims require showing that a legislature acted with an invidious or irrational purpose.

A claim of unconstitutional partisan gerrymandering is an allegation, under the Equal Protection Clause, that a legislature has acted with an invidious or irrational *purpose*. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (a partisan-gerrymandering claim alleges that "political classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective"); *see also Whitcomb v. Chavis*, 403 U.S.

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[1] The Court can therefore hold that partisan-gerrymandering claims are not cognizable under the Equal Protection Clause—wholly apart from any potential application of the political-question doctrine's limits on Article III jurisdiction. That said, the political-question doctrine would independently bar partisan-gerrymandering claims. Partisan concerns are a constitutionally appropriate element in the redistricting process, so any partisan-gerrymandering standard triggered by the degree of partisan interest motivating the plan can have no predictable limiting principle and is, at base, a question for the political branches. *E.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that, among other things, the "lack of judicially discoverable and manageable standards" for resolving a dispute make it a political question, outside the Judiciary's power).

124, 155 (1971) ("it would not follow that the Fourteenth Amendment had been violated unless [the law] is invidiously discriminatory"); *Gaffney*, 412 U.S. at 754 (redistricting plan may be unconstitutional if political group is "fenced out of the political process and their voting strength invidiously minimized").

Because a partisan-gerrymandering challenge to a redistricting plan must allege invidious action, it is "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Equal Protection Clause does not forbid state action that merely affects some individuals differently than others. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). A claim of mere disparate effect does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.)).

Plaintiffs' obligation to prove invidious purpose, therefore, "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Rogers*, 458 U.S. at 619 (quoting *Bolden*, 446 U.S. at 66 (plurality op.)).

B. Partisan purposes are inherent in legislature-controlled redistricting, and there is nothing invidious or irrational about such purposes.

This Court has said time after time that partisan purposes are inherent in redistricting, for example:

- "Politics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753.
- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.
- "[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition." *Miller v. Johnson*, 515 U.S. 900, 914 (1995).
- Redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam).[2]

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[2] *See also Vieth*, 541 U.S. at 285 (plurality op.) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality op.) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."); *Karcher*

Consequently, the fact that a legislature reapportioned with a partisan purpose is not evidence that the legislature acted invidiously or irrationally. *See, e.g.*, *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment) ("[A]ppellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw . . . .").

In contrast, when a legislature acts with a purpose to create a racial classification, for example, that purpose is inherently suspect.[3] But there is nothing inherently suspect, invidious, or irrational about a legislature using a partisan purpose when redistricting. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("Race is an impermissible classification. Politics is quite a different matter." (citation omitted)).

This Court's precedent establishes that partisanship and entrenchment are not invidious purposes—and for good reason. For example, bipartisan gerrymanders, which often favor incumbent legislators of both parties, are permissible. *See Gaffney*, 412 U.S. at 751 (holding that a redistricting plan drawn by a bipartisan commission along political lines was not invidiously discrimina-

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v. Daggett, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("Legislators are, after all politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting.").

[3] *See Rogers*, 458 U.S. at 617 ("[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" (quoting *Washington v. Davis*, 426 U.S. at 240)); *Bolden*, 446 U.S. at 66 (plurality op.) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

tory); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."). Such gerrymanders are just as likely to involve both an "injection of politics," *Vieth*, 541 U.S. at 293 (plurality op.), and an intent to entrench those who control the process. But neither violates equal protection: "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney*, 412 U.S. at 753.

Determining what is "politically fair" is a task left to the States to resolve through the political process. *See, e.g.*, *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

C. The presumptions of constitutionality and good faith for government actions, combined with the many traditional purposes inherent in any reapportionment, make it incredibly difficult—if not impossible—to show invidious partisan purpose.

Even if the Court were to entertain the possibility that a drastic, specific type of partisan purpose could possibly rise to the level of invidious or irrational intent, it would be very difficult—if not impossible—to sustain such a claim. This Court's established precedent makes clear that any unlawful-purpose analysis requires "extraordinary caution" and faces an exacting standard: it requires the clearest proof of invidious purpose in light of the heavy presumptions of constitutionality and good

faith accorded to government actions. *See, e.g.*, *Miller*, 515 U.S. at 916 (recognizing a "presumption of good faith that must be accorded legislative enactments, requir[ing] courts to exercise extraordinary caution in adjudicating claims that a State has [engaged in invidiously-motivated action]"). Plus, any redistricting plan will necessarily involve traditional, legitimate reapportionment purposes—including compliance with the one-person, one-vote doctrine, which already significantly cabins the ability of legislatures to engage in excessive partisan gerrymanders.

1. The exacting standard for invidious-purpose challenges to government action is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in "good faith," *Miller*, 515 U.S. at 916; and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

This Court, therefore, "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). So the Court has permitted an unlawful-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted an unlawful-purpose analysis of government action, the Court has

concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing, 6 Cranch at 128.

The Court has thus explained, in various contexts, that only clear proof of unlawful purpose can allow courts to override facially neutral government actions. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Feeney*, 442 U.S. at 272, 275 (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. at 245-48.
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).

This exacting standard for an unlawful-purpose challenge to facially neutral government action exists for good reason. It keeps a purpose inquiry judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived

lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

2. The fact that reapportionment will always necessarily involve traditional redistricting motives in addition to partisan motives also significantly undermines any allegation of invidious partisan gerrymandering.

Legislatures in charge of redistricting operate under a "broad mandate," and their decisions are rarely "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Thus, while partisan advantage is ever present, it is never a legislature's sole concern in redistricting. Many other traditional, legitimate factors figure into decisions to draw district boundaries in a certain way, such as "compactness, contiguity, and respect for political subdivisions." *Shaw v. Reno*, 509 U.S. at 647.

Importantly, the one-person, one-vote doctrine also significantly cabins the ability of legislatures to rely excessively on partisan purpose. By requiring districts of nearly equal population, legislatures are already limited in how they can use partisan purpose in reapportionment. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) ("Over the ensuing decades, the Court has several times elaborated on the scope of the one-person, one-vote rule.").

When weighing all these traditional reapportionment criteria, politicians' attention naturally gravitates towards the "the location and shape of districts [that]

may well determine the political complexion of the area," *Gaffney*, 412 U.S. at 753, and affect their chances of reelection or the probability that their favored legislation will pass. Voters expect no less. *See* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. Rev. 1, 74 (1985) ("[W]hat . . . matters to almost all Americans when district lines are drawn, is how the fortunes of the parties and the policies the parties stand for are affected. When such things are at stake there is no neutrality. There is only political contest.").

3. The district court did not apply the presumption of constitutionality and good faith, and it contravened this Court's precedent by equating partisan purpose with invidious intent. Rather than exercise "extraordinary caution," *Miller*, 515 U.S. at 916, the district court declared an "invidious" purpose in redistricting based on mere run-of-the-mill evidence of partisan preferences. But evidence of partisan purpose is not evidence of invidious intent. *See supra* Part I.B.

Under the district court's approach, any effort to secure a marginal partisan advantage might qualify as prohibited invidious discrimination. This Court's precedents do not permit that result—especially when virtually every redistricting case will likely abound with indicators of political motive. *See, e.g.*, *Vieth*, 541 U.S. at 347-50 (Souter, J., dissenting) ("[U]nder a plan devised by a single major party, proving intent should not be hard, . . . politicians not being politically disinterested or characteristically naïve.").

II. Plaintiffs Lack Standing, and Their Claims Are Not Justiciable.

Plaintiffs' claims for partisan gerrymandering fail at the outset because they lack standing. Like the *Gill* plaintiffs, they press no concrete injury, but instead seek to vindicate a generalized preference to see more members of a particular party win elections. They profess that their claims are about achieving "good government," not vindicating a particularized harm. Memorandum Regarding Remedies From Common Cause and League of Women Voters Plaintiffs at 3, *Common Cause v. Rucho*, 318 F. Supp.3d 777 (M.D. N.C. 2018) (No. 1:16-CV-1026), ECF No. 144. For these reasons and those explained at length in the appellants' briefing, the district court lacked subject matter jurisdiction. *See* Jurisdictional Statement 16-23. Amici urge the Court to decide this case on the jurisdictional grounds appellants press. *See id.*

In addition, plaintiffs' claims are nonjusticiable because they ask the Court to resolve political questions. As explained in appellants' briefing, there is no workable test for adjudicating partisan gerrymandering claims. *See id.* 26, 28-37; *see also supra* Part I.

CONCLUSION

The district court lacked jurisdiction. This Court should vacate the judgment of the district court and order the district court to dismiss the lawsuit. Alternatively, this Court should reverse the judgment of the district court.

Respectfully submitted.

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In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants

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QUESTION PRESENTED

Whether plaintiffs' partisan-gerrymandering claims are justiciable.

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INTEREST OF THE *AMICUS CURIAE*

Representative Michael Turzai is the Speaker of the Pennsylvania House of Representatives and files this brief in his official capacity. He, like all state legislators, is interested in seeing the Constitution's delegation of federal-election-law authority to state legislatures honored against the position, adopted below, that courts should supervise legislatures' political discretion and deliberative processes. Pennsylvania was ground zero in 2018 for so-called partisan-gerrymandering litigation. The Commonwealth faced three simultaneous challenges, won two trial victories, and spent an enormous sum in legal fees defending the congressional redistricting legislation it enacted under the Constitution's express grant of authority—and with bipartisan support. This effort proved unavailing because the Pennsylvania Supreme Court, overruling decades of precedent, struck down the challenged plan and implemented its own, all at breakneck speed for the transparent purpose of influencing the 2018 elections for Democratic Party gain. This experience shows why partisan-gerrymandering claims should be ruled non-justiciable.[1]

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[1] Pursuant to Rule 37.6, counsel for the *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus* or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs are filed with the clerk.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When the constitutional framers delegated the power to prescribe "[t]he Times, Places and Manner of" congressional elections to "the Legislature" of each state and to "Congress," U.S. Const. art. I, § 4, cl. 1, they knew they were delegating that power to political actors. Those bodies are—no less then than now—composed of politicians, and the framers understood the delegation as one of "discretionary power over elections." The Federalist No. 59, at 398 (Hamilton) (Jacob Cooke ed., 1961). It was both foreseeable and in fact foreseen that political considerations would guide that constitutionally afforded discretion.

The district court profoundly misread this provision, known as the "Elections Clause," by locating in it a source of *judicial* power to invalidate congressional redistricting legislation it identified as too political. This could hardly be more backwards: the district court read the Clause as denying state legislatures political discretion it plainly grants them and as granting the courts purely political power it plainly denies them. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). It is precisely because legislatures engage in politics that this Court has repeatedly held that "redistricting is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Although courts certainly may review redistricting legislation under neutral constitutional and statutory *legal* standards—and even then only

with "extraordinary caution," *Miller v. Johnson*, 515 U.S. 900, 916 (1995)—it is implausible that the Elections Clause contains "judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. 186, 217 (1962), by which a court may invalidate legislation it deems too political. That invades the very essence of the power the Elections Clause delegates to non-judicial bodies.

The district court confused these legislative and judicial roles because it confused two different inquiries. One is whether legislation enacted under the Elections Clause in fact regulates the times, places, or manner of elections—a proper question for the judiciary. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–5 (1995). But, here, that inquiry is simple because North Carolina's congressional redistricting plan plainly regulates election procedure by grouping voters into districts and dictating where they vote. The other inquiry, the one the district court conducted, is whether a law that *does* regulate election procedure somehow ceases to qualify under the Elections Clause because of political motive. That inquiry is improper. Just as a congressional act that directly regulates interstate commerce is no less Commerce Clause legislation when accompanied by a political purpose, Elections Clause legislation is valid as such simply if it sets election procedure. Courts may not question ulterior motive or effect when assessing whether legislation exceeds an affirmative delegation of power.

The district court's approach to the Elections Clause improperly reads the judiciary into the provision, which makes no mention of courts (state or federal) and which

necessarily excludes them, as a matter of both plain language and original public meaning. Because the Clause contains no standard for differentiating good from bad political motive, the power the court claimed is nothing but a veto power to be exercised at will and for political results. Further, it claimed the additional power to replace legislation it deemed overly partisan with its own remedial scheme. Thus, the power it ultimately asserted is nothing less than the power to regulate the times, places, and manner of congressional elections directly from the bench. If that seems incongruous with the Constitution's plain language, that's because it is.

Far from establishing an independent source of judicial intrusion into congressional redistricting, the Elections Clause forecloses judicial intervention on political grounds under *any* constitutional provision. The Clause renders the type of question the district court entertained—which, at base, is what percentage of a congressional district should comprise a political party's perceived supporters—a quintessential political question. Predicating judicial review directly on legislatures' political choices would disfigure the Clause's delegation beyond recognition. Unlike claims asserting one-person, one-vote and racial-discrimination violations, this type of claim turns directly on legislatures' deliberative processes and empowers judges to wield political considerations as weapons in supervising and striking down legislative policy and, ultimately, replacing it with judicial policy. That a proffered reading of the First and Fourteenth Amendments would authorize this "substantial intrusion into the Nation's political life" by judges is

dispositive evidence against it. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

Redistricting is political because of what it is, not because of who does it. Reading the courts into the Elections Clause would not take politics out redistricting; it would bring politics into the courts. Pennsylvania experienced that firsthand in 2018. After a Democratic Party majority took hold of the Pennsylvania Supreme Court and justices campaigned on the promise that, if elected, they would strike down the Commonwealth's congressional maps, the court overruled decades of precedent and imposed a so-called remedial plan that virtually all observers recognized as a Democratic Party gerrymander—which meticulously counteracted the inherent geographic disadvantage Democratic Party supporters experience due to their concentration in and around Philadelphia and Pittsburgh. Calls for impeachment followed, as did, later, a slew of Democratic Party wins in the new districts. Only justices who were members of the Democratic Party voted for this *coup d'état*. By contrast, the legislation they struck down passed with bipartisan support.

This highly publicized and disgraceful episode manifests the very type of power struggle the Elections Clause plainly preempts. Courts and legislatures should not be at loggerheads over the power to regulate congressional elections; the Constitution expressly resolves such disputes. The district court's decision ignores that constitutional fact and should be reversed.

ARGUMENT

The Elections Clause commits power to regulate elections to "the Legislature" of each state and to "Congress," and it denies that power to other branches of the state and federal governments. U.S. Const. art. I, § 4, cl. 1. The term "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The word necessarily differentiates between that body and the "state" of which it is but a subpart. And just as the term is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections, *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), the term "Congress" limits the power the other federal branches may exert over the same. An Article I delegation to "Congress" is not a delegation to the "judicial power of the United States" under Article III. And, the judiciary possessing (like the other federal branches) only limited powers, the absence of a delegation is an express denial of power. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).[2]

In delegating authority to two political bodies, the Clause plainly anticipates an exercise of *political* discretion. *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion) ("The Constitution clearly

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[2] Because the Elections Clause is the sole source of state authority over congressional elections and that power "had to be delegated to, rather than reserved by, the states," *Cook v. Gralike*, 531 U.S. 510, 522 (2001), state courts are no differently situated from their federal counterparts in this unique arena.

contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."). The framers understood the Clause to delegate "discretionary power over elections." The Federalist No. 59, at 398 (Hamilton) (Jacob Cooke ed., 1961). This includes the prerogative to exercise "Will," the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78, *supra*, at 523, 526 (Hamilton). That is all the Elections Clause delegates; the framers identified no legal principle to guide "judgment," the prerogative of courts. *See id.*

Discretion, of course, can be abused. The framers, no strangers to human nature, expressly recognized that potential. They appreciated that the power to regulate federal elections might be wielded for petty, parochial, or partisan purposes. 2 Records of the Federal Convention of 1787, at 241 (Max Farrand ed., 1911) (James Madison observing that legislatures might "mould their regulations as to favor the candidates they wished to succeed"). It is even, they saw, the power even to "annihilate" the federal government itself. The Federalist No. 59, *supra*, at 399 (Hamilton). But, as in so many constitutional provisions, the framers responded to these threats, not by codifying standards differentiating fair from unfair election laws, but by setting checks and balances, dividing the power between two political branches. They delegated primary authority over congressional elections "in each State" to "the Legislature thereof," and empowered Congress to check that power, i.e., "make or alter such Regulations." The resulting provision, the Elections Clause, placed two political

checks against each other, setting fire up to fight fire. *See Vieth*, 541 U.S. at 275–76 (plurality opinion).

It is therefore implausible that the Elections Clause supplies "agreed upon substantive principles of fairness in districting" or "clear, manageable, and politically neutral standards" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). Rather than codify those principles, the Clause delegates power to create them. Indeed, the Elections Clause contains "a textually demonstrable commitment" of those precise issues "to a coordinate political department" (actually, two) and establishes other telltale indicia of a nonjusticiable political question. *Baker v. Carr*, 369 U.S. 86, 217 (1962). Nor is there anything to recommend unprecedented judicial frolics into the "political thicket."[3] Inserting courts into the Elections Clause would do far more to bring politics into the judiciary than to remove partisanship from redistricting. The Court need only look to Pennsylvania's embarrassing experience to see why that is so.

I. The Elections Clause Contains No Judicially Discernable Standard To Govern Partisan-Gerrymandering Claims

A. The Elections Clause Is Not a Source of Judicial Standards

The Elections Clause does not establish substantive principles of fairness; it delegates political questions to political actors. The Clause uses "comprehensive words" that "embrace authority to provide a complete

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[3] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Nothing in the text remotely implies "principles of fairness" that judges may impose *against* legislation that otherwise regulates elections procedure. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). To the contrary, the Clause's plain language and its location in Article I both signal that those choices are vested in non-judicial bodies.

In the debates over this hotly contested provision, the idea that courts might play a role in regulating federal elections appears to have occurred to no one. Alexander Hamilton, for example, found it axiomatic that "there were only three ways, in which this power could have been reasonably modified and disposed": in the state legislatures, in Congress, or divided between the two. The Federalist No. 59, *supra*, at 398–99 (Hamilton). That is hardly surprising, since (as noted) the framers drew a bright line between judicial and legislative power. Redistricting is not an act of legal judgment; it is "primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). It was not intuitive then, and is not now, that judges might properly wield political authority over redistricting.

The Clause's language is no accident. The district court believed that "*partisan* gerrymandering" was not "widespread" before 1789, which it apparently took as a license for its anti-textual interpretation. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 849 (M.D.N.C. 2018). But the framing generation was familiar with redistricting disputes and appreciated that governmental branches might vie for power over lines. For example, "the Tudor sovereigns systematically

pursued the policy of creating insignificant boroughs...for the express purpose of corruptly supporting the influence of the Crown in the House of Commons," and the "House of Commons took the issue of writs into its own hands" after the English Civil War. Thomas Pitt Taswell-Langmead, English Constitutional History 565–66 (Philip A. Ashworth ed., 6th ed. 1905); *see also* Rudolf Gneist, The English Parliament in Its Transformations Through a Thousand Years 241 (R. Jenery Shee trans., 1886) ("Now," at the reign of Charles II, "the right of the Crown to create new boroughs disappears."). Likewise, the royal governors exercised the right to extend representation to new counties in the American colonies, which the colonists considered an "insufferable intrusion." Leonard Woods Labaree, Royal Government in America: A Study of the British Colonial System Before 1783, at 98–99, 333–34 (Yale University Press 2d prtg. 1934). The framing generation, then, knew that power to prescribe election rules may reside somewhere other than the legislature, it knew that this may create inter-branch conflicts, and the Elections Clause plainly preempts those conflicts. The district court's interpretation frustrates that purpose.

Further, the Clause can hardly provide uniform partisan-gerrymandering standards when it plainly establishes *local* control over, and encourages broad variation in, election procedure. It was common ground at the ratification debates that inserting a uniform elections code directly into the Constitution was unworkable, since it would be impossible to account for "every probable change in the situation of the country." The Federalist No. 59, *supra*, at 398 (Hamilton).

Similarly, it was uncontroversial that state legislatures should possess primary authority over elections procedure "on account of their ability to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states." 2 Joseph Story, Commentaries on the Constitution of the United States § 820 (1st ed. 1833) ("Story"). Accordingly, the idea of "empowering the United States to regulate the elections from the particular States" was universally condemned as "an unwarrantable transposition of power" and "a premediated engine for the destruction of the State governments." *Id.*; *see also* 2 Story § 812 ("The objection [to the Elections Clause] was not to that part of the clause, which vests in the state legislatures the power of prescribing the times, places, and manner of holding elections...."). In fact, the objection to *any* congressional involvement in regulating elections was answered with the claim that Congress would prove incapable of abusing its Elections Clause authority: "[t]he interests, the habits, the institutions, the local employments, the state of property, the genius, and the manners, of the people of the different states, are so various, and even opposite, that it would be impossible to bring a majority of either house to agree upon any plan of elections" to achieve an abusive purpose at the national level. *Id.* § 818; *see also* 1 William Blackstone, Commentaries ("Blackstone"), app., note D at 191–92 (George Tucker ed., 1803) ("[A]ny attempt to render the manner of election uniform must therefore inevitably produce discontents among the states.").

Accordingly, the long-elusive "agreed upon substantive principles of fairness in districting," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), cannot be founded in this provision. Reading them in would codify

the very nationally applicable standards the framers deliberately withheld. As Justice Kennedy observed in *Vieth*, redistricting standards like "contiguity and compactness" cannot "promise political neutrality" because "a decision under these standards would unavoidably have significant political effect, whether intended or not." *Id.* at 308–09. That is because "if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another." *Id.* at 309. What is true in the abstract is even truer when compounded across 50 states and innumerable political subdivisions. How political motive and impact become manifest will depend on local geography and politics. The very factors that militated against a constitutionally prescribed elections code foreclose any attempt to read a uniform standard of fairness into the Clause.

B. The Elections Clause Inquiry Is Limited to Whether, on Its Face, Legislation Regulates Election Procedure, as Every Redistricting Plan Does

The district court purported to find a standard because it confused two distinct forms of inquiry, one legitimate and the other illegitimate. *See Rucho*, 318 F. Supp. 3d at 936–41.

The legitimate inquiry is whether challenged legislation properly falls within the Elections Clause's express delegation. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995). That federal courts may review legislation on this basis is well established and uncontroversial—and irrelevant here.

This role is no different from the courts' role in policing *any* positive grant of authority, such as Congress's Commerce Clause power, its spending power, and its power to enforce the Civil War Amendments.

Because the scope of review is limited to assessing whether the exercise is "appropriate" to that grant, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), judicial review of Elections Clause legislation is limited to whether it exceeds the "'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001). In particular, the Court has reviewed whether legislation falls within those "comprehensive words," "Times, Places, and Manner," *Smiley*, 285 U.S. at 366; *see Thornton*, 514 U.S. at 832–36, and whether legislative action was exercised by "the Legislature," *see Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

A redistricting plan—*every* redistricting plan—satisfies this test. Districting legislation "classifies tracts of land, precincts or census blocks," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999), and clearly sets the "Places" and "Manner" of elections. It assigns voters to districts and representatives and dictates where they vote. Under the correct inquiry, North Carolina's districts plainly qualify.

The district court could conclude otherwise only because it conducted a separate, improper inquiry into legislative motive, adjudicating whether the North Carolina legislature's facially valid procedural rule was accompanied by some (ill-defined) purpose and effect. *See Rucho*, 318 F. Supp. 3d at 938. That was legal

error. Motive is irrelevant to whether an exercise of authority falls within a positive grant of power. *See, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (finding inquiry into "hidden motives" to be "beyond the competency of courts" in assessing whether tax legislation exceeded constitutional taxing authority); *McCray v. United States*, 195 U.S. 27, 56 (1904) (rejecting the notion "that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

The question whether legislation exceeds a positive delegation differs in this respect from the question whether legislation infringes on individual rights. Courts probe motive in individual-rights cases because "[a] statute, otherwise neutral on its face," violates individual rights if it is "applied so as invidiously to discriminate on the basis of race" (or another suspect classification). *Washington v. Davis*, 426 U.S. 229, 241 (1976). For that reason, the Court, in adjudicating equal-protection redistricting cases, *does* look past the "tracts of land, precincts or census blocks" to ascertain if a redistricting plan was "motivated by a racial purpose or object." *Hunt*, 526 U.S. at 546 (quotations omitted). But "object or motive" is of no import in assessing whether legislation fits within an affirmative grant of legislative power. *McCray*, 195 U.S. at 54. To hold otherwise would subject the "wisdom" of legislation to judicial review and "overthrow the entire distinction between the legislative, judicial, and executive departments of the government." *Id.* at 54–56. Accordingly, whether or not North Carolina's redistricting legislation is "a partisan gerrymander"

has no bearing on whether or not it is valid under the Elections Clause. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (affording partisan intent no weight on the question whether a voter identification requirement was an impermissible burden on the right to vote).

The district court misread *Thornton* and *Gralike*, in support of its motive inquiry. *Rucho*, 318 F. Supp. 3d at 936–38. Those cases do not condemn procedural election laws if accompanied by improper motive or effect; they rather condemn laws that do not regulate election procedure at all. *Thornton* concluded that the power to craft procedural laws does not encompass the power to establish qualifications to congressional office. 514 U.S. at 828. It then rejected a state constitutional provision establishing qualifications (term limits) on its face in the form of a ballot-access rule. *Id.* at 833–36. The provision expressly stated: "the people of Arkansas...herein limit the terms of elected officials." *Id.* at 784, 830. Likewise, *Gralike* invalidated a statute that, on its face, expressed government opposition to candidates who declined to support term limits; it viewed this mechanism as the functional equivalent of an impermissible qualification for office. *Gralike*, 531 U.S. at 514–15 ("Section 18 provides that the statement 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS' be printed on all primary and general election ballots"). Both cases judged the challenged provisions according to their plain text, and neither provision even purported to set time, place, or manner rules.

Thornton's references to "intent" and "effect" must be understood in that context. 514 U.S. at 829, (quotations omitted). Although the decision condemned

legislation "with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clause," *id.* at 831, it in no way suggested that some amorphous degree of motive unrelated to the Qualifications Clause would condemn a law that *does* regulate election procedure.

The problem was that the law in no way regulated election procedure and in every way set qualifications. In response to the argument that the term-limit provision was a ballot-access rule and did not set qualifications, the Court held that this "indirect" measure had "the sole purpose...to achieve a result that is forbidden by the Constitution" and thus was not a procedural rule. *Id.* at 829. Similarly, *Gralike*'s observation that the legislation at issue "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment" was founded in "a concrete consequence" identifiable in the provision's text. 531 U.S. at 524. It does not follow from either holding that facially neutral state laws that directly and extensively regulate election procedure are invalid on a judicial finding of some type of motive or effect. A redistricting plan, even one enacted to advantage one group over another, is never a "sole...attempt to achieve a result that is forbidden by the Federal Constitution." *Thornton*, 514 U.S. at 829. Notably, the type of fact and expert testimony the district court relied on to discern hidden motive, *see Rucho*, 318 F. Supp. 3d at 868–80, is completely absent from *Thornton* and *Gralike* and foreign to their interpretive approach.

The district court's contrary reading of these precedents is nonsensical. It would equally condemn goals of unfairness and *fairness* in redistricting. That is because the constitutional problem in *Thornton* and *Gralike* was not that the laws were unfair, but that they set qualifications to office. *Thornton*, 514 U.S. at 813–815. If a districting scheme intended to influence electoral results amounts to a qualification, it does not matter whether the qualification is fair or unfair: qualifications *per se* are forbidden. Thus, the district court's reading of these precedents would treat state legislatures' attempts "to allocate political power to the parties in accordance with their voting strength," *Gaffney*, 412 U.S. at 754, no differently from attempts to advantage one group over another. This reading, of course, is untenable. The precedents say nothing whatsoever on this topic and have nothing to do with this case.

II. The Elections Clause Deprives Courts of Authority To Supervise Political Considerations

A. Not only does the Elections Clause itself not support judicial adjudication of so-called partisan-gerrymandering claims, it also is powerful evidence that manageable standards are not to be found in other constitutional provisions. Questions of "fairness" in redistricting are quintessentially political and beyond judicial competency.

1. The Elections Clause contains "a textually demonstrable constitutional commitment" of political discretion over election regulations "to a coordinate political department"—in fact, *two* departments per state, the legislature and Congress. *Baker v. Carr*, 369

U.S. 186, 217 (1962). Although courts may review whether an election law falls under the Clause's delegation (*see* § I.B above) and whether it violates central individual-rights guarantees (*see* § II.B below), review of whether the act is *politically* unfair invades the core of the delegation itself. What is and is not fair is exactly the subject matter the Clause empowers legislatures and Congress to address.

Although the principal recipient of the delegation is the state legislature, that does not extenuate the separation-of-powers harm of judicial review. When it enacts congressional districts, the legislature "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under...the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Moreover, to seize supervisory authority over elections is to seize *congressional* power, an invasion of authority allocated to "a coordinate political department."

2. The Elections Clause points to "the impossibility of deciding" a partisan-gerrymandering case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The framers understood that the power delegated under the Elections Clause is "*discretionary*." The Federalist No. 59, *supra*, at 398 (Hamilton) (emphasis added). To evaluate whether discretion is exercised fairly or unfairly is to evaluate whether it is exercised wisely or unwisely, an inquiry unfit for judicial resolution. *See, e.g.*, *Polish Nat'l All. of the U.S. of N. Am. v. N.L.R.B.*, 322 U.S. 643, 650 (1944).

To be precise, the initial policy determination a partisan-gerrymandering claim presents is what does and does not qualify as "fairness in districting." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring). Electing one's preferred candidates is not like expressing one's beliefs: speech can be countered by more speech, so courts can enforce free-speech rights simply by enjoining a speech restraint; they need not limit other persons' ability to communicate an opposing message. By contrast, for one constituency—defined in its preferred way—to elect its preferred candidates, it must outvote competing constituencies, frustrating their ability to do the same. And, for one constituency to obtain more favorable districts, others must lose favorable districts. Identifying whether a redistricting map unfairly burdens a given constituency requires (1) classifying the constituency in one way over another, (2) deciding how much representation it deserves, and (3) deciding from what other constituency to take that representation.

Accordingly, in racial vote-dilution cases, to identify a burden on a judicially enforceable right, the courts must identify "what the right to vote *ought to be*." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (emphasis in original). This requires proof of "some baseline with which to compare" the challenged scheme. *Id.* "[W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive...." *Holder v. Hall*, 512 U.S. 874, 881 (1994).

But, outside the racial context, those questions are political, not legal.[4] North Carolina can be divided into an infinite number of equally populated districts, and an infinite number of baseline maps can therefore be identified—each with its own set of political winners and losers. Constituencies also can be defined and redefined in any number of ways: "farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats," and so on. *Vieth*, 541 U.S. at 288 (plurality opinion). Democratic and Republican voters do not exist either as facts of nature or as members of constitutionally defined castes; the parties can be broken down into sub-constituencies, and many constituencies have a home in neither party. A *legal right* to elect preferred candidates can only be administered for favored groups (here, the Democratic and Republican Parties), or else administering it would pit the rights of all Americans against each other.

Further, there are innumerable competing principles of fairness. Even if an expert witness creates an algorithm to produce millions of alternative maps by which to measure the alleged gerrymander, the expert necessarily plugs policy judgments into those maps by creating one algorithm, not another. Fairness can be defined geographically, such as under so-called traditional districting principles like compactness,

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[4] Notably, *racial* vote-dilution cases are governed principally by statute, the Voting Rights Act, not the Constitution. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–96 (2012) (distinguishing, for justiciability purposes, adjudication of policy matter delegated to political branches from adjudication of statutory rights flowing from statute enacted under that delegation).

contiguity, and political-subdivision integrity. It can, alternatively, be defined under votes-to-seats ratios by comparing how many votes a party obtains against how many seats its candidates win. These measures, too, may be subdivided and reworked under their own internal logic, and they set up competing definitions of fairness as against other methods.

In all these respects, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889. That is why the Constitution delegates these questions to political bodies, not courts. To decide whether a legislature acted fairly, a court must usurp the predicate question of what that even means, a quintessential political question.

3. The Elections Clause renders it impossible for "a court's undertaking independent resolution" of a partisan-gerrymandering case "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. A court cannot rule that a legislature engaged in improper "partisan gerrymandering" without concluding that the court knows better than the legislature which competing constituencies deserve electoral representation, in what way, and to what degree. What's more, as the district court recognized, invalidating the legislature's redistricting legislation often necessitates replacing it with a court-drawn scheme. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 942–44 (M.D.N.C. 2018). That, in turn, means replacing core legislative policy with judicial policy.

Entertaining these questions disrespects both state legislatures and Congress. When it was proposed, the Elections Clause sparked controversy because many

convention delegates were appalled that it authorized Congress to override state legislatures' election laws, universally viewed as a matter for local control. *See* 2 Story § 813. The Federalists retorted, not that election procedure should be viewed primarily as a national matter, but that the power "will be so desirable a boon in [the legislatures'] possession" that Congress would not likely interfere "unless from an extreme necessity, or a very urgent exigency." *Id.* § 820. But a decision by the courts that a legislature acted unfairly—from a political standpoint—would insult both the legislature, by removing this "desirable" "boon" from its "possession," and Congress, by ruling on what is and is not "an extreme" or "very urgent exigency" meriting federal intervention.

In spite of this, the district court erroneously focused on what principles might apply to partisan-gerrymandering claims without asking why *courts* should apply them. *See Rucho*, 318 F. Supp. 3d 937–39. The district court was correct that the framers feared that partisan mischief might twist election procedure, but the court did "not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of *judicial* review" as the remedy. *Nixon v. United States*, 506 U.S. 224, 233 (1993) (emphasis added).

That no such evidence has been forthcoming is unsurprising. The Clause vests remedial authority with Congress. And to remedy state legislatures' abuse is not "to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (plurality opinion). In referencing the "Times, Places and

Manner" of elections, the Elections Clause plainly references what English parliamentary law called "methods of proceeding" as to the "time and place of election" to parliament. *See* 1 Blackstone 163, 177–179. Those "time and place" "methods," in turn, were "regulated by the law of parliament." *Id.* at 177; *see also* 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797). Neither house would "permit the subordinate courts of law to examine the merits" of an election dispute, and the House of Commons denied "any right" of any officer outside that body "to interfere in the election of commoners" or "intermeddle in elections." 1 Blackstone 163, 179; *see also id.* at 179 (stating that to the house of commons "alone belongs the power of determining contested elections"); George Philips, Lex Parliamentaria 9, 36–37, 70–80 (1689). The House of Commons was not shy to protect its exclusive jurisdiction in this domain. It, for example, declared a *quo warranto* writ from "any Court" that sent burgesses to parliament based on time, place, and manner adjudications to be "illegal and void," and it further opined that the "Occasioners, Procurers, and Judges in such Quo Warranto's" may be punished for jurisdictional usurpation. George Philips, *supra* at 80. By carrying forward that tradition of legislative control over quintessentially legislative matters, the Elections Clause views courts as, if anything, threats to, not vindicators of, "free" elections. 1 Blackstone 179.

4. The Elections Clause codifies "an unusual need for unquestioning adherence to a political decision already made," and it points to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

Partisan-gerrymandering claims set courts up as superior branches, capable of second-guessing and even making *political* choices, when they have no competency to do so. These cases are unlike those alleging criminal misconduct or discrimination based on an immutable characteristic, where courts can tailor their proceedings, inquiries, decisions, and remedies to finite questions distinct from those properly left to other branches—and touch on political questions only incidentally. Courts in partisan-gerrymandering cases have no choice but to place the entire deliberative process at issue, because the entire deliberative process is political, and base their determinations squarely on political choices.

Courts have therefore enforced broad subpoenas against elected officials, demanding testimony and documents concerning core political deliberations and decisions. *See, e.g.*, *League of Women Voters of Michigan v. Johnson*, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (enforcing demand for "all documents, notes, data and analysis related to the 2012 Michigan Redistricting process"); *Agre v. Wolf*, 284 F. Supp. 3d 591, 650 (E.D. Pa. 2018) ("The claim of executive privilege and deliberative privilege asserted by the Legislative Defendants was overruled by this Court."). Such decisions have, in turn, been extended to justify third-party subpoenas to political parties and advocates, demanding wide-ranging document production and testimony about politics, their core organizational mission. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Larose*, --Fed. App'x--, 2019 WL 259431, at *8 (6th Cir. Jan. 18, 2019) (rejecting mandamus petition to prevent broad discovery into the National Republican Committee and related

organizations). This means that one major political party can fund redistricting litigation and thereby obtain discovery into its opponents' political strategy.

This undermines both the judicial and legislative processes. A judge sits on a dais, orders legislators to appear in court and testify and to produce their political email correspondence with constituents and supporters, and passes judgment on the very *politics* of that information. The impropriety of this can hardly be over-emphasized. The Constitution vests these very political choices with the legislature, so placing the judge over and against the legislature and its constituent members to review those very choices, precisely for their being political, creates the public misimpression that courts—viewed as non-political and fair arbiters of law—are competent to condemn legislators' political choices and views.

Further, an enjoined redistricting plan must be replaced, often by a court-ordered plan. Because political consequences are unavoidable, these plans of necessity reflect policy choices. Under this Court's precedents, district courts must narrowly tailor their remedies, touching only discrete legal violations. They must "honor state policies," not "unnecessarily put aside" legislative decisions, and choose a remedy "which most clearly approximate[s] the reapportionment plan of the state legislature, while satisfying constitutional requirements." *White v. Weiser*, 412 U.S. 783, 795–96 (1973); *see also Upham v. Seamon*, 456 U.S. 37, 42–44 (1982); *Perry v. Perez*, 565 U.S. 388, 394 (2012). But a partisan-gerrymandering claim encompasses the very foundations of the legislative policy decisions, politics and all. Thus,

remedying these would-be violations will eventuate wholesale judicial reinvention of redistricting priorities from scratch. The "state policies" themselves being condemned, district courts will surely implement their own criteria. That means directly "prescrib[ing]" the "Times, Places and Manner" of congressional elections and cutting out "the Legislature" altogether.

In this very case, the district court displayed thinly veiled contempt for the North Carolina legislature, representing that "we have not yet decided whether we will afford the General Assembly another chance" to redistrict and that "the General Assembly should" act "as quickly as possible" in the event that the district court *might*, as a matter of judicial *grace*, allow it that opportunity—on an expedited basis. *Rucho*, 318 F. Supp. 3d at 944. But a state legislature does not need judicial permission to enact congressional redistricting legislation; the Constitution delegates that power directly to the legislature. Honoring that delegation means deferring to legislature's political choices. Subjecting them to judicial process upends the unique need for a single voice on these matters.

B. The Elections Clause renders political-gerrymandering claims non-justiciable even though it does not have this impact on one-person, one-vote and racial-gerrymandering and racial vote-dilution claims. Those claims are governed by a "limited and precise rationale" that allows courts to "correct an established violation of the Constitution" without committing "federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). They therefore implicate few, if any, of the political-question factors. A partisan-

gerrymandering claim is altogether different; there is no way for courts to adjudicate such claims without seizing for themselves the political discretion constitutionally delegated to other branches. *Cf. Vander Jagt v. O'Neill*, 699 F.2d 1166, 1176 (D.C. Cir. 1982) (concluding that, although constitutionality of House rules is not *per se* beyond judicial review, challenge to partisan motive and impact of House rules presented a "startlingly unattractive," non-justiciable controversy) (quoting *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977)).

1. It is certainly true that the Elections Clause does not immunize an election law from scrutiny if it threatens core free-speech and equal-protection rights. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). And it is true that the Civil War Amendments "operated to alter the pre-existing balance" established in many constitutional provisions, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996), including the Elections Clause, thereby empowering judicial involvement unforeseen in 1789. *See Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). Accordingly, this Court has correctly held that a time, place, or manner rule that violates an *independent* constitutional right is not immune from judicial review simply because it is enacted under the Elections Clause. *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). Just as Congress's affirmative interstate-commerce, taxing, or spending powers do not immunize ensuing laws from review under constitutional individual-rights guarantees, Elections Clause legislation too must satisfy those guarantees.

But it is equally true that all constitutional provisions must be interpreted together with the Elections Clause as codifying a coherent and unified balance of congressional, legislative, and judicial authority. The Fourteenth Amendment neither abrogated the Elections Clause nor signaled a meaningful departure from its delegation of *legislative* power. For that reason, a proffered interpretation of the Fourteenth Amendment that would disfigure the Election Clause's delegation beyond recognition is untenable. The Civil War Amendments (much less provisions ratified together with the Elections Clause) did not license judicial authorship of state elections codes.

2. This Court's racial-discrimination and one-person, one-vote doctrine leaves state legislative power over congressional elections intact. It targets only discrete abuses and cabins judicial review and remedies to.

The Court's racial precedents address the paradigmatic evils the Civil War Amendments attempted to cure and utilize the same strict scrutiny applied to all racially discriminatory laws. Racial motive and effect are "much more rarely encountered" than *political* motive, *Vieth*, 541 U.S. at 286 (plurality opinion), so review of racial cases does not mark a wholesale transfer of legislative discretion to the judiciary. And, notably, most of the Court's jurisprudence on racial redistricting arises from statute, the Voting Rights Act, not the Constitution.[5]

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[5] Even the Court's racial-gerrymandering precedents, which technically arise under the Equal Protection Clause, virtually

(That a statute is necessary to guarantee racial minorities an equal opportunity "to elect representatives of their choice," 52 U.S.C. § 10301(b), strongly suggests that the Constitution grants no such right to major political parties.)

Similarly, the one-person, one-vote rule—itself controversial when announced—provides a concise and objective framework by which legislatures may redistrict, not a diversion of their power to courts. It provides a "background rule" against which redistricting can occur, *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015), and otherwise frees legislative political and policy choices from judicial scrutiny.

Equally important, the rule presupposes that individuals receive representation from the representative of their geographic-based districts. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1127–31 (2016). This traditional view defines an individual by the piece of geography the state designates as the individual's district, the standard unit of representation. *See* 1 Blackstone at 158–59; 178–79. Although perhaps not readily foreseeable in 1789 or 1868, the principle at least follows logically from that traditional notion: a uniform ratio of persons to representatives ensures equality in voting as between persons within that framework. *See Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964); *see also* 1 Blackstone 178–79; *see also id.*, app., note D at 190 ("[N]o just reason therefore can be

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always arise from state legislatures' attempted compliance with the Voting Rights Act. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 916 (1995).

assigned why ten men in one part of the community should have greater weight in its councils, than one hundred in a different place, as is the case in England, where a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains as many as thousands."). The rule incorporates a theory of "fair and effective representation for all citizens," *Reynolds*, 377 U.S. at 565–66, grounded in "individual rights," not "generalized partisan preferences," *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

3. By contrast, the district court's theory assumes a *partisan* framework and ensures an equal right to *success* within that framework. It predicates the right to vote on affiliation with a major political party with millions of members and millions of dollars in funding. It further exposes all legislative decision-making to judicial scrutiny and in no way restricts review to discrete issues distinct from the legislature's core policy judgments. And it proposes a new theory of representation, ignoring that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion). The district court's theory contains no individual-rights predicate; it instead presupposes a right to a particular partisan composition of the legislature, the assumption being that Democratic Party supporters receive their representation from Democratic Party representatives and vice versa.

The rationale is neither limited nor precise and would work a revolution of the courts' role in legislative matters. It cannot square with the Constitution or traditional American notions of what the right to vote is.

III. Judicial Redistricting Is Political Redistricting

Although partisan-gerrymandering plaintiffs (and the political parties funding the litigation) have long complained of politics in redistricting, two centuries' worth of practical experience demonstrate that districting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. 267, 285 (2004) (plurality opinion). This Court has therefore found it appropriate "to assume that those who redistrict and reapportion work with political and census data" and that, "[w]ithin the limits of the population equality standards of the Equal Protection Clause," they work "to achieve the political or other ends of the State." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

But what happens when judges redistrict? There being no objective legal principles to recommend one district over another, they too engage in political decision-making. And, unsurprisingly, they too "work with political...data" to achieve their own "political" ends in what is "root-and-branch a matter of politics." The trade is one political actor for another, nothing more.

Pennsylvania's experience with state-court partisan-gerrymandering litigation provides a vivid—and entirely repeatable—example of that principle in action. In January 2018, the Pennsylvania

Supreme Court invalidated a legislatively enacted congressional plan and redistricted the state itself, concluding that the legislative plan did not comply with state constitutional requirements for fairness in districting, namely "that all voters have an equal opportunity to translate their votes into representation." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). That requirement has no basis in the Pennsylvania Constitution, which provides no congressional redistricting criteria, even while regulating with precision the Commonwealth's *legislative* districts. And the Pennsylvania Supreme Court had no choice but to overrule decades of its own precedents (and the lower court's rejection of the claims) to achieve this result. This included a 2013 decision holding that "nothing in the [Pennsylvania] Constitution" prohibits partisan redistricting. *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A.3d 1211, 1236 (Pa. 2013); *see also Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002) (holding that "no analogous, direct textual references to...neutral apportionment criteria" govern congressional districts).

The about-face on this supposedly legal question had a political explanation. A Republican-controlled legislature had enacted the challenged congressional districts—with Democratic Party support supplying the votes essential to its passage. Yet judicial elections in 2015 gave control of the Pennsylvania Supreme Court to justices expressly affiliated with the Democratic Party. That development, together with the abrupt change in jurisprudence, would have sufficed to spawn questions about the judiciary's neutrality. But any hope of perceived fairness was shattered when it came to

light that the court's decisions fulfilled campaign promises made by some justices when they ran for election in 2015.

One of the deciding votes (indeed, it was decisive on several key case issues, including at the remedial phase) was cast by Justice David Wecht, who attacked the Commonwealth's congressional plan during his 2015 election campaign. Justice Wecht expressed those views in a forum held by the League of Women Voters—the original lead challenger and named party in the state-court partisan-gerrymandering litigation. At that forum, he stated:

> Everybody in this room should be angry about how gerrymandered we are....Understand, sitting here in the city of Pittsburgh, your vote is diluted. Your power is taken away from you.[6]

On another occasion, he stated:

> There are a million more Democrats in this Commonwealth—I want to let that sink in—a million more Democrats in this Commonwealth, but...*there are only 5 Democrats in the Congress, as opposed to 13 Republicans. Think about it.* Do we need a new Supreme Court? I think you know the answer.[7]

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[6] Eric Holmberg, *Forums Put Spotlight on PA Supreme Court Candidates*, PUBLICSOURCE (Oct. 22, 2015), www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates (emphasis added).

[7] Media Mobilizing Project, *Neighborhood Networks Supreme Court of PA Forum*, YouTube (Apr. 25, 2015), at 18:43, https://www.youtube.com/watch?v=713tnbv55mU&feature= youtu.be (emphasis added).

He also argued:

> ...[I]n 2014, I believe, there were at least more than 200,000 votes for Democratic candidates for U.S. Congress than Republicans *and yet we elected 13 Republicans and 5 Democrats*, and there are more than 1,000,000 more Democrats....I'm not trying to be partisan, but I have to answer your question, frankly–. We have more than a million more Democrats in Pennsylvania, we have a state senate and state house that are overwhelmingly Republican. *You cannot explain this without partisan gerrymandering*.[8]

When these and other statements (including similar statements by other justices during their campaigns)[9] came to light, the legislative parties defending the plan (including the *amicus*) moved for Justice Wecht's recusal. In response, Justice Wecht issued an opinion standing by his prior statements and concluding, *inter alia*, that they were permissible under Pennsylvania

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[8] *Get to Know the Candidates for State Supreme Court*, Lancaster Online (Oct. 31, 2015), http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html (embedded video for "Judge David Wecht, Democrat from Allegheny County," at 38:23) (emphasis added).

[9] For example, as a candidate, Justice Donahue represented that, if elected, she would ensure that "gerrymandering will come to an end." *Scarnati Issues Statement on PA Supreme Court Justices Wecht & Donohue*, Senator Joe Scarnati Pennsylvania's 25th District (Feb. 2, 2018), https://www.senatorscarnati.com/2018/02/02/scarnati-issues-statement-pa-supreme-court-justices-wecht-donohue/.

law and the First Amendment as judicial campaign speech.

That set the stage for remedial proceedings. The Pennsylvania Supreme Court afforded the Pennsylvania General Assembly only 18 days to enact a new plan, and it withheld its 138-page opinion—which stated such rudimentary points as what provision of the Pennsylvania Constitution the legislative plan violated and the new legal standard the Pennsylvania Supreme Court read into it—until two days prior to that deadline. When the General Assembly could not meet that deadline, the Pennsylvania Supreme Court promptly enacted its own plan which it declared by fiat, with no adversarial proceedings, was compliant with state law and superior to the plans proposed by the legislative leadership (including the *amicus*) and others. In crafting its plan, the court made no effort to implement the legislative policy goals of any legislatively enacted districting plan.

As news accounts have noticed, the court's map was self-evidently drawn to favor the voters of the Democratic Party. The New York Times declared that "Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves."[10] Real Clear Politics observed that the court "repeatedly made choices that increased the Democrats' odds of winning

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[10] Nate Cohn et al., *The New Pennsylvania Congressional Map, District by District*, N.Y. Times: The Upshot (Feb. 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

districts."[11] The judicially drawn map achieves this through remarkable partisan precision, which is essential to counteract Democratic Party constituents' natural geographic concentration in an around Philadelphia and Pittsburgh.

In other words, faced with remedying what it perceived to be a Republican Party-friendly "gerrymander," the Pennsylvania Supreme Court, controlled by a Democratic Party majority, drew a Democratic Party-friendly gerrymander. Indeed, it could do nothing else because, even in the most sanitized of circumstances, a political-gerrymandering cause of action claims the right of a major political party to win elections. Remedying its perceived inability to do so requires judges to use their equitable powers directly, intentionally, and expressly to help the party obtain power. That is what the Pennsylvania Supreme Court did: Democratic Party candidates claimed four new seats that were formerly held by Republican representatives. The district court in this case apparently has similar intentions for North Carolina.

If states are "laboratories for devising solutions to difficult legal problems," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quotation marks omitted), this Court should heed their Frankenstein and Chernobyl, as much as their Eureka, moments. Redistricting is political because of what it

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[11] Sean Trende, *How Much Will Redrawn Pa. Map Affect the Midterms?*, Real Clear Politics (Feb. 20, 2018), https://www.realclearpolitics.com/articles/2018/02/20/how_much_will_redrawn_pa_map_affect_the_midterms_136319.html.

is, not because of who conducts it. Opening the courts to partisan-gerrymandering litigation holds no promise of non-partisan redistricting and every threat of a politicized judiciary. And, although there is every reason to hope judges can set partisan feelings aside when enforcing *non*-partisan rules (like one person, one vote), that is too much to ask when the rules are themselves partisan in content and the litigants' express demand is for partisan aid in winning elections.

That federal judges are appointed, not elected, in no way mutes these alarms. Federal judges are appointed by the political branches in increasingly contentious and partisan proceedings, and judges are as human as anyone else. Worse, they—unlike the legislators the district court placed in the dock—are not subject to being voted out of office for political decisions. And, if nothing else, judicial redistricting, even by lifetime-appointed federal judges, will raise questions. This case is no exception. *See* Editorial Bd., North Carolina's Gerrymander Coup: Liberal Judges Hijack Redistricting To Abet a Democratic House, Wall Street J., Aug. 30, 2018.[12]

CONCLUSION

The Court should vacate the district court's injunction with instructions to dismiss this case as non-justiciable.

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[12] https://www.wsj.com/articles/north-carolinas-gerrymander-coup-1535670476

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No. 18-422

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,

v.

COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF 27 ELECTION LAW, SCIENTIFIC EVIDENCE, AND EMPIRICAL LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are 27 scholars of election law, scientific evidence, and empirical legal methods at law schools and universities throughout the United States. We have no personal interest in the outcome of this case (except to the extent that it may affect our electoral influence as individual voters), but we have a professional interest in seeing that the law relating to the application of scientific and statistical evidence develops in a way that supports and encourages methodologically sound practices.

Counsel for amici Andrew Chin is a mathematician and legal scholar who has been a national leader in the application of advanced mathematical techniques to problems in patent, Internet, antitrust, securities, administrative, and election law. He has been a Professor of Law at the University of North Carolina at Chapel Hill since 2001, and previously taught mathematics at Texas A&M University, computer science at King's College London, and public policy at the University of Texas at Austin. He earned a J.D. from Yale Law School in 1998 and a D.Phil. in mathematics from the University of Oxford on a Rhodes Scholarship in 1991.

SUMMARY OF ARGUMENT

In enacting the 2016 Plan under the mistaken assumption that "a political gerrymander" was *per se*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of Record for all parties have filed letters reflecting their blanket consent to the filing of *amicus* briefs with the Clerk.

legal, the defendants drew at least ten of the Common Cause plaintiffs into districts whose partisan composition was highly atypical of districts drawn in pursuit of legitimate districting objectives. This packing and cracking deliberately muted the normal effects of any actual or potential efforts by these voters to influence election outcomes by switching parties or splitting tickets during the life of the plan. The defendants thereby created a discriminatory arrangement of the electoral system in which each packed or cracked plaintiff's disfavored partisan affiliation, while mutable in principle, was frozen in practical effect.

Part I of this brief explains how two of plaintiffs' experts, Jonathan Mattingly and Jowei Chen, applied recent advances in computer technology and the mathematical sciences to demonstrate the atypicality of the plaintiffs' districts in the 2016 Plan. Mattingly's and Chen's analyses of thousands of computer-generated compliant maps showed, *inter alia*, that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives. In so doing, Mattingly and Chen provided the necessary factual predicates for a judicially manageable framework that does not turn on a finding of excessive or predominant partisan considerations, but on whether the challenged plan was the result of the actual pursuit of legitimate districting objectives. Their analyses also accounted for and excluded each of the alternative explanations for disparate partisan performance that supported this Court's rejection of the discriminatory effects tests proposed in *Bandemer*, *Vieth*, and *LULAC*. For these reasons, the Panel's findings of vote dilution as to at least ten of

the Common Cause plaintiffs are reliably supported by Mattingly's and Chen's analyses and warrant deference.

Part II of this brief explains why the legislative defendants' mere compliance with legitimate redistricting criteria as constraints cannot immunize their intentional packing and cracking from equal protection liability. Given the ever-increasing effectiveness of computational technology in enabling mapmakers to maximize partisan advantage while maintaining such compliance, traditional districting criteria can meaningfully limit partisan gerrymandering only when the mapmakers actually pursue them as objectives. The defendants relinquished any claim to a safe harbor from equal protection liability when they drew districts that belied any actual pursuit of traditional districting principles and other legitimate legislative criteria as objectives. By using past election results and empirical knowledge of the limited range of cross-election variation at the precinct and VTD level in North Carolina, the defendants engineered district boundaries that would render cross-election voting variations ineffectual in each packed or cracked district for the life of the 2016 Plan, thereby consistently degrading the influence of each packed or cracked plaintiff on the political process as a whole. For these reasons, the Panel's findings of vote dilution in violation of the Equal Protection Clause as to at least ten of the Common Cause plaintiffs warrant affirmance.

ARGUMENT

I. The Panel's findings of vote dilution are supported by reliable district-specific

and/or residence-specific evidence of individual harm.

As Justice Kennedy foresaw in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), advances in computer technology and the mathematical sciences have delivered the statistical tools with which the law can finally catch up to the technology of gerrymandering. *See id.* at 312 (Kennedy, J., concurring in the result) ("[T]hese new technologies may provide new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.").

In the instant case, computer-aided statistical analyses present this Court for the first time with robust measurements of statewide and district-level partisan skew that control for the state's specific legislative redistricting criteria and political geography. *See* Moon Duchin, *Gerrymandering Metrics: How to Measure? What's the Baseline?* at 5 https://arxiv.org/abs/1801.02064 (Jan. 6, 2018) (explaining that "[t]he great strength of this method is that it is sensitive to the particularities, legal and demographic, of each state that it is used to analyze," including "North Carolina's 'whole county provision'" and "populations ... clustered in highly asymmetrical ways"). These analyses have produced reliable district-specific and residence-specific evidence to support at least ten of the Panel's district-level findings of individual vote dilution injuries.

A. While a vote dilution injury from partisan gerrymandering is specific to, and evidenced by, the boundaries and composition of the voter's district, evidence of such an injury may also be

specific to the voter's place of residence within the district.

In *Gill v. Whitford*, 138 S.Ct. 1916 (2018), this Court addressed the Article III standing of twelve Democratic voters to bring constitutional equal protection challenges to Wisconsin's 2011 legislative districting plan based on statewide and district-level theories of vote dilution through "packing" and "cracking."[2] *See id.* at 1923-24. Only four of the twelve plaintiffs had specified in the complaint that their district had been packed or cracked, *id.* at 1924, with two alleging that they lived in a packed district and two alleging that they lived in a cracked district. *See* Complaint at 7-8, ¶¶ 20, 23, 24, 26, *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wis. 2016).

This Court held that only these four plaintiffs' district-level claims satisfied the injury-in-fact element of the standing requirement. *Gill*, 138 S.Ct. at 1930. It characterized the cause of an individual's vote-dilution injury as district-specific, insofar as "[t]he boundaries of the [voter's] district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked." *Id.* Accordingly, this Court found that the four plaintiffs had adequately "pleaded a particularized burden" from vote dilution by virtue of alleging that they "live in districts where Democrats like them have been packed or cracked," and remanded the case to allow them "to prove concrete and particularized injuries using evidence... that would

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[2] "'Packing' refers to the practice of filling a district with a supermajority of a given group or party. 'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." *Vieth v. Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (plurality opinion).

tend to demonstrate a burden on their individual votes." *See id.* at 1934.

The *Gill* Court also described a vote diluted by packing or cracking as "carry[ing] less weight than it would carry in another, hypothetical district." *Id.* at 1931. The dilutionary harms from packing or cracking may therefore also manifest themselves in residence-specific ways, as any hypothetical redrawing will retain some but not all of a packed or cracked district's voters, depending on their places of residence within the district.

In the instant case, plaintiffs presented robust statistical evidence that served as a reasonable basis for the Panel to "distinguish [the 2016 Plan] from the results of legitimate districting objectives, including those objectives that take into account political data or permissible partisan considerations." *See Common Cause v. Rucho*, 318 F.Supp.3d 777, 851-52 (M.D.N.C. 2018). As the following sections I.B and I.C describe, Professor Mattingly's and Professor Chen's statistical analyses (1) support the same conclusion that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives, and (2) provide reliable district-specific and residence-specific evidence, respectively, of vote dilution injuries in a total of ten congressional districts.

B. Professor Mattingly's analysis provides (1) a robust statistical basis for inferring that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives, and (2) reliable district-specific evidence to support the

Panel's findings of vote dilution injuries in Districts 1, 4, 9, 12 and 13.

Professor Jonathan Mattingly's statistical analysis addresses, *inter alia*, the question of whether the partisan performance of each district in North Carolina's 2016 Congressional Redistricting Plan ("2016 Plan") in the 2012 and 2016 general elections was typical of districts drawn in compliance with legitimate redistricting criteria. *See Common Cause*, 318 F.Supp.3d at 872. To investigate this question, Mattingly's team used a randomized Markov chain Monte Carlo ("MCMC") algorithm to generate a large sample from the set of all possible North Carolina congressional redistricting plans (without purporting to propose any particular plan as a remedial alternative). *Id.* at 871.[3] They then eliminated plans that failed to meet specified thresholds for contiguity, population equality, compactness, county and voting tabulation district ("VTD") splits, and Black voting age population distribution ("ensemble selection criteria"), leaving an ensemble of 24,518 compliant plans. *See id.*

Mattingly analyzed the partisan performance of the 2016 Plan and each of the ensemble maps using results from the 2012 and 2016 congressional general elections. *See id.* at 871. This analysis showed that

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[3] Mattingly's team had already developed the techniques used in his study of the 2016 Plan long before the plan was enacted. *See* Jonathan C. Mattingly & Christy Vaughn, *Redistricting and the Will of the People*, https://arxiv.org/abs/1410.8796 (Oct. 29, 2014) (using MCMC algorithm to generate a sample of North Carolina congressional redistricting plans and analyzing their partisan performance); Sachet Bangia, *Quantifying Gerrymandering: 2012 House Election*, http://services.math.duke.edu/~sb337/gerrymandering/NC.html (2015) (presenting district-level outlier analysis).

the 10-3 Republican advantage resulting from the 2016 Plan was an extreme statistical outlier: more than 99.6% and 99.3% of the ensemble maps would have produced a closer result from the precinct-level partisan vote shares in 2012 and 2016, respectively, and none would have yielded more Republican seats. *See id.* at 871-72.

Mattingly's ensemble analysis also revealed that the partisan performance of the 2016 Plan was highly atypical at the district level. *See id.* at 872. In particular, the 2012 and 2016 Democratic vote shares in the three districts that elected Democratic candidates (Districts 12, 4, and 1) were extremely high outliers in comparison with the respective distributions of vote shares in the three most Democratic-leaning districts in the ensemble. *See id.* at 872-73; JA351; JA360. Also, the 2012 and 2016 Democratic vote shares in Districts 9 and 13 were extremely low outliers in comparison with "the equivalent districts in the ensemble." 318 F.Supp.3d at 872; JA351; *see also* JA360 (also showing District 2 as an extreme outlier in 2016); Trial Tr. I, at 71:13-72:2 (reporting Mattingly's testimony that none of the ensemble maps had as few Democratic votes in the fourth, fifth and sixth most Democratic districts combined as Districts 9, 2 and 13 had in the 2016 Plan). In terms of partisan performance, ensemble maps typically had three relatively balanced but safe Republican districts with a 40% to 45% Democratic vote share in the 2016 congressional general election, but the 2016 Plan had six such districts. *Compare* 318 F.Supp.3d at 873 (Figure 1) *with id.* at 885 (noting defendants' expert's testimony characterizing a 10% [55%-45%] margin as a threshold for a safe seat).

Mattingly followed generally accepted scientific practices for estimating the distribution of a descriptive statistic over a finite but incalculably vast probability space. *See* Moon Duchin, *Geometry v. Gerrymandering*, 319 SCI. AM. 48, 51-52 (Nov. 2018) (describing MCMC as the "industry standard used across scientific domains for [this] colossal task"). In this context, Mattingly's work has been part of a remarkable convergence of mathematical scholarship on the idea of using a large, randomly-generated set of compliant plans as a normative baseline for detecting and measuring the effects of partisan gerrymandering. *See generally* Gregory Herschlag *et al.*, *Quantifying Gerrymandering in North Carolina* at 7-8, https://arxiv.org/pdf/1801.03783 (Jan. 9, 2018) (surveying early and current literature on "[p]ossible methods for generating the ensemble of redistricting plans"); *cf. Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594, 599-600 (7th Cir. 2008) (Easterbrook, C.J.) (opining that if racial gerrymandering plaintiffs had submitted 1,000 computer-generated "random, race-blind" maps showing that the challenged plan was an outlier with respect to the number of "'Latino effective' districts ... [t]hen a court might sensibly conclude that [defendants] had diluted the Latino vote by undermining the normal effects of the choices that Aurora's citizens had made about where to live.").

Mattingly validated this ensemble analysis internally with a comprehensive battery of sensitivity tests in which he studied the effects of widely varying each of the ensemble selection criteria and the scoring criteria on which the Markov transition probabilities were based. *See* 318 F.Supp.3d at 872 (citing Trial Tr. I, at 85:9-86:24).

His results proved robust under all of these variations with respect to both the 2012 and 2016 congressional general election results, which the Panel found to be a representative range of observations for demonstrating "the imperviousness of the 2016 Plan's partisan advantage to changes in candidates and the political environment." *See id.* at 874.[4] He also validated his analysis externally by comparing it with a demonstration plan that had been independently "drawn by a bipartisan group of retired North Carolina judges who served as a simulated nonpartisan districting commission," *id.* at 871 n.27. The judges' plan exhibited partisan performance both statewide and at the district level that was typical of the ensemble. *See id.* at 873 (Figure 1). Finally, Mattingly showed that small, localized boundary perturbations consistently resulted in maps whose partisan performance was "very, very different" from that of the 2016 Plan, demonstrating that the "2016 Plan was 'specifically tuned' to achieve a pro-Republican 'partisan advantage.'" *See id.* at 873-74.

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[4] As Mattingly's "'signature' of gerrymandering" graph demonstrates, the ensemble analysis reveals the persistence of the 2016 Plan's packing and cracking effects across an even wider range of variations in the statewide political environment than those spanned by the 2012 and 2016 congressional general election results. For example, the characterization of individual districts as packed or cracked relative to the ensemble remains stable even when a uniform swing is assumed to shift the entire graph up or down by a significant amount. *See Common Cause*, 318 F.Supp.3d at 873 (Figure 1); *see also id.* at 806 (quoting defendants' expert Thomas Hofeller's testimony that in his experience, "the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it.").

Within the analytical framework of statistical inference, Mattingly's robust ensemble and validation analyses established a reasonable basis for rejecting any of (1) the ensemble selection and scoring criteria, or (2) a wide range of variations on those criteria, or (3) any other set of nonpartisan criteria, as sufficient explanations for the 2016 Plan's partisan performance. *See generally* David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 240-57 (3d ed. 2011) (describing the analytical framework of statistical inference and hypothesis testing).

In a redistricting challenge where the legislative defendants had asserted that the enacted map had been drawn in pursuit of some stated set of legitimate objectives, Mattingly's statistical analysis would provide a method by which a court could reliably test that assertion. In the instant case, however, the defendants' publicly stated redistricting objectives were based on the legally incorrect propositions that "a political gerrymander" is *per se* legal, *see Common Cause*, 318 F.Supp.3d at 808 (citation omitted) ("Representative Lewis 'acknowledge[d] freely that this would be a political gerrymander,' which he maintained was 'not against the law.'"), and that achieving the maximum possible number of Republicans in the state's congressional delegation is a legitimate redistricting objective. *See id.* at 850-51 (citing *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015); *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964)) ("[T]he Supreme Court's acceptance of state legislatures' reliance on partisan considerations and political data for certain purposes does not

establish that a state legislature may pursue any partisan objective, as Legislative Defendants contend. In particular, the Supreme Court has never recognized that a legislature may draw district lines for the purpose of diminishing or minimizing the voting strength of supporters of a particular party or citizens who previously voted for representatives of a particular party — the legislative action challenged here."); *cf. Cooper v. Harris*, 137 S.Ct. 1455, 1472 (2017) (rejecting the District 1 drawn in 2011 by Hofeller at Sen. Rucho's and Rep. Lewis's direction as "a racial gerrymander whose necessity is supported by no evidence and whose *raison d'etre* is a legal mistake").

The Panel thus discerned that Mattingly's ensemble selection and scoring criteria described the range of legitimate redistricting criteria more accurately than the defendants' efforts to characterize openly invidious partisan discrimination as a legitimate objective. *See Common Cause*, 318 F.Supp.3d at 872 (finding that Mattingly's ensemble selection and scoring criteria "reflect[ed] traditional redistricting criteria ... and nearly all non-partisan criteria adopted by the Committee"); *id.* at 874 (finding that the ensemble's plans "conformed to traditional redistricting criteria and the non-partisan criteria adopted by the Committee."). In this context, Mattingly's statistical tests establish a reasonable basis for rejecting the hypothesis that the legislature pursued any of its stated legitimate redistricting criteria as objectives rather than merely complying with them as constraints. *See id.* at 874 ("[W]e agree with Dr. Mattingly's conclusion that the 2016 Plan's pro-Republican bias is not attributable to a legitimate redistricting objective, but instead reflects

an intentional effort to subordinate the interests of non-Republican voters.").

Accordingly, Mattingly's extreme outlier analysis of the 2016 Plan at the district level, *see id.* at 872-73, provides a robust statistical basis for excluding cross-election variation, political geography and compliance with legitimate legislative criteria as alternative explanations for atypical partisan performance. *See infra* section I.D; *see also supra* note 4 (noting the persistence of the 2016 Plan's S-shaped "signature of gerrymandering" curve under significant cross-election variation). From this evidence, it was reasonable for the Panel to infer that the legislature's pursuit of Republican partisan advantage as an objective had the effect of packing or cracking the individual plaintiffs and other Democratic voters in at least five congressional districts. *See* 318 F.Supp.3d at 902-03 (District 1, packed); *id.* at 908 (District 4, packed); *id.* at 916-17 (District 9, cracked); *id.* at 921-22 (District 12, packed); *id.* at 923 (District 13, cracked).

C. Professor Chen's analysis provides (1) a reasonable basis for inferring that the defendants merely complied with their stated legitimate redistricting criteria as constraints and did not pursue them as objectives, and (2) reliable residence-specific evidence to support the Panel's findings of vote dilution injuries in Districts 1, 2, 3, 8, 9, 10, 11, and 12.

Professor Jowei Chen's analysis addresses, *inter alia*, the question of whether the partisan performance of the 2016 Plan reflects the actual pursuit of any of the redistricting committee's adopted criteria other than the partisan advantage

criterion, *see Common Cause*, 318 F.Supp.3d at 808, as redistricting objectives. *See id.* at 874-75. To investigate this question, Chen used a randomized algorithm to generate large sets of plans by successively aggregating adjacent VTDs into districts so as to improve the scores for a redistricting objective at each aggregation step until no more improvement was possible. *See id.* at 874 n.32; Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering*, 44 ELECTORAL STUDIES 329, 332 (2016).[5] Like Mattingly's analysis, Chen's work has been part of the U.S. mathematical community's convergence on the idea of using a large, randomly-generated set of compliant plans as a normative baseline for detecting and measuring the effects of partisan gerrymandering. *See* Herschlag, *supra*, at 7-8.

Chen generated three sets of 1,000 plans each. *Common Cause*, 318 F.Supp.3d at 874. The first set consisted of maps generated in pursuit of optimal scores for population equality, contiguity, avoiding county and VTD splits, and compactness. *See id.* at 875. The second set consisted of maps generated in pursuit of optimal scores for population equality, contiguity, avoiding county and VTD splits, compactness, and avoiding pairing of incumbents. *See id.* Each of the maps in Chen's first two sets matched or outperformed the 2016 Plan with respect to each of the redistricting committee's adopted nonpartisan criteria. *See id.* The third set consisted of maps generated in pursuit of optimal scores for

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[5] Like Mattingly's team, Chen had already developed the techniques used in his study of the 2016 Plan long before the plan was enacted. *See* Chen & Cottrell, *supra*, at 329 (noting article submission date of Dec. 22, 2013).

population equality, contiguity, avoiding VTD splits, and compactness, and scores for avoiding county splits and avoiding pairing of incumbents that were comparable to the corresponding scores for the 2016 Plan. *See id.* at 875-76.

Chen analyzed the partisan performance of the 2016 Plan relative to each of his sets of plans using (1) the seven-election average used by the defendants' expert Thomas Hofeller in creating the 2016 Plan, and (2) the average of results from twenty previous statewide elections presented to the redistricting committee before it voted to approve the 2016 Plan. *See id.* at 806, 809, 874-75. This analysis showed that the 10-3 advantage resulting from the 2016 Plan was atypical in the sense that all 3,000 of the maps in Chen's three sets would have yielded fewer Republican seats from the precinct-level partisan vote shares in past elections under either averaging method. *See id.* at 875-76. The fact that this result was insensitive to the variations in redistricting objectives among the three sets and between two different composites of the committee's adopted political data provided internal validation for Chen's results. *See id.* at 876-77.

To the extent that the first 2,000 maps generated by Chen's randomized, objective-driven algorithm are deemed representative of the range of all maps that could have been drawn with the goal of optimizing the committee's adopted nonpartisan criteria, Chen's analysis establishes a reasonable basis for rejecting the hypothesis that the committee actually pursued any of those criteria as objectives, as opposed to the one omitted adopted criterion: partisan advantage. *See id.* at 876 n.33. Furthermore, Chen's analysis of a further 1,000 maps in his third set of plans

demonstrates that these findings hold regardless of whether or not the 2016 Plan's thirteen county splits and two paired incumbents reflect a purported effort to minimize those criteria. *See id.* at 876.

On remand, Chen provided a supplemental declaration with a residence-specific analysis for the purpose of addressing the standing framework set forth by this Court in *Gill*. *See id.* at 819. Chen located each Common Cause plaintiff's district by place of residence in the 2016 Plan and in each of the 2,000 maps in his first two sets of computer-generated maps. *See id.* at 819 n.9; Exh. B to Brief of the Common Cause Plaintiffs in Response to Order of June 27, 2018 at 2, Dkt. 129-2, *Common Cause v. Rucho*, Civ. No. 16-1026 (M.D.N.C. filed July 11, 2018) ("Second Chen Decl."). Using Hofeller's average of the precinct-level results from seven statewide elections, Chen compared the partisan composition of each plaintiff's district in the 2016 Plan with the partisan compositions of his or her 2,000 computer-generated districts. 318 F.Supp.3d at 819 n.9.[6]

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[6] Chen singled out Plan 2-297 as scoring high with respect to the committee's adopted nonpartisan criteria as well as producing the modal partisan outcome among the 1,000 maps in his second set. *See Common Cause*, 318 F.Supp.3d at 820 n.10. Plan 2-297 also happens to place all but one of the League plaintiffs and all but one of the Common Cause plaintiffs into districts in which their votes would have carried more weight than in the 2016 Plan. *See id.* at 819 ("[I]n all but one of those League members' districts, the votes of those members would have carried more weight" in Plan 2-297); *see id.* at 821-826 (including Plan 2-297 in review of district-specific standing evidence for all Common Cause plaintiffs except in District 4). The Panel cited Plan 2-297 extensively as a comparator in review of district-specific evidence. *See id.* at 901-23 *passim*. But Chen's residence-specific analysis of 2,000 maps provides an even more robust set of comparators for demonstrating

Chen's residence-specific analysis revealed that the 2016 Plan placed eight of the Common Cause plaintiffs into districts with a highly atypical partisan composition. *See id.* at 821 ("all but 3 of the plans ... would have placed [the District 1 plaintiff] into a less Democratic leaning district"); *id.* at 821-22 ("over 99 percent ... would have assigned [the District 2 plaintiff] to a more Democratic-leaning district"); *id.* at 822 ("over 95 percent ... would have placed [the District 3 plaintiffs] in a more Democratic-leaning district"); *id.* at 824 ("over 99 percent ... placed [the District 8 plaintiff] in a district that was less heavily tilted in favor of Republicans"); *id.* ("over 97 percent ... placed [the District 9 plaintiff] in a more Democratic-leaning district"); *id.* at 825 (emphasis in original) ("*all* 2,000 districting plans ... would have placed [the District 11 plaintiff] into a district more favorable to Democratic candidates"); *id.* at 826 ("over 99 percent ... placed

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injury-in-fact and discriminatory effect. *See id.* at 820-21 n.11 (defending "the use of Plan 2-297 and Dr. Chen's other 1,999 computer-generated maps as comparators" for showing discriminatory effect).

Plan 2-297 illustrates that an alternative map could be drawn at the *remedial phase* that would address the individual plaintiffs' vote dilution injuries while also improving on the 2016 Plan's performance with respect to the committee's adopted nonpartisan criteria. But the nature and extent of those injuries is more fully demonstrated by Mattingly's district-specific and Chen's residence-specific evidence of discriminatory effect based on large random samples of similarly compliant maps. *See id.* at 901 (describing the "numerous alternative districting plans to prove [the plaintiffs'] partisan vote dilution claims," including "the thousands of computer-generated districting plans created by Dr. Chen and Dr. Mattingly to conform to—and often more effectively advance—the General Assembly's non-partisan districting objectives.").

[the District 12 plaintiff] into a district with fewer likely Democratic voters"); *see also* Second Chen Decl. at 9-10 (reporting that 970 of the first set's 1,000 maps and 985 of the second set's 1,000 maps "placed [the District 10] plaintiff into a more Democratic-leaning district"). This analysis of 2,000 maps establishes a reasonable basis for excluding all of the committee's adopted redistricting criteria other than partisan advantage as an explanation for the atypical partisan composition of at least these eight districts in the 2016 Plan. *See infra* section I.D; 318 F.Supp.3d at 894 (characterizing Chen's finding "with overwhelmingly high statistical certainty that neutral, non-partisan districting criteria, combined with North Carolina's natural political geography could not have produced a districting plan as electorally skewed as the [2016 Plan]" as "strong evidence" of dilutionary effect). From these "numerous alternative maps" including Plan 2-297, *see supra* note 6, it was reasonable for the Panel to infer that the legislature's pursuit of Republican partisan advantage as an objective had the effect of packing or cracking at least these eight Common Cause plaintiffs. *See* 318 F.Supp.3d at 902-03 (District 1, packed); *id.* at 905 (District 2, cracked); *id.* at 906-07 (District 3, cracked); *id.* at 914 (District 8, cracked); *id.* at 916 (District 9, cracked); *id.* at 918 (District 10, cracked); *id.* at 919-20 (District 11, cracked); *id.* at 921 (District 12, packed).

D. Professor Mattingly's and Professor Chen's analyses overcome the analytical infirmities of the tests rejected in *Bandemer*, *Vieth*, and *LULAC*.

In past cases, the analytical difficulty of separating mixed motives has warranted this Court's reluctance

to apply constitutional scrutiny to a legislature's pursuit of partisan objectives when "partisan aims did not guide every line it drew." *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 418 (2006) (citation omitted) ("Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous... When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting."). Disparities between the major parties' statewide shares of votes and seats won could not logically be attributed to constitutional equal protection violations in the face of obvious alternative explanations, including (1) the inherent disproportionality of "winner-take-all, district-based elections," *Davis v. Bandemer*, 478 U.S. 109, 130 (1986); (2) cross-election variation in the political affiliations of voters and the strength of individual candidates that produces "possibly transitory" measurements of partisan performance, *id.* at 140; *Vieth*, 541 U.S. at 287 (plurality opinion); (3) "all the other goals that the map seeks to pursue" that might confound identification of "the predominant motivation behind the entire statewide plan," *id.* at 284-85 (emphasis omitted); and (4) the "'natural' packing effect" of political geography on "political groups that tend to cluster," id. at 290; *see also Gill*, 138 S.Ct. at 1933 (noting defendants' contention that Democrats in lead plaintiff's district are "'naturally' packed due to their geographic concentration").

The inherent disproportionality of a "winner-take-all" election result is one of many reasons why "a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause." *Bandemer*, 478 U.S. at

132. Moreover, an equal protection claim based on the mere showing that a plan "can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats" cannot tenably "rest[] upon the principle that groups ... have a right to proportional representation." *Vieth*, 541 U.S. at 286, 288 (plurality opinion). In contrast, Mattingly's and Chen's analyses nowhere involve any test of proportional representation or any other *a priori* normative baseline concerning the functional relationship between seats and votes. Their baselines instead are large samples of alternative plans from the astronomical number of plans that could have been drawn in accordance with stipulated sets of legal criteria. These samples have been internally (and in Mattingly's case, externally) validated for representativeness by showings that generating plans under widely varying assumptions has a negligible effect on the quantitative and qualitative conclusions drawn from them. *See supra* sections I.B-C; *see also Gonzalez v. City of Aurora*, Ill., 535 F.3d 594, 599-600 (7th Cir. 2008) (Easterbrook, C.J.) (describing inference of racial gerrymandering from a large set of computer-generated maps and concluding that "[r]edistricting software can not answer all hard questions, but it provides a means to implement a pure effects test without demanding proportional representation.").

Cross-election variation precludes a finding of an equal protection violation based on the results of "a single election" because without more, "a showing of possibly transitory results" does not demonstrate "a history of disproportionate results ... in conjunction with strong indicia of lack of political power and the denial of fair representation." *See Bandemer*, 478

U.S. at 139-40; *Vieth*, 541 U.S. at 287 (plurality opinion) (noting that "[p]olitical affiliation ... may shift from one election to the next" and "the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold"). In contrast, Mattingly's and Chen's analyses found consistent results between the 2012 and 2016 congressional general elections, relatively good years for Democrats and Republicans, respectively. *See Common Cause*, 318 F.Supp.3d at 874. Beyond this span of actual election results, Mattingly's district-specific evidence of packing and cracking is robust under significant uniform swing perturbations, *see supra* note 4, and Chen's use of a twenty-election average in addition to Hofeller's seven-election average "reflected a broad variety of candidates and electoral conditions." 318 F.Supp.3d at 877.

The difficulty of "[e]valuating the legality of acts arising out of mixed motives," *LULAC*, 548 U.S. at 418, complicates efforts to identify a "predominant motivation" behind a challenged plan. *See Vieth*, 541 at 285. Despite this, the Panel found that Mattingly's and Chen's analyses both "provide strong evidence that the General Assembly's predominant intent in drawing the 2016 Plan was to dilute the votes of voters likely to support Democratic candidates and entrench the Republican Party in power." *See Common Cause*, 318 F.Supp.3d at 874 (Mattingly); *see also id.* at 876 (Chen). But crucially, Mattingly's and Chen's analyses also demonstrated that the defendants merely complied with their stated legitimate criteria as constraints and did not pursue them as objectives. *See supra* sections I.B-C. In so doing, they provided the necessary factual predicates

for a "judicially manageable framework" that does not "'turn[] on whether partisan interests in the redistricting process were excessive,'" but "distinguishes partisan gerrymandering from the results of legitimate districting objectives, including those objectives that take into account political data or permissible partisan considerations." *See Common Cause*, 318 F.Supp.3d at 851-52 (quoting *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment)); *infra* section II.A (describing the significance of the distinction between pursuing objectives and merely complying with constraints in equal protection doctrine).

The asymmetric residential tendencies of different political groups typically produce "'natural' packing effect[s]," *see Vieth*, 541 U.S. at 290 (plurality opinion); *see also Gill*, 138 S.Ct. at 1933, that can confound the use of the efficiency gap and other partisan symmetry measures in quantifying the effects of partisan gerrymandering.[7] Both Mattingly and Chen, however, developed their analytical methods with the express purpose of controlling for the effects of political geography on the measurement and evaluation of partisan performance. *See*

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[7] Even so, differential causal inferences in this context are well within the competence of a trial court. *See, e.g.*, *Whitford v. Gill*, 218 F.Supp.3d at 921, 924 (finding that "Wisconsin's political geography ... affords the Republican Party a natural, but modest, advantage in the districting process," but "cannot explain the magnitude" of the partisan advantages observed in 2012 and 2014); *cf. Wood v. Textron, Inc.*, 807 F.3d 827, 832 n.4 (7th Cir. 2015) (quoting FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 214 (1994)) ("A differential etiology is a process-of-elimination approach to determining a subject's cause of injury. Under this method, an expert 'considers all relevant potential causes of the symptoms and then eliminates alternative causes.'").

Mattingly & Vaughn, *supra* note 3, at 2 ("It might be that in North Carolina the [partisan asymmetry] would happen in any redistricting which balances the representation of the urban with the rural or the beach with the mountains, and each with the Piedmont. Maybe the vast majority of reasonable districts which one might draw would have these issues due to the geography of the population's distribution. We are left asking the basic question: 'How much does the outcome depend on the choice of districts?'"); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239, 247-48 (2013) (finding that "migration, sorting, and residential segregation ... has left the Democrats with a more geographically concentrated support base than Republicans" resulting in partisan asymmetry, and "seek[ing] to estimate the electoral bias that would emerge under hypothetical districting plans that are not intentionally gerrymandered"). Since all of Mattingly's and Chen's computer-generated plans overlay the same political geography as the 2016 Plan, many exhibited partisan effects from natural packing and cracking similar to those in the 2016 Plan, while deliberately packed and cracked districts in the challenged plan had no counterpart among the computer-generated plans. *Compare id.* at 256 (finding in a study of computer-generated Florida congressional and legislative plans that "at least some pro-Republican bias" was typical) *with Common Cause*, 318 F.Supp.3d at 872-73 (reporting Mattingly's district-level findings of the 2016 Plan's atypicality); *id.* at 821-26 (reporting Chen's district-level findings of the 2016 Plan's atypicality). Accordingly, the Panel found that both Mattingly's and Chen's analyses account for and

exclude North Carolina's political geography as an explanation for the 2016 Plan's atypical partisan performance and discriminatory effects. *See id.* at 897.

E. The Panel's weighing and admission of the statistical evidence are entitled to great deference.

In making its findings of vote dilution, the Panel reviewed voluminous district-specific and residence-specific statistical evidence, *see Common Cause*, 318 F.Supp.3d at 901-23, as well as "five different types of [statewide] statistical analyses performed by three different experts all reach[ing] the same conclusion," *id.* at 895.[8]

The Panel's weighing of this statistical evidence is entitled to deference under the clear error standard of review. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."). Great deference is especially warranted

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[8] In addition to Mattingly's and Chen's analyses, the plaintiffs presented Professor Simon Jackman's analysis comparing the 2016 Plan's measured efficiency gap with estimates of efficiency gaps observed in 512 congressional elections between 1972 and 2016. *See Common Cause*, 318 F.Supp.3d at 885-87. A full review of the inferential power of Jackman's analysis is beyond the scope of this brief. Counsel for *amici* has previously described to this Court how a similar analysis by Jackman supported various causal inferences in *Gill*. *See* Brief of 44 Election Law, Scientific Evidence, and Empirical Legal Scholars as *Amici Curiae* in Support of Appellees, *Gill v. Whitford*, No. 16-1161 (filed Sept. 1, 2017); *see also supra* note 7 (describing one such causal inference).

with respect to the Panel's weighing of statistical evidence. *See Soria v. Ozinga Bros., Inc.*, 704 F.2d 990, 994 n.6 (7th Cir. 1983) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977) (Rehnquist, J., concurring)) ("Moreover, especially where statistical evidence is involved, great deference is due the district court's determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue.").

The Panel's decisions regarding the admissibility of scientific evidence in this case are also entitled to wide deference. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("We hold, therefore, that abuse of discretion is the proper standard by which to refer a district court's decision to admit or exclude scientific evidence."); *United States v. Abel*, 469 U.S. 45, 54 (1984) ("A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules.").

II. In this age of computationally intensive redistricting, the legislative defendants' mere compliance with legitimate redistricting criteria as constraints cannot immunize their intentional packing and cracking from equal protection liability.

Computational advances have by now largely overwhelmed the capacity of traditional districting criteria to discipline the pursuit of partisan advantage. See *Gill v. Whitford*, 138 S.Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like).... The

technology will only get better, so the 2020 cycle will only get worse."). [9] In *Vieth*, however, Justice Kennedy expressed the hope that these same computational advances could eventually enable the law to catch up to the technology of gerrymandering. 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment).

In holding open the future possibility of a justiciable standard for equal protection review of a partisan gerrymandering challenge, Justice Kennedy duly noted that "great caution is necessary when approaching this subject" and that the suspect-classification jurisprudence involved in racial gerrymandering cases is "quite a different matter." *Vieth*, 541 U.S. at 307. He also observed that the Court in *Gaffney v. Cummings* had emphatically declined to prohibit the use of partisan classifications in redistricting. *See id.* at 307 (quoting *Gaffney*, 412 U.S. 735, 752 (1973)) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). Accordingly, Justice Kennedy offered the guidance that liability for partisan gerrymandering "must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative *objective*." *Vieth*, 541 U.S. at 307 (emphasis added).

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[9] Indeed, if the Court were to hold partisan gerrymandering nonjusticiable, it is difficult to see *any* basis upon which future courts could rein in departures from traditional districting criteria, such as the drawing of non-contiguous districts.

Notably, Justice Kennedy's guidance gives no warrant to mere compliance with traditional districting criteria as *constraints* incident to the pursuit of illegitimate or invidious legislative objectives (even less so to mere compliance with "some traditional criteria but not others," *see Vieth*, 541 U.S. at 296 (plurality opinion)). As the *Vieth* plurality recognized, mere compliance with traditional districting criteria is insufficient to prevent legislators from diluting the votes of particular citizens on a partisan basis. *See id.* at 298 (plurality opinion) ("[I]t certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution.... [P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines."); *see also* Duchin, *Geometry v. Gerrymandering*, *supra*, at 50 ("The problem [with compactness criteria] is that the outline of a district tells a very partial and often misleading story. On one hand there can certainly be benign reasons for ugly shapes.... On the other hand districts that are plump, squat and symmetrical offer no meaningful seal of quality.").

Computer technology has long been instrumental and has become ever more effective in enabling mapmakers to maximize partisan advantage while maintaining compliance with traditional districting criteria. *See, e.g.*, *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) ("The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues."); *Karcher v.*

Daggett, 462 U.S. 725, 752 (1983) (Stevens, J., concurring) ("Since Justice Harlan wrote [in *Wells*], developments in computer technology have made the task of the gerrymanderer even easier."); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (describing technology as a "threat" that could increase "the temptation to use partisan favoritism in districting in an unconstitutional manner"); *id.* at 364 (Breyer, J., dissenting) ("[T]he political advantages of a gerrymander may become ever greater in the future" due to "enhanced computer technology"); *Gill*, 138 S.Ct. at 1941 (Kagan, J., concurring) ("[M]apmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like).").

Given these computational developments over half a century with more to come, mere compliance with legal requirements can no longer logically be accorded significance in adjudicating the intent and effect of redistricting decisions. As in racial gerrymandering cases, "'traditional districting principles,' which include 'compactness, contiguity, and respect for political subdivisions,' ... 'may serve to defeat a claim that a district has been gerrymandered,'" *see Vieth*, 541 U.S. at 336 (Stevens, J., dissenting) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)), but only to the extent the mapmakers have pursued them as objectives. The defendants relinquished any claim to a safe harbor from equal protection liability when they designed districts that belied any actual pursuit of traditional districting principles and other legitimate legislative criteria as objectives.

A. Legislatures can avoid equal protection challenges by publicly stating and actually pursuing legitimate redistricting objectives.

The doctrinally significant distinction between pursuing redistricting objectives and merely complying with redistricting constraints establishes at least one "comprehensive and neutral principle[] for drawing electoral boundaries," *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in the judgment): The best way for legislatures to avoid partisan gerrymandering challenges is by actually pursuing their publicly stated legitimate redistricting criteria as objectives, not merely complying with them as constraints incident to the pursuit of undisclosed, illegitimate, or invidious objectives.[10] Even absent the defendants' own public statements and other direct evidence of their invidious partisan intent, *Common Cause*, 318 F.Supp. at 868-70, Mattingly's and Chen's robust statistical analyses would reveal that partisan advantage was the only adopted redistricting criterion that they pursued as an objective in the drafting of the 2016 Plan, while merely maintaining compliance with all of the other adopted criteria and legal requirements as constraints. *Compare supra* sections I.B-C *with* 318 F.Supp.3d at 882 (reviewing legislative defendants' public statements signifying intent to achieve "the maximum partisan advantage that could be obtained

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[10] The distinction is not one of "motivation," as legislatures are necessarily "motivated" by force of law to comply with any traditional districting requirements. *See LULAC*, 548 U.S. at 420 (noting that "when a legislature redistricts pursuant to its decennial constitutional duty... [it] is then immune from the charge of sole motivation").

without risking that the [*Cooper v.*] *Harris* court would 'throw' the plan out as perpetuating the constitutional violation.").

Legitimate redistricting criteria need not be completely nonpartisan: political considerations are permissible and perhaps even inevitable. See *Gill*, 138 S.Ct. at 1926 (quoting *Gaffney*, 412 U.S. at 752-53) ("[D]istricting 'inevitably has and is intended to have substantial political consequences'"); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (noting that political classifications are "generally permissible"). Nor have political classifications been recognized as suspect. See *Bandemer*, 478 U.S. at 151-52 (O'Connor, J., concurring in the judgment) (explaining that major parties lack "the traditional indicia of suspectness" in that they are not "vulnerable to exclusion from the political process by some dominant group"); *Vieth*, 541 U.S. at 287 (plurality opinion) ("Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line."); *id.* at 307 (Kennedy, J., concurring in the judgment) (citations omitted) ("Race is an impermissible classification. Politics is quite a different matter.").

Nevertheless, when legislators use partisan criteria to identify particular citizens whose votes are susceptible to dilution through packing or cracking, a legislative decision to draw those citizens into a district with the purpose and effect of promoting such a packed or cracked outcome raises colorable equal protection concerns. See *Gill*, 138 S.Ct. at 1934 (declining to direct dismissal where individual plaintiffs have alleged that they "live in districts

where Democrats like them have been packed or cracked"). Such deliberate legislative manipulation of a district's electoral outcome, *see Common Cause*, 318 F.Supp.3d at 941 (quoting *Cook v. Gralike*, 531 U.S. 510, 526 (2001) (internal citation omitted)) (concluding that "the 2016 Plan amounted to a successful 'attempt[] to "dictate election outcomes"'"), is not rationally related to any conceivable state interest in accordance with the legitimating "'core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Arizona State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)).

B. A factfinder may reasonably infer from robust statistical evidence of a district's packing or cracking that the drawing of the district's boundaries has arranged "the electoral system in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."

Partisan gerrymandering violates the Equal Protection Clause "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132. The adjudication of a district-level vote dilution claim "focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their ability to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." *Id.* at 133. In

this context, evidence of vote dilution "must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.*

Both packing and cracking, as evidenced by a district's consistently atypical partisan performance, dilute the votes of an opposing party's voters by "undermining the normal effects of the choices that [voters] had made about where to live." *See Gonzalez*, 535 F.3d at 600. As this Court has recognized in the racial gerrymandering context, "dilution of ... group voting strength may be caused by the dispersal of [the group] into districts in which they constitute an ineffective minority of voters or from the concentration of [the group] into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986); *see also Gill*, 138 S.Ct. at 1933-34 (declining to dismiss four plaintiffs who had pleaded a particularized vote dilution injury, two from packing and two from cracking, and remanding for trial on both theories).

Drawing a voter into a district with the objective of minimizing the effectiveness of the voter's party in converting votes into seats irrespective of wide variations in cross-election conditions is a direct assault on that voter's "chance to directly influence the election returns and to secure the attention of the winning candidate," *Bandemer*, 478 U.S. at 133. This is true even when the district, engineered for partisan advantage, complies with legitimate redistricting criteria. *See Vieth v. Jubelirer*, 541 U.S. at 298.

The instant case exemplifies all of the above principles. At least ten of the Common Cause

plaintiffs proved, through direct evidence and robust statistical evidence, that their districts had been drawn with the purpose and effect of degrading their votes and the votes of other district residents who defendants had predicted would likely support a Democratic candidate based on past election results. *See supra* sections I.B-C; *Common Cause*, 318 F.Supp.3d at 878-89. Relying on those past election results and empirical knowledge of the limited range of cross-election variation at the precinct and VTD level in North Carolina, 318 F.Supp.3d at 878, the defendants intentionally and effectively packed or cracked each of these ten plaintiffs into a district where he or she and other Democratic voters "constitute an ineffective minority... [or] an excessive majority," *Gingles*, 478 U.S. at 46 n.11. This safely ensured the defendants' intended electoral outcome in each packed or cracked district, *see Common Cause*, 318 F.Supp.3d at 902-23 *passim* (reviewing district-specific evidence of vote dilution through, *inter alia*, the deliberate drawing of atypically "safe" districts), rendering cross-election voting variations ineffectual there for the life of the 2016 Plan. *See id.* at 895 ("[T]he discriminatory effects intended by the 2016 Plan's architects and predicted by Dr. Mattingly's analyses—the election of 10 Republicans by margins that suggest they will retain their seats throughout the life of the plan—in fact occurred."); *see also* Thomas Wolf & Peter Miller, *How the GOP Gerrymander Blocked the Blue Wave in NC*, NEWS & OBSERVER (Nov. 12, 2018) ("[D]espite an extraordinary year, [Democrats] netted just three of the state's 13 congressional seats — the same as in 2014 and 2016. That happened because a promising Democratic wave crashed against one of the country's most extreme gerrymanders.").

In deliberately muting the effects of cross-election variation, the defendants effectively barred Democratic voters in each packed or cracked district from "directly influenc[ing] the election returns and ... secur[ing] the attention of the winning candidate," *Bandemer*, 478 U.S. at 133, at least by the means of "shift[ing] from one election to the next" or voting against "an utterly incompetent candidate" that give political affiliation its mutable character. *See Vieth*, 541 at 287. The defendants thereby created an abnormal and discriminatory arrangement of the electoral system in which each packed or cracked plaintiff's disfavored partisan affiliation, while mutable in principle, was frozen in practical effect, "consistently degrad[ing the plaintiff's] ... influence on the political process as a whole." *Bandemer*, 478 U.S. at 132.

CONCLUSION

The Panel's findings of vote dilution in violation of the Equal Protection Clause, at least as to the Common Cause plaintiffs in Districts 1, 2, 3, 4, 8, 9, 10, 11, 12, and 13, should be affirmed.

Respectfully submitted,

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No. 18-422

IN THE
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF AMICUS CURIAE SENATOR SHELDON WHITEHOUSE IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amicus is U.S. Senator Sheldon Whitehouse of Rhode Island.[1] In *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), *amicus* submitted a brief with the late Senator John McCain of Arizona to provide a bipartisan view of how partisan gerrymandering threatens our democracy. *See* Br. of Senators John McCain and Sheldon Whitehouse, 2017 WL 4311105 (filed Sept. 5, 2017). Because the concerns expressed in that brief are just as relevant today, *amicus* presents the same arguments in this brief.

As a national political leader, *amicus* has a strong interest in the proper functioning of our democracy, and is a witness to the symptoms and ill effects of its distress. As an active, democratically elected legislator, *amicus* is deeply concerned about the damage excessive partisan redistricting inflicts on the American democratic process.

Amicus sees firsthand the concerns of constituents who increasingly view politics as a game run by powerful special interests that have changed the rules to win the game. The age-old problem of an "influencer class" is worsening, and the public sees this class garnering disproportionate rewards at the public's expense. Gerrymandering is a tool of the influencer class in that effort.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk consenting to the filing of all amicus briefs in this case.

Americans do not like gerrymandering. They see its mischief, and absent a legal remedy, their sense of powerlessness and discouragement has increased, deepening the crisis of confidence in our democracy. *Amicus* shares this perspective. From this vantage point, *amicus* sees wasted votes and silenced voices. *Amicus* sees hidden power. And *amicus* sees a correctable problem.

Amicus submits this report from the political front lines in the hope that it will aid the Court by providing pragmatic, real-world input on the ways in which partisan gerrymandering undermines our democracy. These concerns should be central to the Court's review of whether the district courts correctly held that the North Carolina and Maryland redistricting schemes constitute unconstitutional partisan gerrymanders.

On a personal note, *amicus* mourns the loss of his friend and colleague and submits this brief in his honor.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases implicate the effective functioning of American representative democracy. With roots tracing to Patrick Henry and Massachusetts Governor Elbridge Gerry, politically motivated redistricting has long been a part of American politics. But what began as a tactic to protect individual incumbencies and to undercut adversaries has morphed into something much different today. Partisan gerrymandering is now accomplished by using sophisticated technology—including mapping software, census data, and

voting algorithms—to redraw a state's district lines to maximize partisan advantage across an entire state.[2]

This new breed of "bulk" partisan gerrymandering distorts statewide votes, systematically diluting the effect of votes based on political affiliation and leading to the election of congressional and state legislative delegations that do not represent the will of the voters. This practice violates "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted). And importantly—as demonstrated by the redistricting schemes at issue in the cases now before the Court—extreme partisan gerrymandering is a bipartisan problem, undertaken by Republicans and Democrats alike in an effort to entrench political power at the expense of the American voter.

I. A. The rise of extreme partisan gerrymandering over the past decade can be traced directly to this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Although partisan gerrymandering existed before *Vieth*, the threat of judicial review provided a strong deterrent that kept states from adopting extremely gerrymandered districts. *Vieth*'s refusal to treat partisan gerrymandering claims as justiciable effectively removed this threat. State legislatures—and political operatives seeking to gain and entrench

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[2] *See* Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy* 83–86 (2017); Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. Times Mag. (Aug. 29, 2017).

political power—have viewed this decision as an invitation to redraw districts to push the limit of partisan advantage. As the American Bar Association observed, "[t]he Court's recent decisions appear to give legislators leeway to [preserve] partisan advantage as zealously as they like when drawing district lines."[3]

B. The increase in partisan gerrymandering in recent years has been bolstered by the growing presence of "dark money" in the American political system.[4] Special interest groups, fueled by hidden funders with deep pockets and skin in the political game, are now focused on influencing redistricting. The payoff for these groups is obvious: By shaping the decennial redistricting process, special interest groups can affect the outcome of every congressional race in a state for the next decade. The role of dark money in this process is a bipartisan concern, as both Republicans and Democrats now rely on this funding.

C. This Court has already acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles." *Vieth*, 541 U.S. at 292. Severe partisan gerrymandering undermines our democracy, which is based on fair and open elections that accurately reflect the will of the people and count every vote equally. When the voters of a state vote one way, the resulting congressional delegation is more than 2-1 the opposite way, and the advantaged party intentionally produced that undemocratic result, it should

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[3] J. Gerald Hebert, Paul M. Smith, Martina E. Vandenberg, & Michael B. DeSanctis, A.B.A., *The Realist's Guide to Redistricting: Avoiding the Legal Pitfalls* 19 (2d ed. 2010).

[4] The term "dark money" refers to money contributed to nonprofit organizations and used for political purposes without disclosure of the donor's identity.

be obvious that "one person, one vote" has been violated. This partisan gerrymandering leads voters to perceive, rightly, that their votes do not matter. Indeed, we have seen firsthand the growing concerns of constituents who view politics as a game orchestrated by powerful special interests whose victories come at the expense of the American voter.

II. The Court should affirm the district court decisions. The district courts relied on equal protection and First Amendment tests that provide a workable framework for distinguishing between district maps drawn based on legitimate political considerations and those constituting unlawful partisan gerrymandering. The tests are more than sufficient to find an unconstitutional gerrymander on the facts of these cases. Beyond remedying the constitutional violations present in these cases, affirming the district court decisions will send a clear message that partisan gerrymandering will not be tolerated.

ARGUMENT

I. Partisan Gerrymandering Has Become A Tool For Powerful Interests To Distort The Democratic Process.

Democracy is not abstract or academic. It is a battleground on which competing interests exert all the pressure they can muster. This battleground often pits special interest groups against a general population that wants only to be treated fairly.[5]

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[5] This is a long-observed conflict, reflected in the pages of history from Niccolo Machiavelli's writings to President Jackson's bank veto message. *See, e.g.*, Niccolo Machiavelli, *The Prince*, ch. IX

Special interest groups have long influenced the outcome of elections. But this Court's decision in *Vieth* made redistricting a particularly attractive tool for these groups. No longer concerned about the prospect of judicial review, state legislatures now push gerrymandering to its limits, and special interests, supported by dark money, help them do so. The result has greatly undermined the public's faith in our democracy.

A. *Vieth* Opened The Door To Extreme Partisan Gerrymandering.

Justice Kennedy, in his concurring opinion in *Vieth*, predicted that "if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow." 541 U.S. at 312. That prediction has come true. The frequency and egregiousness of partisan gerrymandering has intensified in the decade since *Vieth*, and absent this Court's intervention, the problem is only likely to worsen. Without the threat of judicial review, political parties have every incentive to engage in extreme partisan gerrymandering.

(1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832), *available at* http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves").

Vieth sent a clear signal that the Court was no longer inclined to intervene in partisan gerrymandering cases.[6] *Vieth*'s impact has been felt since 2010—the first round of redistricting after the decision—as state governments sought to redraw electoral maps for partisan advantage more aggressively than ever before.[7] Observers have recognized that "[t]he world changed with the 2010 redistricting. States were no longer constrained by the threat of judicial challenge of partisan gerrymanders, and where one party completely controlled the redistricting process, it often took full advantage."[8]

The North Carolina map currently before the Court illustrates how partisan gerrymandering evolved after *Vieth*. In 2010, Republicans gained control of North Carolina's General Assembly and, with it, exclusive control over the redistricting process. *See Rucho* J.S. App. at 10. The next year, they adopted a new map that allowed Republicans to win a supermajority of the state's congressional seats (9 of 13) in the 2012 election despite receiving a minority of the statewide vote (49%). *Id.* at 13. In 2014, Republicans gained an additional seat, meaning they won 10 of 13 seats with only 54% of the statewide vote. *Id.* at 13-14.

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[6] Anthony J. McGann, et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* 5 (2016) ("[A]fter *Vieth v. Jubelirer* (2004), state legislatures were willing to district for partisan advantage far more than they had previously.").

[7] *Id.* at 3.

[8] *Id.* at 17.

North Carolina was forced to adopt a new map for the 2016 elections after courts invalidated the previous map as a racial gerrymander. *Id.* at 14, 24. The General Assembly created the new map using "Partisan Advantage" as a criterion. *Id.* at 20. One of the Republican leaders explained that "the goal" of this criterion was "to elect 10 Republicans and 3 Democrats." *Id.* at 23. Republicans succeeded. In the 2016 elections, they won 10 of 13 congressional seats (77%) despite receiving only 53% of the statewide vote. *Id.* at 26.

North Carolina was not alone in seizing the opportunity presented in *Vieth* for partisan gerrymandering without judicial oversight. Wisconsin also implemented a gerrymandered map for General Assembly elections designed to ensure that "Republicans would maintain a majority *under any likely voting scenario*; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority." *Whitford v. Gill*, 218 F. Supp. 3d 837, 852 (W.D. Wis. 2016) (emphasis added), *vacated and remanded*, 138 S. Ct. 1916 (2018). The Wisconsin plan produced precisely this lopsided result in the 2012 election that followed, in which Republicans won 60 of 99 General Assembly seats despite receiving only 48.6% of the statewide vote. *Id.* at 853.

Pennsylvania provides another example of extreme gerrymandering in the wake of *Vieth*. Following the 1990 Census, Pennsylvania's congressional districts were relatively compact with few oddly shaped districts, and had little or no partisan bias.[9]

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[9] McGann, *supra* note 6, at 9.

After the 2000 Census, the redistricting plan had a few more oddly shaped districts and indications of partisan bias, but the plan was approved by the district court and affirmed by the Court in *Vieth*.[10]

After the 2010 Census, Pennsylvania's districting plan changed dramatically, pushing partisan gerrymandering to its limits. The previously compact districts were largely replaced by districts that are "either elongated or have tendrils that cut into the surrounding districts."[11] From the Republicans' perspective, these changes worked: In the 2012 House elections, Democrats received more votes than Republicans, but the state sent thirteen Republicans and only five Democrats to Congress.[12] This scheme ultimately drew the attention of the Pennsylvania Supreme Court, which in 2018 redrew Pennsylvania's districts after finding that the Republican redistricting plan violated the state's constitution.[13]

Scholars have concluded that this Court's decision in *Vieth* was the primary reason for Pennsylvania's efforts to further gerrymander its congressional districts.[14] When the post-2000 districts were drawn,

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[10] *Id.* at 11.

[11] *Id.* at 13.

[12] Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J. L. Ethics & Pub. Pol'y 323, 329 (2014).

[13] *League of Women Voters of Pa. v. Commonwealth of Pa.*, 181 A.3d 1083 (Pa. 2018).

[14] McGann, *supra* note 6, at 3. The increase in partisan gerrymandering from the 2000 Census to the 2010 Census is clear even if one controls for a variety of other factors, including urban concentration, changes in technology, and the requirements of the Voting Rights Act. *See id.* at 4–5, 12.

gerrymandering for political gain could still be meaningfully challenged in the courts, which explains "why the level of partisan gerrymandering was quite modest in the post-2000 districts compared to the post-2010 ones, even though the Republicans controlled the governorship and state legislature in both cases."[15] The congressional districts adopted after *Vieth*, in contrast, "show the full potential of partisan gerrymandering when there is no threat of judicial action."[16]

The combined effect of partisan gerrymanders in 2012 resulted in Republicans gaining a 33-seat advantage in the House, despite receiving more than one million fewer votes than Democrats.[17] Most of this advantage can be attributed to Republicans successfully tilting the electoral maps in key swing states.[18]

Republicans have certainly benefited from post-*Vieth* bulk gerrymandering, but they are hardly alone in skewing district lines for political gain. As one commentator noted, partisan gerrymandering is "a decennial sin of every majority party."[19] Where Democrats

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[15] *Id.* at 12.

[16] *Id.* at 13 ("In the previous round, the Pennsylvania state government had to consider the possibility that the courts would strike down a blatantly gerrymandered districting plan. After *Vieth v. Jubelirer* (2004), this was no longer the case.").

[17] Stephen Ohlemacher, *GOP Gerrymandering Creates Uphill Fight for Dems in the House*, PBS NewsHour (Mar. 31, 2014), http://www.pbs.org/newshour/rundown/gop-gerrymandering-creates-uphill-fight-dems-house/.

[18] *Id.*

[19] *Why Democrats are Taking Aim at Gerrymandering*, The Economist (July 12, 2017), https://www.economist.com/blogs/economist-explains/2017/07/economist-explains-6.

have been in control, they have drawn gerrymandered maps just like their Republican counterparts.

The Maryland plan before the Court illustrates as much. Following the 2010 Census, Democrats sought to redraw district lines to improve upon the 6-2 advantage they already enjoyed in the state's congressional delegation. *See Lamone* J.S. App. 14a. Democrats took aim at Maryland's Sixth District, which had elected a Republican representative for the previous two decades. *Id.* at 3a, 7a. Working with hired data analysts using sophisticated mapping software, Democrats successfully implemented the Governor's goal of creating a 7-1 map. *See id.* at 12a, 16a, 18a, 22a. The plan "effect[ed] a swing of about 90,000 voters," which "br[ought] about the single greatest alteration of voter makeup in any district in the Nation following the 2010 census." *Id.* at 2a. After the reshuffling, a Democratic challenger unseated the district's ten-term Republican incumbent, confirming that "[t]he result of the wholesale recomposition of the Sixth District was precisely as intended and predicted." *Id.* at 24a; *see also id.* at 11a.

Democrats also led successful partisan redistricting efforts in Illinois. In 2010, Republicans held 11 of Illinois' 19 House seats. After Democrats redrew the district lines in 2011, they took 12 of Illinois' 18 seats in the 2012 election. Although challenged by Republicans, a federal district court, relying heavily on *Vieth*, upheld the gerrymander despite finding that it was "a blatant political move to increase the number of Democratic congressional seats." *Comm. for a Fair*

and Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 567 (N.D. Ill. 2011).[20]

In short, partisan gerrymandering has worsened significantly since *Vieth* removed the threat of judicial review, and bulk gerrymandering has been the vehicle. With the 2020 Census quickly approaching, the Court should curb this pernicious practice.

B. Dark Money Fuels Partisan Gerrymandering On Both Sides Of The Aisle.

As state governments become more willing to engage in partisan gerrymandering post-*Vieth*, a predictable result has occurred: Special interest groups, funded by dark money, are playing an increasingly active role in redistricting.

Drawing district lines that maximize partisan advantage is a complicated task. Legislators therefore turn to outside consultants and organizations, which offer detailed guidance on how to redraw district maps. These groups rely on sophisticated mapmaking software, census data, and partisan voting algorithms to determine how best to maximize partisan gain.[21] This expertise is expensive, but special interest groups are willing to foot the bill because they recognize the potential return on their investment. Spending money to help a House candidate in an election

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[20] *See also* Catanese, *supra* note 12, at 331 (discussing Illinois as an example of a Democratic-controlled gerrymander).

[21] *See, e.g.*, *Lamone* J.S. App. at 17a–18a; Bazelon, *supra* note 2; Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 411 (2016) ("The advent of computers had turned redistricting into an expensive, cynical, and highly precise science.").

can change the occupant of that seat for the next two years. But spending to support redistricting can change every House race in the state for the next decade.

Financial support from groups accepting dark money has been crucial to recent gerrymandering efforts, and redistricting groups in most states can take unlimited amounts of money without disclosing the source. In early 2010, the Republican State Leadership Committee created the Redistricting Majority Project ("REDMAP") with the goal of redrawing electoral maps to benefit Republican candidates.[22] In 2010, REDMAP raised more than $30 million—much of it dark money—to elect majorities in state legislatures in battleground states including Ohio, Michigan, North Carolina, Pennsylvania, and Wisconsin.[23] After gaining control of state legislatures, REDMAP then expanded its efforts to influence the redistricting of those states' congressional seats.[24]

The Republicans' redistricting efforts were largely supported by "opaque nonprofits funded by dark money, supposedly nonpartisan campaign outfits, and millions in corporate donations to achieve Republican-

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[22] *See* Republican State Leadership Comm., *The Redistricting Majority Project*, http://www.redistrictingmajorityproject.com/ (last visited Mar. 6, 2019) ("Republicans have an opportunity to create 20–25 new Republican Congressional Districts through the redistricting process over the next five election cycles, solidifying a Republican House Majority."); Olga Pierce, et al., *How Dark Money Helped Republicans Hold the House and Hurt Voters*, ProPublica (Dec. 21, 2012 3:36 PM ET), https://www.propublica.org/article/how-dark-money-helped-republicans-hold-the-house-and-hurt-voters.

[23] Pierce, et al., *supra* note 22.

[24] *Id.*

friendly maps throughout the country."[25] Among the organizations funding REDMAP were groups with such seemingly neutral names as American Justice Partnership, Fair and Legal Redistricting for North Carolina, and Michigan Redistricting Resource Institute.[26] The neutral names disguise these organizations' underlying agendas.[27]

The strategy behind this effort was clear, and the political intent unmistakable. In 2010, one of REDMAP's early boosters wrote in the Wall Street Journal that Republicans were targeting state legislatures because "[h]e who controls redistricting can control Congress."[28] REDMAP's own 2012 Summary Report highlighted how their "strategy of targeting state legislative races in 2010 led to a Republican U.S. House Majority in 2013."[29] REDMAP explained: "Drawing new district lines in states with the most redistricting

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[25] *Id.* ("Two tobacco giants, Altria and Reynolds, each pitched in more than $1 million to the main Republican redistricting group, as did [Karl] Rove's super PAC, American Crossroads; Walmart and the pharmaceutical industry also contributed. Other donors, who gave to the nonprofits Republicans created, may never have to be disclosed.").

[26] *Id.*

[27] *See, e.g.*, Peter Overby, NPR News Investigations, *From Social Welfare Groups, a River of Political Influence* (Nov. 5, 2013 5:00 AM ET), http://www.npr.org/2013/11/05/242354030/from-social-welfare-groups-a-river-of-political-influence (describing American Justice Partnership as an organization dedicated to legal reform that has "target[ed] liberal judges for defeat").

[28] Karl Rove, *The GOP Targets State Legislatures*, Wall St. J. (Mar. 4, 2010 5:01 AM ET), https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

[29] The Redistricting Majority Project, *2012 REDMAP Summary Report* (Jan. 4, 2013) (capitalization altered), http://www.redistrictingmajorityproject.com/.

activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[30]

The Democratic Party also has supported its redistricting efforts by accepting "secretive redistricting funding."[31] For example, as noted above, Maryland Democrats gerrymandered congressional districts behind closed doors to preserve their incumbencies while taking aim at the state's two remaining Republican seats. As former governor Martin O'Malley explained in a deposition, "part of our intent was to create a map that was more favorable for Democrats over the next ten years."[32] To that end, Democrats hired outside consultants to redraw the district lines. Those consultants later testified that their job "was to see if there was a way to get another Democratic district in the state."[33] They succeeded, and Maryland's two Republican seats shrunk to one.

Democrats too have relied on nonprofit organizations, funded by dark money, for support in redistricting. Like the Republican groups, these groups have nonpartisan-sounding names, such as Democracy Alliance, America Votes, and Patriot Majority USA, that belie their political agendas.[34] Patriot Majority USA,

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[30] *Id.*

[31] Pierce, et al., *supra* note 22.

[32] *Lamone* J.S. App. at 13a.

[33] *Id.* at 16a.

[34] *See, e.g.*, About, America Votes (last accessed Mar. 6, 2019), https://americavotes.org/about/ (describing America Votes as "the coordination hub of the progressive community," with "an eye on redistricting"); Richard Berman, *The Democrats' Dark*

a 501(c)(4) social welfare group not required to publicly disclose its donors, reportedly raised $30 million in 2014 and "was a major player in the Democrats' failed bid to retain control of the U.S. Senate" in 2014.[35] Unions have reportedly donated to Patriot Majority USA,[36] as well as to "an array of 'dark money' liberal advocacy groups including the 501(c)(4) arms of the Center for American Progress, National Employment Law Project, and Partnership for Working Families—which aren't required to report who funds them."[37]

As troubling as these examples are, *amicus* expects that the influence of special interests groups and dark money in redistricting efforts will increase unless this Court steps in. One recent study found that 38 times more dark money was spent during the 2014 elections than in 2006.[38] And political groups are

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Money Hypocrisy, The Hill (May 5, 2016 9:00 AM ET), http://thehill.com/blogs/congress-blog/politics/278881-the-democrats-dark-money-hypocrisy; Matea Gold, ***Wealthy Donors on Left Launch New Plan to Wrest Back Control in the States***, Wash. Post (Apr. 12, 2015), https://www.washingtonpost.com/politics/wealthy-donors-on-left-launch-new-plan-to-wrest-back-control-in-the-states/2015/04/12/ccd2ff5ee-dfd3-11e4-a1b8-2ed88bc190d2_story.html?utm_term=.94e5ec28352c (describing Democracy Alliance as "[a] cadre of wealthy liberal donors").

[35] Michael Beckel, *Secret Donors Fuel Democratic Political Powerhouse*, Ctr. for Pub. Integrity (Nov. 18, 2015), https://www.publicintegrity.org/2015/11/18/18875/secret-donors-fuel-democratic-political-powerhouse.

[36] *Id.*

[37] Berman, *supra* note 34.

[38] Chisun Lee, et al., Brennan Ctr. for Justice, *Secret Spending in the States* 3 (June 26, 2016), https://www.brennancenter.org/publication/secret-spending-states.

gearing up for the next round of redistricting. Democrats are already planning for a 2020 redistricting campaign, including through groups funded by "dark money,"[39] and Republicans will surely do the same.

This is just one of many ways in which dark money plagues United States elections, but it is a significant one.

C. Partisan Gerrymandering Produces Uncompetitive And Unrepresentative Districts That Have A Corrosive Effect On Our Democracy.

"Something is rotten in the state of Denmark," wrote Shakespeare to convey the notion of disease in the body politic. Here too, there is a powerful sense among Americans that something has gone awry.[40]

The increase in partisan gerrymandering following *Vieth*, fueled by dark money contributions and advanced technology, distorts our representative democracy and pollutes Americans' faith in their political institutions. This Court has long recognized

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[39] *Id.*

[40] These concerns are well-founded, with recent studies illustrating the high rewards (a return of nearly 1000-1 for lobbying expenditures) and high stakes (over $700 billion per year for one subsidy) for America's influencer class. *See* Bill Allison & Sarah Harkins, Sunlight Found., *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions* (Nov. 17, 2014), https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/; Laurence Cockroft & Anne-Christine Wegener, *Unmasked* 14 (2017) (showing a 750-1 ratio); *see also* http://priceofoil.org/fossil-fuel-subsidies/.

that "[t]he true principle of a republic is[] that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) (quoting Alexander Hamilton in 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). The current practice of partisan gerrymandering undermines that principle, because it "enables politicians to entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring); *see also id.* at 1940. As one commentator recently observed, "[i]t used to be that the idea was, once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents."[41]

As Republicans and Democrats battle each other to control redistricting, the real losers are the American people. Sending delegations to Congress that do not conform to the results of elections leads to disinterested and justifiably disillusioned voters. Ordinary voters may not identify the dark money forces that have separated a state delegation's makeup from that state's election results, but they surely see that some dark force is intermediating to create that anomalous outcome. Realizing that their votes have been gerrymandered into near-meaninglessness, many Americans are checking out of the process entirely, as

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[41] *See* Jeffrey Toobin, *Drawing the Line*, The New Yorker, at 35 (Mar. 6, 2006) (quoting Stanford Law School Professor Pamela Karlan); *see also* Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1329 (1987) (gerrymandering raises "profound issues concerning the legitimacy of our representational structures").

reflected by the lowest voter turnout in 2014 in any election since 1942.[42]

When gerrymandering is used to establish safe districts, the proliferation of those safe seats leads to a more polarized and dysfunctional political climate. In safe districts, an incumbent's biggest threat is often a primary challenge from a more extreme member of his or her own party. This threat makes legislators reluctant to work across the aisle and support bipartisan legislation. Gerrymandering thus worsens "the hyper-partisanship that paralyzes our politics and governance."[43]

Public trust in our democracy is further weakened by the lack of transparency in how redistricting is funded. The influx of dark money compounds this concern, replacing the will of the people with the will of anonymous special interests and wealthy donors. Dark money also increases the risk that politicians become beholden to the special interest groups funding redistricting efforts, rather than to their constituents. Recent surveys have shown that a significant majority of Americans believe "it doesn't matter if they vote," because politics and elections are controlled by wealthy interests.[44] This sentiment is bipartisan:

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[42] Brian Klaas, *The Despot's Accomplice: How the West is Aiding and Abetting the Decline of Democracy* 184 (2017).

[43] Jared Dews, *A Primer on Gerrymandering and Political Polarization*, Brookings (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

[44] *See, e.g.*, Betsy Cooper, et al., PRRI, *The Divide Over America's Future: 1950 or 2050? Findings From the 2016 American Values Survey* (Oct. 25, 2016), https://www.prri.org/research/poll-1950s-2050-divided-nations-direction-post-election/; *Views on Power and Influence in Washington*, Assoc. Press-NORC Ctr. for Pub.

"Democrats and Republicans generally agree that people like them, working people, the poor, and small businesses don't have enough power in Washington, and that political lobbyists, Wall Street, large businesses, and the wealthy have too much influence."[45] And not without reason: studies have found that "the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy."[46]

Americans are particularly troubled by how special interest groups are helping to gerrymander state and federal legislative districts. Across party lines, 64% of Americans believe that redistricting is a tactic to take power away from voters.[47] 71% of Americans believe that "those who stand to benefit from redrawing congressional districts should not have a say in how they are redrawn."[48] One Wisconsin senator who voted for the redistricting plan at issue in *Gill* expressed remorse for his vote, explaining, "[w]hen you talk to people about our government, the thing they

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Affairs Research (2017), http://www.apnorc.org/projects/Pages/Power-and-Influence-in-Washington.aspx [hereinafter AP-NORC Poll].

[45] AP-NORC Poll, *supra* note 45.

[46] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics 564, 575 (Sept. 2014), https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf.

[47] *Americans Across Party Lines Oppose Common Gerrymandering Practices*, The Harris Poll (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html.

[48] *Id.*

tell you is it's rigged."[49] Indeed, the process of redistricting merits little faith because drawing district lines is "among the most easily manipulated and least transparent systems in democratic governance."[50]

Finally, Americans are not the only ones who have observed how partisan gerrymandering has undermined our political system. America's democracy has long stood as a model to the world, a "city [on] a hill."[51] Partisan gerrymandering now threatens that role. A scholar of comparative politics recently remarked that "the American model is not the only viable one out there, and . . . other nations may not be insane to look at it with some sense of distaste."[52] Rooted in part in our use of partisan gerrymandering, this view creates "knock-on effects that damage the core of democracy."[53]

That study of different democratic countries concluded that America's extreme gerrymandering threatens the very fabric of our democracy and "mak[es] a mockery of the one person, one vote principle that is the granite ridge to which democracy should be anchored."[54] Amicus agrees.

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[49] Bazelon, *supra* note 2.

[50] Dews, *supra* note 43.

[51] *See* Governor John Winthrop, A Model of Christian Charity, at 12 (1630); President Ronald Reagan, *Election Eve Address: A Vision for America* (Nov. 3, 1980), https://www.reaganlibrary.gov/11-3-80.

[52] Klaas, *supra* note 42, at 188.

[53] *Id.* at 183.

[54] *Id.* at 185 (internal quotation marks omitted).

II. The Court Should Curb The Rise Of Partisan Gerrymandering By Affirming The District Court Decisions.

When it comes to partisan gerrymandering, this Court can no longer remain on the sidelines. In *Reynolds v. Sims*, the Court explained that "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. 533, 562 (1964). The Court should reaffirm this principle by holding that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland plans violate the Constitution.

The *Rucho* court held that the North Carolina plan violated the Equal Protection Clause by applying a test similar to the test applied in *Gill*. That test—which requires evidence of discriminatory intent, a large and durable discriminatory effect, and a lack of a legitimate justification—provides a clear roadmap for lower courts and is grounded in this Court's precedents. The test addresses this Court's prior concerns by articulating a clear standard that avoids sweeping in legitimate political conduct. The test is manageable, and, importantly, will impose a needed threat of judicial accountability to constrain future partisan gerrymandering efforts.

The first element of the equal protection test—discriminatory intent—provides a workable standard that addresses the concerns expressed in *Vieth*. For this element, the district court analyzed whether the

"predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power'" *Rucho* J.S. App. 145a–146a (quoting *Ariz. State Leg.*, 135 S. Ct. at 2658). Unlike the proposed intent requirements addressed in *Vieth*, this test captures only those political classifications "applied in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J., concurring). The test is also a workable one, allowing courts to consider different forms of intent evidence including admissions, rejection of more neutral plans for no apparent reason, secrecy and lack of transparency surrounding the redistricting process, and unwillingness to include minority party voices. When politicians admit that their efforts to redraw district lines were intended to create undemocratic outcomes, courts should hold them accountable.[55]

The second element of the equal protection test—discriminatory effect—also addresses the concerns articulated in *Vieth*. The district court considered whether "the lines of a particular district have the effect of discriminating against—or subordinating—

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[55] A state ordinarily should find safe harbor against any allegation that it acted with discriminatory intent when it entrusts redistricting to an independent redistricting commission. *See, e.g., Ariz. State Legislature*, 135 S. Ct. at 2652. As this Court recognized implicitly in *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), safe harbors could also include districts designed by "a three-[person] bipartisan Board" rather than a single-party-controlled state legislature, or other processes that incorporate minority voices and promote public scrutiny and transparency through openness and publication of proposed and revised maps. When states take steps like these to protect redistricting from partisan influence, they ought rightly to insulate themselves from cries of foul play.

voters who support candidates of a disfavored party," and "if the district dilutes such voters' votes by virtue of cracking or packing." *Rucho* J.S. App. 151a. Unlike in prior cases, plaintiffs here focus on dilution of their votes due to their political affiliations, rather than on any claim to proportional representation. *Cf. Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (rejecting fairness principle based on a proportionality theory).

The Court has recognized that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Vote dilution is a firmly rooted constitutional injury and provides a sound basis for the discriminatory effect test. And as Appellees demonstrate, experts can now readily measure the dilutive effects of partisan gerrymandering through election results, partisan bias, the "efficiency gap," and sensitivity testing. These are exactly the sort of advancements "that make more evident the precise nature of the burdens gerrymanders impose." *Vieth*, 541 U.S. at 312–13. Wild mismatches between the popular vote and the balance of the delegation are an obvious signal.

The final factor of the equal protection test—lack of a legitimate justification—also speaks to *Vieth*'s concerns. This part of the test ensures that courts can distinguish between district maps drawn to achieve legitimate objectives and those based on impermissible partisan considerations. For example, this element will defeat claims where a non-partisan explanation, such as geographical distribution of voters, accounts for the map's alleged discriminatory effect. *See, e.g., Rucho* J.S. App. 152a–153a

("examin[ing] whether districts' discriminatory partisan effects are justified by a legitimate state districting interest or neutral explanation"). This element appropriately guarantees that legitimate legislative decisions will not be lumped in with naked retaliation based on party affiliation.

The district courts in both cases also held that the districting plans violated the First Amendment. *See Lamone* J.S. App. 4a; *Rucho* J.S. App. 299a–300a. The First Amendment test applied in both cases also provides a workable standard for analyzing partisan gerrymandering claims.

Indeed, the First Amendment test largely mirrors the equal protection analysis by focusing on intent, injury, and causation. For the intent element, the First Amendment test asks whether "those responsible for [a redistricting] map redrew the lines of [plaintiff's] district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." *Lamone* J.S. App. 43a (first alteration in original) (internal quotation marks omitted). For a claim alleging injury based on vote dilution, the First Amendment test requires that "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." *Id.* (internal quotation marks omitted). And for causation, the First Amendment test examines whether "the mapmakers' intent to burden a particular group of voters by reason of their views was a but-for cause of the adverse impact." *Id.* (internal quotation marks omitted); *see also Rucho* J.S. App. 286a. Like the equal protection test, the similar First

Amendment test also addresses the concerns expressed in *Vieth*.

The Court should affirm the equal protection and First Amendment tests applied in these cases. But even if the Court concludes that these tests are inadequate, the Court should, at a minimum, hold that partisan gerrymandering claims are justiciable. As discussed above, the *Vieth* plurality's retreat from *Davis v. Bandemer*, 478 U.S. 109 (1986), has resulted in more frequent and extreme gerrymandering at the expense of our democracy. *See supra* Part I.

Moreover, the plurality's reasons for deeming partisan gerrymandering claims non-justiciable are unpersuasive. For example, the plurality relied in part on Congress's power to make or alter redistricting lines. *See Vieth*, 541 U.S. at 275–77. But the Constitution leaves room for both Congress and the courts to remedy the problem of partisan gerrymandering. Nothing in Article I, Section 4 provides Congress with *exclusive* authority to modify congressional districts. And the question for courts is not what districts should look like, but whether partisan forces have manipulated the process to dilute votes based on political affiliation. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained." (emphasis added)).

Even if the democratic process could prevent excess partisan gerrymandering in some cases, the Court must still step in where, as here, the democratic process has been used to violate citizens' fundamental rights. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 415 (2006) (Kennedy, J.) ("[O]ur precedents recognize an important role for

the courts when a districting plan violates the Constitution."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

The *Vieth* plurality incorrectly suggested that Congress alone can solve the problem of partisan gerrymandering. The facts on the ground since *Vieth* demonstrate that the political process alone cannot provide an adequate solution. Judicial review is a necessary ingredient to restoring our democracy. This Court should hold that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland redistricting plans are unconstitutional.

CONCLUSION

For the foregoing reasons, and those in Appellees' briefs, the Court should affirm the district court decisions.

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In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

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STATEMENT OF INTEREST[1]

The Wisconsin Constitution tasks the legislature with drawing state and federal legislative districts after every census. Wis. Const. Art. IV, § 3. Pursuant to that authority, the Wisconsin State Senate and State Assembly enacted Act 43 in 2011. Four years later, a group of Wisconsin Democratic voters sued to invalidate Act 43. The voters alleged that Act 43 unconstitutionally "distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats" for Republicans in the State Assembly. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016). The district court agreed: Act 43 unconstitutionally impeded Democratic voters' "ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." *Id.* at 910.

This Court vacated that decision last term. In *Gill v. Whitford*, the Court ruled that the *Whitford* plaintiffs had no standing to challenge "'their collective representation in the legislature'" or their ability to "influenc[e] the legislature's overall 'composition and policymaking.'" 138 S. Ct. 1916, 1931 (2018). The "fundamental problem with the plaintiffs' case" was that it was one "about group political interests, not individual legal rights." *Id.* at 1933. This Court remanded, giving

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

plaintiffs a second chance to prove that each had been individually harmed. *Id.* at 1934.

Now back before the district court, the *Whitford* plaintiffs have attempted to rehabilitate their case by adding new plaintiffs, new constitutional claims, and a new expert. *See Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis.); *see also Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis.).[2] The Wisconsin State Assembly has since intervened, supported by experts of its own. A second trial of plaintiffs' claims has been postponed until this Court decides *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726. But both fact and expert discovery continue.

The ongoing discovery in *Whitford* has been illuminating. The parties' battle-of-the-experts has confirmed that partisan gerrymandering claims are nonjusticiable. Indeed, the work of the *Whitford* plaintiffs' new expert (also an expert in *Rucho*) has revealed that the alleged harm in these cases cannot be measured. Nor can plaintiffs' alleged harm be judicially remedied, lest states altogether abandon territorial redistricting.

Both in the *Whitford* litigation and as *amici curiae* here, the legislature has an acute interest in ensuring

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[2] After *Gill*, the Wisconsin Assembly Democratic Campaign Committee filed a second lawsuit against the same election officials. The district court consolidated the *Whitford* plaintiffs' suit with the Committee's, which also alleged that Act 43 violated the Committee's First Amendment associational rights. But in January, the Committee voluntarily dismissed its suit. Order Granting Motion to Dismiss, *Whitford v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis. Jan. 29, 2019), ECF No. 45.

that the task of redistricting remains with the legislature. The legislature is uniquely positioned to explain that allegedly partisan redistricting is not a problem to be solved by hired experts in federal litigation like *Whitford*.

SUMMARY OF ARGUMENT

This Court remarked in *Gill v. Whitford* that there were "few clear landmarks" in the Court's partisan gerrymandering precedents. 138 S. Ct. 1916, 1926 (2018). That may be so, but the only two landmarks necessary to resolve partisan gerrymandering claims are the following: Plaintiffs are not entitled to proportional representation of Democrats and Republicans in the legislature. Nor can plaintiffs backdoor that relief by claiming they are entitled to politically "competitive" districts, whatever that may mean.

Look no further than the shifting theories of the *Whitford* plaintiffs. Plaintiffs have converted their statewide political gerrymandering claim into district-specific claims alleging that districts are not competitive. But that has not unearthed any justiciable, district-level harm. Plaintiffs have been reduced to declaring districts with greater than 50% Democratic voting strength (measured by an arbitrary selection of elections) as "packed" and districts with less than 50% Democratic voting strength as "cracked."[3] *Voilà!* All

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[3] The *Whitford* plaintiffs have alleged that a plaintiff living in a district with an estimated 50.4% Republican vote share is "cracked." *See, e.g.*, Amended Complaint ¶ 82, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Sept. 14, 2018), ECF No. 201; *see also id.* at ¶¶ 49, 79 (alleging plaintiffs are "cracked" in districts with estimated 51% Republican vote shares). The *Whitford* plaintiffs also allege that it would be constitutional for a voter to

plaintiffs are harmed, and their chosen remedy is statewide proportional representation. Worse still, the claims are boundless. Every time the Democratic voting strength goes above 50% (packing!), the Republican voting strength is below that threshold (cracking!). The plaintiffs have done little more than dress up their original theory in the gossamer of district-specific claims.

Plaintiffs' quest for partisan proportionality is inconsistent with our system of territorial redistricting. Partisan political affiliation is not uniformly distributed "save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). Like-minded people live with like-minded people. Communities develop shared interests and political preferences. Voters who tend to vote for Democrats tend to live in urban areas, near others who tend to vote for Democrats. Voters who lean Republican tend to disperse throughout a state.

These naturally occurring demographic phenomena affect redistricting. Because the legislature draws contiguous and compact districts, it will not place Madison Democrats in a district with Republicans in the far reaches of Wisconsin's Northwoods. Nor would

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be in a district with an expected 60% Democratic vote share, but the same voter is unconstitutionally "cracked" if the estimated vote share is 60% Republican. *See id.* at ¶¶ 24-26. And they allege that it would be constitutional for one voter to live in a district with an estimated 63% Democratic vote share but unconstitutional for another voter to be "packed" into a district with an estimated 61% Democratic vote share. *Compare id.* at ¶¶ 21-23, *with id.* at ¶¶ 87-89.

such a pairing respect communities of interest, continuity with previous districts, or any number of other traditional redistricting criteria. The application of these criteria often results in a map that is not politically neutral, even before partisan interests enter the calculus. Each of these traditional non-partisan factors may, at any given moment, favor one party or another.

"The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). When political gerrymandering plaintiffs allege that the political asymmetries in their districts are unconstitutional, what they really mean is that territorial redistricting pursuant to traditional redistricting criteria is unconstitutional. And what they really want is redistricting—even though "root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285 (plurality opinion)—transferred from the political branches to the federal judiciary. Whether there are better means of electing representatives is a debate to be had in the political branches, not the federal courts. The Constitution takes no side in that debate.

When faced with a political gerrymandering claim, a federal court is also without the tools to measure a district's alleged discriminatory effect. Using past election results, hired experts opine on whether there is "too much" partisan advantage. But those expert opinions rest on the flawed assumption that political beliefs are immutable—measurable like race in the racial gerrymandering cases or counted like people in one-person-one-vote cases. Voters' political

beliefs are not so easily coded. For example, in Wisconsin's 2018 general election, a majority of voters in nearly 20% of districts voted both for their Republican State Assembly candidate and the Democratic U.S. Senate candidate.

For all of these reasons, courts cannot measure whether alleged partisan influence has exceeded some hidden constitutional limit. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.). Even if voters could be reliably counted as Democrats or Republicans, territorial redistricting and traditional redistricting criteria will inevitably (and lawfully) have partisan effects. Even the Platonic district map in which partisan interests played no role will itself have districts where Democrats have been "packed" or "cracked" (at least under the *Whitford* plaintiffs' theory). The resulting statewide map will have a partisan tilt, even if generated by a computer programmed to ignore partisan voting patterns. But there is no reliable way for a federal court to determine that preexisting partisan baseline.

Any attempt to divine a baseline would require a federal court to step into the shoes of legislators. Divining that baseline requires policy judgments about what criteria should take priority in redistricting, and in what relative proportions. When hired experts generate simulated maps as comparators in litigation, those simulations are pre-programmed to prioritize certain redistricting criteria (*e.g.* compactness) and ignore others (*e.g.* continuity with prior district boundaries). These are distinctly political judgments, not judgments for a federal court. *See Holder v. Hall*,

512 U.S. 874, 901 (1994) (Thomas, J., concurring in judgment).

Without a baseline, it is impossible to determine whether the legislature's map exceeded any supposed constitutional ceiling for partisan influence. The only possible answer—that partisan interests can have *no* role in redistricting—is no answer at all. To hold that partisan interests can have no role in redistricting would elevate partisanship to a level of prohibition that even race does not today occupy. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015). Finding that in the Fourteenth Amendment might be difficult.

These problems cannot be avoided by recasting a partisan gerrymandering plaintiff's claim as one about her associational rights. In our two-party system, politics is often a zero-sum game. So a court's attempted vindication of one voter's associational rights could very well harm the associational rights of others. For this reason and others, a majority of this Court has not connected partisan gerrymandering claims to this Court's associational rights cases. Those cases involve harms distinct from those alleged here. Many involve a state's meddling with the machinery of a political party or their candidates. Redistricting legislation imposes no analogous restriction, limitation, or condition on voters' First Amendment activities. Those cases, therefore, do not provide a manageable framework to resolve partisan gerrymandering claims. Plaintiffs' claims are nonjusticiable.

ARGUMENT

I. So Long As Territorial Redistricting Is Constitutional, Political Symmetry Cannot Also Be Constitutionally Required.

The Constitution does not compel proportional representation. Nowhere does the Constitution "sa[y] that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers," either in the state legislatures or in Congress. *Vieth*, 541 U.S. at 288 (plurality opinion); *see also id.* at 308 (Kennedy, J., concurring in judgment) (stating there is "no authority" for the notion that a Democratic majority of voters in Pennsylvania should be able to elect a Democratic majority of Pennsylvania's congressional delegation). By the same token, the Constitution does not require political symmetry in individual districts, meant only to maximize a party's chances of achieving proportional representation statewide. Such political symmetry, both at the state- and district-level, is often unattainable given a state's political geography.

Territorial, winner-take-all districts are rarely politically neutral. That is not the result of legislative ill-will. It is basic demographics: like-minded people live near one another. When legislatures follow traditional redistricting criteria, relatively homogenous communities are grouped together into single contiguous and compact districts.[4] Requiring politically competitive

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[4] *See* Expert Report of James Gimpel, Ph.D. at 6, 34-42, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249 (Gimpel Report).

districts would require a radical departure from traditional redistricting criteria. Only then could a legislature combine disparate populations to manufacture political heterogeneity.[5] Such a departure from traditional redistricting criteria is neither constitutionally required, nor wise.

A. Demographic trends should not be mistaken for "cracking" and "packing."

A state legislature does not start with a blank slate when it sets out to reapportion its citizens. Every state must navigate the web of federal constitutional and statutory requirements. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (districts must have near-equal populations); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (districting cannot dilute the voting strength of minority groups); *Ala. Legis. Black Caucus*, 135 S. Ct. at 1272-73 (districting cannot cause retrogression in minority voting strength in certain jurisdictions); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797, 801 (2017) (racial considerations cannot predominate absent a compelling interest). Beyond those federal requirements, several traditional criteria guide redistricting. Legislators consider whether proposed district lines create compact and contiguous districts, whether they preserve communities of interest, whether they pit incumbents against

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[5] Gimpel Report at 7 ("Elevating the priority of competitiveness in redistricting above traditional redistricting criteria will submerge the many benefits of geographic- and population-based representation determined by winner-take-all elections and the expression of established communities of interest. This will be accomplished by combining disparate populations for the sake of creating an uncharacteristic political heterogeneity.").

one another, or how much they deviate from existing district lines. *See* James A. Gardner, *Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L.J. 881, 894-97 (2006); *see, e.g.*, Wis. Const. Art. IV, § 4 (districts "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable"). These criteria are non-exhaustive; myriad local considerations, such as keeping a public works project in a single district, guide redistricting. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 678 & n.95 (2002).

When state legislators apply these traditional criteria, the resulting districts are often not politically competitive. *See Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment). As Justice Breyer noted in his dissenting opinion in *Vieth*, Democrats tend to live closely together in urban areas, while Republicans tend to disperse into suburban and rural areas. 541 U.S. at 359-60; *see* James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 565-66, 569 (2007). Drawing contiguous and compact districts means grouping urban Democrats in one district and dispersing rural Republicans among others. Leaving communities of interest intact might mean an intensely progressive college town determines election outcomes in one district, while a farming community does in another.

Discovery in the *Whitford* litigation shows this trend has intensified in recent years: populations are

even more politically homogenous now than they were a decade ago. One of the Assembly's experts has shown that the concentration of historically Democratic voters is increasing in Wisconsin's urban areas.[6] But the number of historically Republican voters is rising throughout the rest of Wisconsin—meaning districts that were previously competitive or leaned Democrat now lean Republican. *See* App. 1a (comparing Figures 3 and 4 in Gimpel Report).[7] In Wisconsin's smallest 62 counties (of 72 total counties), votes cast for Republicans in statewide elections increased by nearly 5% between 2000 and 2016, while votes cast for Democrats decreased nearly 5%.[8]

Together, these trends confirm that Republicans have a natural advantage in a state with Wisconsin's demographics. Even the *Whitford* plaintiffs' experts have confirmed that fact. In the first *Whitford* trial, one expert concluded that Wisconsin's 2002 district map—a *court-drawn* map—significantly benefited Republicans using plaintiffs' preferred measure of

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[6] For example, as the population of Madison's Dane County has grown, so too has the concentration of historically Democratic voters. In 2000, Dane County delivered 11.5% of the Democratic vote for candidate Al Gore. But by 2016, Dane County delivered 15.8% of the Democratic vote for candidate Hillary Clinton. Gimpel Report at 31. Detailed in Part II.A, the political complexion of a state changes over time because voters change over time, as do the parties.

[7] *See* Gimpel Report at 31-34 & Table 1; *see also* App. D to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-4 (district-by-district table comparing change in vote share over time).

[8] *See* Gimpel Report, Table 1.

fairness (the efficiency gap).[9] *See Whitford v. Gill*, 218 F. Supp. 3d 837, 938-39 (W.D. Wis. 2016) (Griesbach, J., dissenting) (remarking that the pre-Act 43 court-drawn map showed efficiency gap as high as 11.8%). Now on remand, Dr. Chen has produced more than 9,400 simulated maps (constrained by plaintiffs' cherry-picked redistricting criteria).[10] He has chosen one, Simulated Plan 43995, to compare against Act 43. But Simulated Plan 43995 is a complete outlier, even among Dr. Chen's thousands of simulations. Shown below, its near-zero efficiency gap is multiple standard deviations away from Dr. Chen's median map, which has a 5.7% pro-Republican efficiency gap.[11] Even using plaintiffs' flawed metrics, traditional redistricting criteria benefit Republicans.

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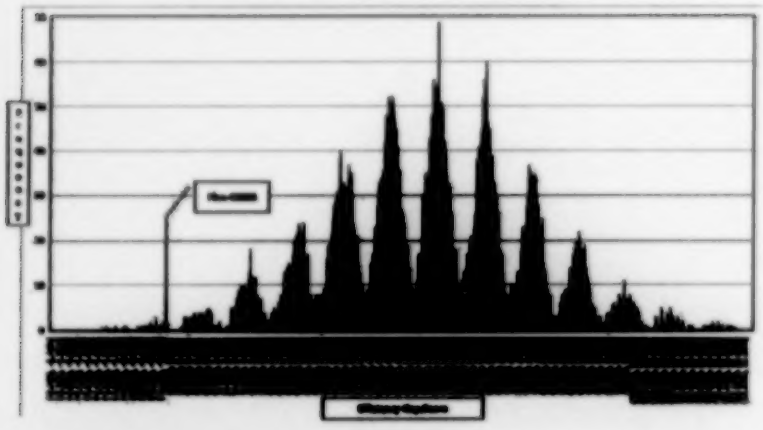
[9] The efficiency gap purports to measure "wasted" votes (meaning votes cast for a losing candidate or excess votes cast for a winning candidate). *See Gill*, 138 S. Ct. at 1933. The efficiency gap equals [(statewide sum of Republican wasted votes)–(statewide sum of Democratic wasted votes)] / (total statewide votes). *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851-52 (2015). In *Gill*, this Court criticized the efficiency gap as failing to "address the effect that a gerrymander has on the votes of particular citizens." 138 S. Ct. at 1933.

[10] *See* Expert Report of Jowei Chen, Ph.D. at 8-9, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Oct. 26, 2018), ECF No. 221 (Chen Report). Detailed in Part II.B, these made-for-litigation computer simulations cannot approximate the human judgment exercised in redistricting.

[11] *See* Gimpel Report at 43-45 & Figure 6.

Gimpel Report, Figure 6



These trends directly affect the composition of legislative districts. They make it more likely for Republican candidates to outperform Democrats in winner-take-all elections, even in states that appear to be closely divided based on statewide election returns. Imagine the following hypothetical, 10-district state where the number of historically Republican and Democratic voters are equally divided.[12] Districts 1, 2, and 3 are urban, comprising 7,000 Democrats and 3,000 Republicans. Suburban District 4 is equally matched. And Districts 5 through 10 are rural, comprising 6,000 Republicans and 4,000 Democrats each:

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[12] For simplicity's sake, this hypothetical creates districts of equal size based on *voting-age* population. In practice, states ordinarily comply with the one-person-one-vote rule by creating districts of equal size based on a state's *total* population. *See Evenwel*, 136 S. Ct. at 1124.

DISTRICT	(D) VOTERS	(R) VOTERS
1	7,000	3,000
2	7,000	3,000
3	7,000	3,000
4	5,000	5,000
5	4,000	6,000
6	4,000	6,000
7	4,000	6,000
8	4,000	6,000
9	4,000	6,000
10	4,000	6,000
Statewide Total:	50,000	50,000

Assuming that historically Democratic and Republican voters cast votes for Democratic and Republican candidates respectively, *but see* Part II.A, *infra*, Democrats and Republicans receive the same number of votes statewide. Even so, Republicans will secure at least six seats in the legislature, and Democrats at most four.

The legislature cannot be expected or required to even out the distribution of voters in our hypothetical state so that a political party's representation in the legislature reflects its share of the popular vote. A legislature, for example, will not send a portion of District 1's urban Democrats to District 5, and send District 5's rural Republicans to District 1. If the counties or municipalities in Districts 1 and 5 do not border each other, then moving voters from one district to another would result in "islands" of voters in each

district. Even if the districts' counties and municipalities bordered each other, no constitutional principle requires splitting those communities of interest or making the districts less compact for the sake of political heterogeneity.

Similarly, imagine that more than half of District 3 is a college town that overwhelmingly votes for Democratic candidates. If District 3's college town neighbors District 6, the legislature could move the college town into District 6. But doing so requires the legislature to move other (likely Republican) voters into District 3. District 6 might now lean Democrat and District 3, Republican. But the overall makeup of the legislature is the same. The only way to make both Districts 3 and 6 politically competitive is to sacrifice traditional redistricting criteria—slicing the college town into two, even though it is a community of interest—for the sake of political heterogeneity.

As these examples show, the application of traditional redistricting criteria often results in politically lopsided districts. That should not be mistaken as "cracking" or "packing" like-minded voters. There is a "'natural' packing effect" in states where political groups tend to cluster and where the legislature's objectives are "compactness and respect for the lines of political subdivisions." *Vieth*, 541 U.S. at 289-90 (plurality opinion). Neither the Equal Protection Clause nor the First Amendment requires legislatures to abandon or reprioritize these traditional redistricting criteria to avoid district-level political asymmetries.

Indeed, the homogeneity of territorial districts has democratic benefits. In *Vieth*, Justice Breyer acknowledged that territorial redistricting enables

more citizens to elect legislators with their same views and maintains stability in the legislature. *Id.* at 360 (Breyer, J., dissenting). It also better ensures that both political and ethnic minorities are represented in their state and federal legislatures (as compared to at-large elections or multimember districts). *See Gingles*, 478 U.S. at 47 (recognizing "that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population" (cleaned up)); *see also Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 563 (2013) (Ginsburg, J., dissenting) (similar). These benefits are consistent with the long-held notion that legislators represent the distinct interests of a particular place, not merely statewide or nationwide party platforms. *See* Gardner, *What is "Fair,"* 90 Marq. L. Rev. at 575, 577-79.

Compare these democratic benefits to plaintiffs' preferred alternative: politically symmetrical districts. Those districts might maximize competition in district-level elections and increase the odds of statewide proportionality. But maximizing competition "promises to make the greatest number of voters *unhappy* with the outcome of the election....In a highly competitive district, nearly half the voters will have voted for the loser." Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. at 668-669 (emphasis added). At the very least, whether the quixotic search for political competitiveness ought to replace traditional redistricting criteria (and the resulting benefits) is a political choice, not a judicial one.

B. Partisan gerrymandering plaintiffs' quest for politically competitive districts is a quest to ban territorial redistricting.

The logical endpoint of plaintiffs' arguments in these political gerrymandering cases is that territorial redistricting is unconstitutional. Plaintiffs bemoan the political asymmetry in their districts. But for the reasons explained above, winner-take-all, territorial districts are often unavoidably politically lopsided. Milwaukee Democrats cannot be included in the same district as Republicans in the Northwoods of Wisconsin. Plaintiffs cannot rid their states of these naturally occurring political asymmetries without also ridding their states of territorial redistricting.

Perhaps at-large or multimember district elections would generate greater competition between the parties for legislative seats in a state like Wisconsin where regions are politically homogenous. *See Baumgart v. Wendelberger*, Nos. 01-c-0121, 02-c-0366, 2002 WL 34127471, at *6 (E.D. Wis. May 30, 2002) (per curiam) ("Wisconsin Democrats tend to be found in high concentrations in certain areas..., and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly.").[13] That would be a policy choice for a state and its citizens to

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[13] Depending on voting rules and demographics, at-large or multimember district elections could have the opposite effect—further entrenching a majority party. *See Gingles*, 478 U.S. at 87 (O'Connor, J., concurring in judgment) (using illustration to show that "the at-large or multimember district has an inherent tendency to submerge the votes of the minority").

consider, not something compelled by the Constitution. *See Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment) (distinguishing "questions of political philosophy" from "questions of law").

Indeed, it would be puzzling for the First or Fourteenth Amendment to prohibit territorial redistricting for state assembly seats when the Constitution's election-specific provisions are silent about the form elections must take. Article IV requires only that states maintain a "Republican Form of Government." U.S. Const. Art. IV, § 4. And the Elections Clause vests state legislatures with the power to dictate the "Times, Places and Manner" of electing U.S. Senators and Representatives but permits Congress to "make or alter" such regulations. U.S. Const. Art. I, § 4. The Framers left unanswered the question whether states should employ single-member districts, multimember districts, or at-large elections. *See Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment).

It would also be puzzling for the Constitution to prohibit territorial redistricting for state legislatures when federal law *requires* single-member district elections for the U.S. House of Representatives. Beginning in 1842 and pursuant to its power under the Elections Clause, Congress prohibited multimember congressional districts, with few exceptions. *See* Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491; Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified as amended at 2 U.S.C. § 2c); *cf. Evenwel*, 136 S. Ct. at 1129 ("It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously

prohibits States from apportioning their own legislative districts on the same basis.").

Any judicial fix for plaintiffs' claims calls into question the constitutionality of a state's choice to adopt single-member, territorial districts. Since the founding, states have debated that choice. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 911-15; *Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment). Wisconsin's very first state Constitution, for example, required "single districts." Wis. Const. of 1848, Art. IV, § 4. Many others elected representatives at large until the mid-nineteenth century. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 913. At bottom, these are political questions. A state's resolution of those questions demands deference. It is part and parcel of the state's "primary responsibility" for reapportionment. *Growe v. Emison*, 507 U.S. 25, 34 (1993).

II. Partisan Gerrymandering Claims Are Nonjusticiable Because Plaintiffs' Alleged Harm Cannot Be Measured.

Federal courts are also without the means to test partisan gerrymandering claims. There is no justiciable way to measure an alleged partisan gerrymander. Whether a redistricting map violates Equal Protection cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Such a "sterile" approach will not tell the federal courts "how much partisan dominance is too much." *Id.*; *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see Hall*, 512 U.S. at 902-03 (Thomas, J., concurring in judgment).

To be sure, this Court has articulated rules in other reapportionment cases. In recent one-person-one-vote cases, state reapportionment plans with a maximum population deviation of less than 10% are presumptively constitutional. *See Harris v. Ariz. Indep. Redistricting Comm.*, 136 S. Ct. 1301, 1307 (2016). The Court has opted for more malleable standards to adjudicate racial gerrymandering claims. *See, e.g., Bethune-Hill*, 137 S. Ct. at 799, 801. But even in racial gerrymandering cases, the minority voters whom the Court intends to protect are readily identifiable.

The same clear rules are unavailable to decide political gerrymandering cases. A voter's political preference is not an immutable characteristic. Voters cannot be categorized as "Republicans" and "Democrats" in the same way voters are categorized in racial gerrymandering cases or populations are counted in one-person-one-vote cases. *See Vieth*, 541 U.S. at 287 (plurality opinion). Further complicating partisan gerrymandering cases is that, unlike race, consideration of partisanship is not *verboten*. *Compare Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment"), *with Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." (quotation marks omitted)).

These features, combined with the reality that districts are politically lopsided to some unknown and

unknowable extent, make a judicial assessment of partisan gerrymandering claims impossible. For courts to decide how much partisan influence is "too much," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), courts must divine the starting point—the pre-existing, baseline partisan advantage in a particular state. They will fail.

A. Partisanship is not an immutable characteristic.

Partisan gerrymandering cases rest on the fiction that certain voters vote only for Democrats and others vote only for Republicans in all elections—past, present, and future. Indeed, the methodology of plaintiffs' expert in *Whitford* (who also served as the *Rucho* plaintiffs' expert) depends entirely on the assumption that votes cast between 2004 to 2010 for candidates at the top of the ticket are a reliable measure of the partisan advantage of a particular district.

But measuring partisanship is not so simple. Over time, voters' political preferences change. "[V]oters can—and often do—move from one party to the other...." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment). Their political affiliation "is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality opinion).[14] "These facts make it impossible to

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[14] *See also* Expert Report of Brian Gaines, Ph.D. at 4-5, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 250 (Gaines Report) ("Even if everyone were to lock into a partisan category for a lifetime upon reaching voting age—which is clearly not the case—electorates would still shift in partisanship as their composition changed due to replacement (from

assess the effects of partisan gerrymandering," let alone articulating a standard or crafting a remedy. *Id.*

In *Whitford*, the perceived partisan advantage of Dr. Chen's Simulated Plan changes considerably using more recent election results versus older results. According to Dr. Chen, his Simulated Plan 43995 has a near-zero efficiency gap, plaintiffs' chosen measure of fairness.[15] Election results over time tell a much different story. Using votes cast in 2004 to 2010 statewide elections to measure the efficiency gap, Simulated Plan 43995 shows a pro-Democratic lean (4.81% fewer "wasted" Democratic votes).[16] Gimpel Report, Table 7. Using votes cast in 2012 to 2016

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death, attaining adulthood, and out- and in-migration). Generally, over the lifetime of a redistricting plan, most districts change not only in population levels, but also in their electorates' partisanships.").

[15] *See* Chen Report at 9. In *Whitford*, the "votes" in Dr. Chen's efficiency gap calculation are completely hypothetical. *See id.* at 8. Dr. Chen assumes that if 1,000,000 two-party votes were cast in a particular district with 50.32% Republican advantage (according to his outdated and arbitrary estimation of Republican advantage), then there would be 503,200 Republican "votes" and 496,800 Democratic "votes" in that district's hypothetical election. *See id.* Because Republican votes outnumber Democratic votes, Dr. Chen would classify that district as a Republican victory—meaning there were 3,199 "wasted" Republican votes and 496,800 "wasted" Democratic votes. *See id.* After repeating this methodology for all districts, Dr. Chen summed all wasted votes for each party, then subtracted those sums, and finally divided by the total number of two-party votes cast statewide for his final efficiency gap score. *See id.*

[16] Even though Dr. Chen's efficiency gap scoring also uses 2004-2010 election results, his methodology disguises the 2004-2010 pro-Democratic lean of his Simulated Plan because his measure of partisan advantage (the "Chen Composite Measure") adds a

statewide elections, Simulated Plan 43995's efficiency gap swings the opposite direction: a more significant pro-Republican lean (7.54% fewer "wasted" Republican votes). *Id.* The Plan's Republican advantage is even greater using only votes cast in the most recent presidential election (8.91% fewer "wasted" Republican votes). *Id.* These variations show that political change over time has a dramatic effect, even using plaintiffs' preferred measurement of "fairness."

Recent elections also show that votes cast for particular candidates cannot always predict a voter's party affiliation. Voters do not mindlessly cast votes for all Democrats or all Republicans. Candidates matter.[17] *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 (plurality opinion) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold."). So while a Republican might win a race at the top of the ticket, a Democrat might win the race for State Assembly.[18] *Id.* at 288-89.

1.8% Republican swing to those election results. Only with that swing is Dr. Chen able to say that his Simulated Plan is politically neutral. *See* Chen Report at 3.

[17] *See* Gaines Report at 18-22 (surveying impact of candidate traits including incumbency advantage, race, gender, religion, physical appearance, and leadership quality).

[18] *See* Gaines Report at 18 ("The average Republican (or Democratic) vote for distinct offices need not match, particularly when one compares top-of-the-ballot offices and down-ballot offices. Mixing together multiple contests does not cancel out candidate effects. As a theoretical construct, partisanship is quite distinct from votes cast, and observed vote for a contest or select contests, averaged, is, at best, a noisy measure of the range of partisan

Wisconsin's 2018 elections are telling. Voters in District 92 voted overwhelmingly for U.S. Senate candidate Tammy Baldwin (D) but also overwhelmingly for State Assemblyman Treig Pronschinske (R).[19] The results in District 92 were not a fluke. Also in Wisconsin's Districts 4, 13, 15, 21, 23, 24, 29, 30, 42, 49, 50, 51, 55, 68, 85, 88, and 96, the majority of voters cast ballots for both Democratic Senator Baldwin and their Republican State Assembly candidate.[20] If that is not enough to prove that candidates matter, consider this: In the same election, Senator Baldwin outperformed candidates from her own party like Democratic Wisconsin Governor Tony Evers (by an average of 4.8%).[21] Likewise, 35 Republican Assembly candidates outperformed incumbent Republican Governor Scott Walker (excluding those who ran unopposed).[22]

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attachments—in direction and strength—of those legally entitled to cast those ballots."); *see also id.* at 23 ("Not only are the Chen estimates based on somewhat old results, from 2004-2010, but those election results were surely determined not solely by partisanship of the electorates, but also by candidate traits [such as incumbency advantage], which are ignored in the averaging.").

[19] Senator Baldwin received roughly 53.7% of two-party votes cast; Assemblyman Pronschinske received roughly 55.1% of two-party votes cast. *See* App. G to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-7 (Gimpel Report, App. G).

[20] *See* Gimpel Report, App. G. A majority of two-party voters in Wisconsin's District 1 also voted for both Democratic Senator Baldwin and the Republican incumbent for Assembly, who defeated his Independent challenger. No Democratic candidate ran for State Assembly in District 1. *See id.*

[21] *See* Gimpel Report at 59-60; Gimpel Report, App. G.

[22] *See* Gimpel Report, App. G. Wisconsin's 2018 election results are instructive for another reason. Democrats won every

Blind to these political realities, political gerrymandering plaintiffs hire experts who resort to past statewide election results to attempt to predict future district-level elections. At bottom, plaintiffs seek a "constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). But no amount of vote counting and number crunching by hired experts can overcome the fact that, in the real world, good candidates win and bad candidates lose. Nor can plaintiffs ignore the fact that voters' politics change over time. Political affiliation cannot be labeled or counted in the same way as race in racial gerrymandering cases or people in one-person-one-vote cases. That alone frustrates any attempt by courts to reliably measure partisan unfairness.

B. Courts cannot determine the baseline partisan advantage in a state and therefore cannot decide how much partisan influence is "too much."

All of the above complexities come to a head when a court attempts the impossible: measuring alleged partisan influence to decide whether redistricting crosses the line from permissible partisan advantage

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statewide office. Even if a party is allegedly disadvantaged at the district level, that party is on equal footing at the state level. With sufficient power and coordination, as was the case in Wisconsin in 2018, that party "should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

to impermissible. This Court's precedents instruct that the permissible amount of partisan influence in redistricting is something more than zero. *See Vieth*, 541 U.S. at 285-86 (plurality opinion) (redistricting informed by partisan considerations is a "lawful and common practice"). But how much more? No one can answer that question because the magnitude of an effect cannot be measured without a control, or baseline.

The Constitution does not wholly forbid the consideration of partisanship in redistricting. Exactly the opposite—by giving legislatures primary responsibility for redistricting, the Framers necessarily anticipated that redistricting would be "root-and-branch a matter of politics." *Id.* at 285. The "opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in judgment). For this reason alone, the permissible partisan influence cannot be zero.

Even if the Court provided guidance for how much partisanship were too much, it would be impossible to determine when redistricting crossed that threshold. Redistricting, even without any consideration of politics, often does not result in politically neutral districts. Demographic trends will cause a party to pick up legislative seats in excess of their share of the popular vote. Even the thousands of expert-generated simulations in *Whitford* show that the lion's share of Wisconsin maps will advantage Republicans (even maps using plaintiffs' artificial selection and prioritization of redistricting criteria, not the legislature's). *See* pp. 11-12, *supra*. That lopsidedness is an inherent

feature of territorial redistricting with winner-take-all elections. *See Bandemer*, 478 U.S. at 130 (plurality opinion). And it is a lawful feature of territorial redistricting. *See id.*; *Vieth*, 541 U.S. at 289-90 (plurality opinion). The Constitution does not require legislators "to engage in heroic levels of nonpartisan statesmanship," creating a map less favorable to them than thousands of randomly generated maps. *Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting).

A federal court must first account for these neutral manifestations of partisan advantage—*i.e.*, the permissible, preexisting partisan baseline—before it can even begin to answer the metaphysical question of how much is "too much." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see also, e.g.*, *Hall*, 512 U.S. at 887-88 (O'Connor, J., concurring) (concluding there was no "objective alternative benchmark for comparison" in Voting Rights Act case). As discovery in *Whitford* has shown, no amount of expert testimony will help a federal court reliably answer that threshold question.

An expert like Dr. Chen can program a computer to generate thousands of maps, but made-for-litigation maps will not help a court divine the baseline partisan advantage in a state. The algorithms used to generate these maps cannot approximate the boundless redistricting choices available to actual legislators. In *Whitford*, for example, Dr. Chen programmed an algorithm to generate maps with a maximum number of counties or municipalities to split and incumbents to pair, as well as a minimum number of majority-minority districts. Chen Report at 7. Confined by those parameters—and wholly ignoring others including

continuity with prior districts—the maps generated are only the tip of the iceberg. An expert like Dr. Chen cannot possibly account for the near-infinite permutations that are possible when human legislators draw district lines. In real-life redistricting, humans (not computers) must resolve the often-conflicting goals of traditional redistricting criteria and make policy judgments, tradeoffs, and adjustments informed by local knowledge of particular areas. Accepting a baseline based on a sampling of simulated plans takes these policy judgments out of the hands of legislators and puts them into the hands of hired experts. *See Gaffney*, 412 U.S. at 749 (cautioning that federal courts "themselves must make the political decisions necessary to formulate a plan" when they take on reapportionment).

This impossibility cannot be sidestepped by arbitrary benchmarks dreamt up by social scientists or law professors. *See* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 566 (describing attempts to construct a "definition of partisan fairness that takes into account both the commitment to partisan proportionality ... and the commitment to territorial election districts" as "generally unsatisfying"); *Hall*, 512 U.S. at 899 n.6 (Thomas, J., concurring in judgment) (criticizing "desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues"). A measure like the efficiency gap is nothing but an *ex post* measure of election outcomes, not an *ex ante* measure of competitiveness. *See*

Gill, 138 S. Ct. at 1933.[23] And it is not a very good measure at that—the efficiency gap is highly variable, punishing states like Wisconsin where elections are won by narrow margins.[24]

Ultimately there is no way for courts to answer how much partisan influence is "too much" unless this Court decrees that *any* partisan consideration in redistricting is "too much." That, of course, is no solution at all. Forbidding partisan considerations in redistricting leads to the ridiculous conclusion that the Constitution offers greater protections to Democrats

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[23] Creators of the efficiency gap have argued that congressional redistricting plans exceeding a 2% efficiency gap and state redistricting plans exceeding an 8% efficiency gap (where sensitivity testing shows the efficiency gap is unlikely to hit 0% over the plan's lifetime) are presumptively invalid. Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. at 886-890. One-size-fits-all benchmarks might work in one-person-one-vote cases. But what might be "fair" in a Democratic stronghold like Vermont might not be in a swing state like Ohio. Likewise what is "fair" in Wisconsin in 2019 might not be "fair" in Wisconsin in 2009. *Compare id.* at 888-89 (proposing static benchmark based on pre-2010 data), *with* pp. 10-11, *supra* (showing regional political homogeneity has increased since 2010).

[24] Take, for example, a four-district state in which each election is won by five votes. If Democrats win two districts and Republicans win two districts, the efficiency gap is 0. But if Democrats win three districts and Republicans win only one district, the efficiency gap is roughly 25%. *See also* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 572 ("If every district is split evenly among Republicans and Democrats, then even a slight general shift in voter preferences toward one party can permit that party to win every seat, even if it is supported by only fractionally more than half the electorate. This is not, however, an objection based on a lack of equal opportunity to compete but one based on a lack of equality of outcome.").

or Republicans than racial minorities. Even in racial gerrymandering cases, this Court has acknowledged that race sometimes predominates the redistricting process if there are "good reasons" for doing so. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (quotation marks omitted).

There is no judicially manageable standard for how to measure partisan influence on redistricting. Voters are not easily categorized. People are not born Republicans and Democrats. Over time voting preferences change, the parties change, and the candidates change. Even if Republicans and Democrats were easily categorized, figuring out the baseline map, which will inevitably have some partisan tilt, is impossible. Without a way to identify either voters or the baseline, a court cannot even begin to assess whether partisan gerrymandering has gone too far.

III. Reframing Partisan Gerrymandering Claims As First Amendment Associational Claims Does Not Make Them Justiciable.

There is also no judicially manageable way to balance the First Amendment associational rights affected by any redistricting plan. Every voter in a state has a constitutional right to associate, not just plaintiffs who claim partisan gerrymandering. The moment this Court begins entertaining claims that redistricting burdens one party's right to associate, so too begins the game of judicial whack-a-mole. A judicial remedy for one group of voters could very well frustrate the associational rights of another.

To adjudicate these competing associational claims, courts "will find their decisions turning on imponderables such as whether the legislators of one

party have fairly represented the voters of the other." *Bandemer*, 478 U.S. at 157 (O'Connor, J., concurring in judgment). What causes voters to politically engage? To politically disengage? Why might a voter have a yard sign for one candidate but not another? Donate to one candidate but not another? Attend a town hall meeting one week but not the next? How is a court to know whether changes in a voter's behavior (much less the behavior of many voters) are because of redistricting or because of myriad other factors?

Those "imponderables" are far from the more concrete questions presented in this Court's associational rights cases involving political parties or their candidates. In *California Democratic Party v. Jones*, the state meddled with a party's "internal processes" by requiring the party to open its primary voting to non-party members. 530 U.S. 567, 573, 577 (2000). This Court ruled that California's scheme impermissibly "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577. Likewise, in *Buckley v. Valeo*, federal law required political committees to divulge their donors before they could accept political contributions. 424 U.S. 1, 64-74 (1976); *see id.* at 84 (holding disclosure requirements constitutional). Similarly, in *Anderson v. Celebrezze*, the state required Independents to file earlier than Democrats or Republicans. 460 U.S. 780, 790-94 (1983). Each of these cases involved a state-imposed requirement or condition affecting the internal operations of political parties or their candidates.

Nothing resembling those state-imposed requirements is present in partisan gerrymandering cases. Redistricting legislation in no way restricts, limits, or conditions a voter's political activity. Plaintiffs instead claim that the majority's redistricting causes a political malaise for the minority, making it more difficult to elect their preferred candidates. That is simply not enough. Even if redistricting makes it more difficult for plaintiffs to elect their preferred candidates, "the power to influence the political process is not limited to winning elections." *Bandemer*, 478 U.S. at 131-32 (plurality opinion). The First Amendment protects the rights of political minorities; it does not shield them from becoming political minorities.

After reapportionment, minority party members might find it more difficult to generate enthusiasm for certain assembly candidates in certain districts; indeed, reapportionment might lead a Democrat to make the "hard choice" of associating with a Republican to find some common ground. *See Cal. Democratic Party*, 530 U.S. at 584. It might cause voters to support candidates likely to lose, or to redivert their energies to other state or national elections. But not every hard choice in politics is tantamount to a "state-imposed restriction" upon voters' freedom to associate. *Id.*

* * *

Nearly fifty years ago, this Court raised concerns that redistricting "is recurringly removed from legislative hands and performed by federal courts." *Gaffney*, 412 U.S. at 749. That concern has only intensified in recent years. And it will reach a fever-pitch if this Court begins policing partisan gerrymandering. Whether a district unfairly disadvantages a political

party is "beyond the ordinary sphere of federal judges." *Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment). The claim is nonjusticiable.

CONCLUSION

For the foregoing reasons, this Court should rule political gerrymandering claims are nonjusticiable.

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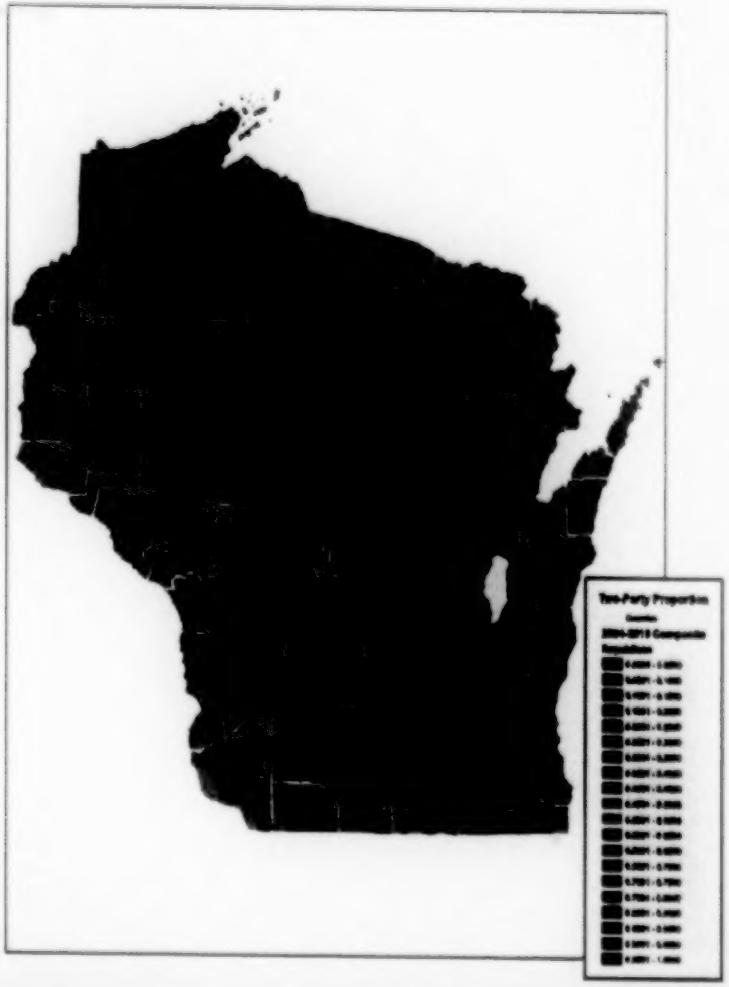
APPENDIX

Gimpel Figure 3
2004-2010 Statewide Elections Two-Party Proportion



Gimpel Figure 4
2012-2016 Statewide Elections Two-Party Proportion

Source: Expert Report of James Gimpel, Ph.D. at 32-33, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249.